

Article

Fundamental Norms, International Law, and the Extraterritorial Constitution

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I. INTRODUCTION

In a wide variety of contexts, aliens have challenged U.S. government actions undertaken outside our territorial limits. Iraqi and Afghan citizens allegedly tortured while detained by the U.S. military in Iraq and Afghanistan have sought damages for violations of their constitutional rights;¹ aliens subjected to extraordinary rendition—the transfer of detainees by U.S. officials to countries where they are detained and tortured—have asserted various constitutional claims;² and foreign nationals detained by the U.S. military at Bagram Airfield Military Base in Afghanistan have filed petitions for habeas corpus.³

The Supreme Court’s 2008 decision in *Boumediene v. Bush* decisively rejected the Bush administration’s categorical argument that constitutional rights do not apply to governmental actions taken against aliens beyond our borders and instead adopted a functional approach to the extraterritorial application of the Constitution. The Court concluded that “questions of extraterritoriality turn on objective factors and practical concerns, not formalism.”⁴ Whether a constitutional provision has extraterritorial effect must be determined on a case-by-case basis, depending on the “‘particular circumstances, the practical necessities, and the possible alternatives which Congress had before it,’ and, in particular, whether judicial enforcement of the provision would be ‘impracticable and anomalous.’”⁵ Applying that functional test to detainees held at Guantanamo, the Court found habeas review necessary because (1) the procedural protections afforded the detainees were inadequate; (2) “in every practical sense Guantanamo is not abroad;” and (3) there were few, if any, practical barriers to federal courts’ exercise of habeas jurisdiction.⁶

While the *Boumediene* decision has been viewed by some as broadly reflecting the Court’s march toward a global or more cosmopolitan Constitution, its import and application remain unclear.⁷ In subsequent cases,

1. *In re Iraq and Afghanistan Detainees Litigation*, 479 F. Supp. 2d 85 (D.D.C. 2007).
 2. *Arar v. Ashcroft*, 414 F. Supp. 2d 250 (E.D.N.Y. 2006), *aff’d*, 532 F.3d 157 (2d Cir. 2008), *vacated and superseded on reh’g en banc*, 585 F.3d 559 (2d Cir. 2009); *El-Masri v. Tenet*, 437 F. Supp. 2d 530 (E.D. Va. 2006), *aff’d sub nom. El-Masri v. United States*, 479 F.3d 296 (4th Cir. 2007).
 3. *Al Maqaleh v. Gates*, 604 F. Supp. 2d 205 (D.D.C. 2009), *rev’d*, 605 F.3d 84 (D.C. Cir. 2010); *Wazir v. Gates*, 629 F. Supp. 2d 63 (D.D.C. 2009).
 4. *Boumediene v. Bush*, 553 U.S. 723, 764 (2008).
 5. *Id.* at 759 (quoting *Reid v. Covert*, 354 U.S. 1, 74-75 (1957)).
 6. *Id.* at 767-70.
 7. David D. Cole, *Rights Over Borders: Transnational Constitutionalism and Guantanamo Bay*, 2008 CATO SUP. CT. REV. 47; Eric A. Posner, *Boumediene and the Uncertain March of Judicial Cosmopolitanism*, 2008 CATO SUP. CT. REV. 23, 35-38.

the government has argued that *Boumediene* was premised on Guantanamo's unique status as de facto sovereign territory that in every practical sense is "not abroad," and therefore cannot be applied to other prisoners detained by the United States in Afghanistan, Iraq, or CIA sites around the globe.⁸ The government also has successfully asserted in several D.C. Circuit cases after *Boumediene* that the Court's decision only applies to habeas petitions and leaves unaffected the circuit's prior law that Fifth Amendment rights do not apply to aliens anywhere abroad, even those detained at Guantanamo.⁹ While it is unlikely that the government's attempt to cabin *Boumediene* so narrowly will succeed, the Court's functional balancing test has been criticized as vague, malleable, and policy oriented.¹⁰ Most recently, the D.C. Circuit applied *Boumediene*'s functional test to deny prisoners held at Bagram Airfield Military Base in Afghanistan a right to seek habeas relief, leading to editorial criticism that the court had permitted what the Supreme Court had refused to countenance at Guantanamo—"a legal black hole"¹¹ or "law-free zone"¹²—and had affirmed an "extravagant claim of executive power."¹³

This Article argues that *Boumediene*'s functional test, which focuses the inquiry of whether the Suspension Clause applies to an executive detention abroad primarily on practical concerns, is in considerable tension with the fundamental norms jurisprudence that underlies and pervades the Court's opinion. The Court's functional test is disconnected from its ringing pronouncements that the writ of habeas corpus is a "fundamental" bulwark in protecting liberty, "a right of first importance," and "an indispensable mechanism for monitoring the separation of powers."¹⁴ While the Court claimed that the writ's indispensable separation of powers function was central to its analysis of the extraterritorial application of the Suspension Clause,¹⁵

8. *Al Maqaleh v. Gates*, 605 F.3d 84, 94 (D.C. Cir. 2010) (noting the government's argument that *Boumediene* has no application to territories not subject to the de facto sovereignty of the United States); Transcript of Oral Argument at 6, 9-10, *Al Maqaleh v. Gates*, 605 F.2d 84 (D.C. Cir. 2010) (No. 09-5265) (on file with author) (recording the government's view that Guantanamo was "unique" and *Boumediene* only covers places where the United States has de facto sovereignty, which means "total plenary control"); Replacement Brief for John Ashcroft, *The Official Capacity Defendants-Appellees and the United States* at 52, *Arar v. Ashcroft*, 532 F.3d 157 (2d Cir. 2008) (No. 06-4216-CV), *vacated and superseded on reh'g en banc*, 585 F.3d 559 (2d Cir. 2009).

9. *Kiyemba v. Obama*, 555 F.3d 1022, 1026-27 (D.C. Cir. 2009) (citing numerous precedential cases in holding that "the due process clause does not apply to aliens without property or presence in the sovereign territory of the United States"), *vacated as moot*, 130 S. Ct. 1235 (2010); *see also Rasul v. Myers*, 563 F.3d 527, 529 (D.C. Cir. 2009), *cert. denied*, 130 S. Ct. 1013 (2009) (noting 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").

10. *See Boumediene*, 553 U.S. at 842-43 (Scalia, J., dissenting) (describing the functional test as an "inherently subjective" test, which will never "provide clear guidance for the future"); GERALD L. NEUMAN, *STRANGERS TO THE CONSTITUTION* 113-17 (1996); Christina Duffy Burnett, *A Convenient Constitution? Extraterritoriality After Boumediene*, 109 COLUM. L. REV. 973 (2009); Gerald L. Neuman, *The Extraterritorial Constitution After Boumediene v. Bush*, 82 S. CAL. L. REV. 259, 273 (2009) (claiming that the functional approach "suffers from the lack of certainty" but asking whether there is any alternative).

11. Editorial, *Bagram: A Legal Black Hole?*, L.A. TIMES, May 26, 2010, at A20.

12. Editorial, *Backward at Bagram*, N.Y. TIMES, June 1, 2010, at A26.

13. *Id.*

14. *Boumediene*, 553 U.S. at 798.

15. *Id.* at 765-66.

nowhere does the test the Court articulates acknowledge the importance of separation of powers principles. So too, while the Court continuously emphasized the detainees' interest in avoiding lengthy, prolonged, and indefinite confinement without adequate due process protections, that fundamental interest makes no appearance in the Court's functional test. Justice Kennedy's opinion in *Boumediene* thus resembles his decision in *Lawrence v. Texas* in that both are strongly premised on a fundamental norms jurisprudence that is untethered from the specific test used to decide the case.¹⁶

This Article seeks to reintegrate the fundamental norms strands of the *Boumediene* opinion into its functional test, and thus normatively ground the opinion. It does so by arguing that the functional test should be informed by international law, a consideration that the *Boumediene* decision omitted from its analysis despite briefing by the petitioners and amici arguing that international law supported the application of habeas.¹⁷ While several commentators have supported applying international law's *jurisdictional* principles to address the practical concerns underlying the functional test,¹⁸ this Article argues that utilizing international law's *substantive*, fundamental, nonderogable norms to help determine the Constitution's extraterritorial application would both allay the Court's practical concerns and ground the Court's test on the important normative principles that underlie its *Boumediene* opinion.

The argument made here is premised on international law's post-World War II recognition that certain basic norms of civilized society, such as the prohibitions on torture, genocide, slavery, extrajudicial execution, and prolonged arbitrary detention without any judicial review¹⁹ are so fundamental as to be nonderogable under any circumstances. That certain norms are so central to individual dignity and civilized society that, unlike ordinary proscriptions, they can never be disregarded by any government at any time, finds expression in several contemporary international law concepts and terms. For example, the International Court of Justice has referred to "fundamental" or "peremptory" norms of international law, and the Vienna Convention on the Law of Treaties provides that governments have no power to enter into treaties that conflict with a peremptory—or *jus cogens*—norm, which it defines as "a norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted."²⁰

16. *Lawrence v. Texas*, 539 U.S. 558 (2003); see also Laurence H. Tribe, *Lawrence v. Texas: The "Fundamental Right" That Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1916-17 (2004).

17. Neuman, *supra* note 10, at 276-77, 277 n.101; see, e.g., Brief for United Nations High Commissioner for Human Rights as Amicus Curiae in Support of Petitioners, *Boumediene v. Bush*, 553 U.S. 723 (2008) (Nos. 06-1195, 06-1196).

18. See, e.g., Sarah H. Cleveland, *Embedded International Law and the Constitution Abroad*, 110 COLUM. L. REV. 225 (2010); Cole, *supra* note 7; Note, *The Extraterritorial Constitution and the Interpretive Relevance of International Law*, 121 HARV. L. REV. 1908 (2008).

19. The authoritative RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 702 cmt. n & n.11 (1987) lists these norms as *jus cogens* norms that are not subject to derogation even in emergency situations.

20. Vienna Convention on the Law of Treaties art. 53, May 23, 1969, 1155 U.N.T.S. 331; see also *Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Rwanda)*, 2006 I.C.J. 6, ¶ 64

The use of such “fundamental,” “peremptory,” “jus cogens” norms to inform the applicability of the Constitution’s provisions to U.S. officials’ conduct abroad would address the tension between perceived U.S. foreign policy needs and the recognition that there are certain fundamental principles that the government should never violate wherever it acts. Such a normative approach follows from the Court’s decisions in the Insular Cases as well as Justices Harlan’s and Frankfurter’s opinions in *Reid v. Covert*,²¹ and is consistent with the line of cases, including *Johnson v. Eisentrager*,²² that Justice Kennedy relied on in *Boumediene*. Moreover, the use of international law in this manner to determine not the content of constitutional rights but rather their territorial applicability avoids the primary objections raised to the use of international law to help determine the Constitution’s meaning domestically.²³ Finally, the determination by the international community, including the United States, that certain conduct is never justified by practical concerns, and the prohibition of such conduct in every nation in the world, should meet the concerns for flexibility and practicality at the root of the “impractical and anomalous” functional test.

Part II of the Article demonstrates how Justice Kennedy’s functional test sought to negotiate a compromise between an all-or-nothing view of the Constitution’s extraterritorial application to aliens abroad. It argues, however, that Kennedy’s compromise formulation is in considerable tension with the fundamental norms jurisprudence underlying the opinion, and is ultimately based on an unprincipled and erroneous separation of the domestic arena from the international order. Part III traces the development of Kennedy’s impractical and anomalous test from the cases he relied upon, illustrating that those cases emphasize not merely practicalities, but the fundamental norms of civilized society in determining when constitutional norms apply abroad. Those decisions are, at minimum, consistent with using international law to inform that determination. Part IV argues that judicial use of fundamental, nonderogable norms of international law to inform the Constitution’s extraterritorial application is consistent with principles of modern international law, the intent and practice of the Framers, and modern judicial precedent. Part V explores the use of international law by other legal systems—Canada, the United Kingdom, and the European Court of Human Rights—to determine the reach of constitutional or human rights.

Finally, Part VI applies the theoretical framework set forth in Part IV to two important cases currently before the courts. The first case is the recent decision of the Court of Appeals for the D.C. Circuit denying prisoners detained for many years at the U.S. Bagram military base in Afghanistan a right

(Feb. 3); *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), 1986 I.C.J. 14, ¶¶ 100, 188 (June 27); *United States Diplomatic and Consular Staff in Tehran* (U.S. v. Iran), 1979 I.C.J. 7, ¶¶ 38-40 (Dec. 15).

21. 354 U.S. 1 (1957).

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

23. See Neuman, *supra* note 10, at 275-76 (suggesting that the majority in *Boumediene* was worried about invoking international or comparative practice in support of its position because such a methodology has provoked vigorous objections in the past).

to seek writs of habeas corpus.²⁴ The district court decision, the oral argument in the court of appeals, and the ultimate appellate decision were, in significant part, devoted to an analysis of the extent and nature of U.S. control over the base and its location within a war zone.²⁵ Yet the question of whether the United States can indefinitely detain those who claim to be innocent civilians—perhaps for the rest of their lives—without meaningful due process or any judicial review, should not turn on the particular characteristics or location of the secure military facility at which the government chooses to detain them. The D.C. Circuit’s analysis of the functional test factors did not consider the length of detention, although the prolonged detention of the Guantanamo prisoners without adequate process was clearly an important concern motivating the Supreme Court in *Boumediene*. Under the analysis suggested here, the court should have strongly considered whether the prohibition of prolonged executive detention without judicial process is a fundamental norm of international law in determining whether the writ of habeas corpus was available to the Bagram detainees.

Secondly, the D.C. Circuit has shown no inclination post-*Boumediene* to revisit its holding that an alien abroad is not afforded constitutional protection from torture by United States officials, and the Supreme Court has refused to grant certiorari in recent cases raising that question.²⁶ Since the prohibition against torture is clearly a fundamental, nonderogable norm of international law, the analysis presented here should lead courts to conclude that the constitutional proscription against torture applies to United States governmental actions abroad.

II. *BOUMEDIENE*’S COMPROMISE: THE TENSION BETWEEN PRACTICALITIES AND PRINCIPLES

A. *Competing Constitutional Theories of Extraterritoriality*

The question of whether and to what extent the Constitution applies to U.S. government action abroad has historically oscillated between several broad, competing perspectives. The first views the Constitution and the Bill of Rights as reflecting a social compact between the government and the people, in which the people grant the government certain powers in return for protection and rights.²⁷ This perspective underlay Justice Rehnquist’s opinion

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

25. *Id.*; Transcript of Oral Argument, *supra* note 8; *Al Maqaleh v. Gates*, 604 F. Supp. 2d 205 (D.D.C. 2009), *rev’d*, 605 F.3d 84 (D.C. Cir. 2010).

26. *Rasul v. Myers*, 563 F.3d 527 (D.C. Cir 2009), *cert. denied*, 130 S. Ct. 1013 (2009) (dismissing damage claims alleging torture brought by ex-Guantanamo detainees, suggesting that the court must adhere to prior circuit law unless it explicitly conflicts with Supreme Court precedent, but ultimately resting its holding on qualified immunity); *see also Kiyemba v. Obama*, 555 F.3d 1022, 1026-27 (D.C. Cir. 2009) (holding that the court is required to follow past circuit precedent denying that constitutional rights other than the right to habeas corpus apply to aliens abroad), *judgment vacated on other grounds*, 130 S. Ct. 1235 (2010).

27. *See generally* NEUMAN, *supra* note 10, at 54-55 (discussing the social compact theory, including Federalist arguments that, because aliens were not party to the compact, the compact did not confer any rights onto them and did not bind them to the performance of specific duties); Louis Henkin,

for the Court in *United States v. Verdugo-Urquidez*, in which the Court held the Fourth Amendment inapplicable to a search of an alien's home in Mexico because

“the people” protected by the Fourth Amendment, and by the First and Second Amendments, and to whom rights and powers are reserved in the Ninth and Tenth Amendments, refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community.²⁸

Undertones of social compact theory also pervade Justice Jackson's *Eisentrager* decision holding that enemy aliens held abroad had no right to a writ of habeas corpus.²⁹ The social contract theory is closely allied with a strict territorial view of the Constitution's applicability, articulated by the Supreme Court most starkly in its sweeping declaration in *In re Ross* that the Constitution established a government for the United States and not for countries outside of its limits, and that therefore “[t]he Constitution can have no operation in another country.”³⁰

A far broader, more alien-protective perspective that is ultimately derived from a social contract understanding of the Constitution's scope is what Professor Gerald Neuman has termed the “mutuality of legal obligation” approach,³¹ articulated most forcefully in Justice Brennan's dissent in *United States v. Verdugo-Urquidez*³² and Neuman's own scholarly work.³³ Justice Brennan relied, in part, on “basic notions of mutuality” to support the application of the Fourth Amendment to a search of an alien's residence in Mexico.³⁴ To Brennan, *Verdugo-Urquidez* was “entitled to the protections of the Fourth Amendment because our Government, by investigating him and attempting to hold him accountable under United States criminal laws, has treated him as a member of our community for purposes of enforcing our laws. He has become, quite literally, one of the governed.”³⁵ While the mutuality approach thus expands the national community to include persons the

The Constitution as Compact and as Conscience: Individual Rights Abroad and at Our Gates, 27 WM. & MARY L. REV. 11 (1985) (describing the social compact approach); Jules Lobel, *The Constitution Abroad*, 83 AM. J. INT'L L. 871 (1989) (same).

28. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1980). Justice Rehnquist described the dissent from the court of appeals as “view[ing] the Constitution as a ‘compact’ among the people of the United States.” *Id.* at 264. He also argued that the “purpose of the Fourth Amendment was to protect the people of the United States against arbitrary action by their own Government; it was never suggested that the provision was intended to restrain the actions of the Federal Government against aliens outside of the United States territory.” *Id.* at 266.

29. *Johnson v. Eisentrager*, 339 U.S. 763, 769-72 (1950) (stating that the government's obligation to protect correlates with the duty of loyalty). Various scholars have also articulated versions of the social compact theory. See, e.g., Posner, *supra* note 7, at 43-46; Paul B. Stephan III, *Constitutional Limits on International Rendition of Criminal Suspects*, 20 VA. J. INT'L L. 777, 783-84 (1980).

30. *In re Ross*, 140 U.S. 453, 464 (1891); see also *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 318 (1936) (holding that “[n]either the Constitution nor the laws passed in pursuance of it have any force in foreign territory unless in respect of our own citizens”).

31. NEUMAN, *supra* note 10, at 7.

32. 494 U.S. at 284 (Brennan, J., dissenting).

33. NEUMAN, *supra* note 10, at 7-8.

34. *Verdugo-Urquidez*, 494 U.S. at 284 (Brennan, J., dissenting).

35. *Id.*

government seeks to impose our law on, it fundamentally derives from the social contract premise that constitutional rights only affix to members of our national community—either broadly or narrowly conceived.

The main difficulty with the compact approach is that it removes any constitutional limits whatsoever on the government's powers to act against the class of aliens who can be viewed as outside the social contract. For example, the D.C. Circuit has held that even an alleged government conspiracy to torture an alien abroad was outside of the Constitution's purview under the doctrine enunciated in *Verdugo-Urquidez* and other cases.³⁶ More recent claims of torture by U.S. officials abroad have met the same fate in the D.C. Circuit.³⁷ While the alien still can claim the protection of customary international law and treaties that proscribe certain governmental action, those sources of law have generally proven unenforceable in U.S. courts against U.S. governmental action.³⁸ Under our prevailing dualist model, the alien is generally left to seek protection through international protest and diplomacy, an often futile remedy that is particularly weak where the alien's country of origin either has little political leverage or doesn't even support the alien's claim.³⁹

The competing categorical perspective to the social compact theory is a universalist theory of the Constitution, in which any U.S. government action, wherever and against whomever it takes place, is subject to all the limits imposed by the Constitution. Justice Black's plurality opinion in *Reid* suggested a universalist position that the government is a "creature of the Constitution," and "can only act in accordance with all the limitations imposed by the Constitution."⁴⁰ Although *Reid* only dealt with the rights of citizens abroad, not aliens,⁴¹ one could read into Black's opinion the view that every provision of the Constitution must always be deemed applicable to U.S. government actions abroad.⁴²

While the universalist position has adherents in the academy,⁴³ it finds

36. *Harbury v. Deutch*, 233 F.3d 596, 602-04 (D.C. Cir. 2000), *rev'd on other grounds sub nom.* *Christopher v. Harbury*, 536 U.S. 403 (2002).

37. *In re Iraq and Afghanistan Detainees Litigation*, 479 F. Supp. 2d 85 (D.D.C. 2007).

38. *Medellin v. Texas*, 552 U.S. 491, 504-05 (2008) (holding that non-self-executing international treaties are unenforceable absent implementing legislation); *Pierre v. Gonzales*, 502 F.3d 109, 119 (2d Cir. 2007) (holding that plaintiff's claims raised under the non-self-executing Convention Against Torture are unenforceable absent implementation through a domestic statute).

39. *See Johnson v. Eisentrager*, 339 U.S. 763 (1950) (stating that the prisoners could not rely on the Geneva Conventions in their habeas action).

40. *Reid v. Covert*, 354 U.S. 1, 6 (1957).

41. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 263-70 (1990) (distinguishing *Reid* as based on citizenship, whereas *Verdugo-Urquidez* was an alien). Indeed, in *Eisentrager*, Justice Black recognized in dissent that he would not agree with the proposition "that this nation either must or should attempt to apply every constitutional provision of the Bill of Rights in controlling temporarily occupied countries." 339 U.S. at 796-97 (Black, J., dissenting).

42. *See, e.g., United States v. Verdugo-Urquidez*, 856 F.2d 1214, 1218 (9th Cir. 1988) (reading *Reid* and scholarly opinion to the effect that the "Bill of Rights controls the activities of U.S. law enforcement officers wherever they occur" (quoting Stephen A. Saltzburg, *The Reach of the Bill of Rights Beyond the Terra Firma of the United States*, 20 VA. J. INT'L L., 741, 745 (1980)), *rev'd*, 494 U.S. 259 (1990); *see also Reid*, 354 U.S. at 74 (Harlan, J., concurring) ("I cannot agree with the suggestion that every provision of the Constitution must always be deemed automatically applicable to American citizens in every part of the world.").

43. *See, e.g., Henkin, supra* note 27; Lobel, *supra* note 27; Timothy Zick, *Constitutional*

little judicial support.⁴⁴ The Ninth Circuit's majority opinion in *Verdugo-Urquidez* suggested a universalist position,⁴⁵ as did the court of appeals decision in *Eisentrager*.⁴⁶ So did Justice Brennan's dissent in *Verdugo-Urquidez* in the Supreme Court,⁴⁷ although Brennan mainly relied on the mutuality of obligation approach.

The mainstream judicial hostility to the universalist approach is premised primarily on the practical fear of overly constraining the political branches' ability to conduct U.S. foreign policy. As Justice Rehnquist stated in *Verdugo-Urquidez*, "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.'"⁴⁸ To the Court in *Verdugo-Urquidez*, restrictions on U.S. government actions responding to threats to important American interests around the globe must be imposed by the political branches through diplomacy, treaty, or legislation, not by judicial application of the Constitution.

Throughout American history, however, those practical concerns have competed with the recognition that, even if the entire Constitution did not apply to aliens in certain situations, there must be some fundamental constitutional principles that restrain governmental conduct. As James Madison put it in the context of protesting the treatment of resident non-enemy aliens, "If aliens had no rights under the Constitution, they might not only be banished, but . . . even capitally punished, without a jury or the other incidents to a fair trial."⁴⁹ Similarly, Henry Clay, Speaker of the House of Representatives, claimed in 1819 that General Andrew Jackson's execution of two British citizens in Spanish territory was beyond the Executive's constitutional authority, denying that "any commander-in-chief, in this country, had this absolute power of life and death, at his sole discretion."⁵⁰ More recently, in response to a question from Justice Stevens as to the constitutional rights of unadmitted aliens—who generally are accorded little or no constitutional protection—the Deputy Solicitor General admitted that while the government can summarily exclude such an alien, it couldn't just "shoot him."⁵¹ Or as Justice Brown put it in a

Displacement, 86 WASH. U. L. REV. 515, 589-606 (2009) (arguing for a more universal application of the Constitution not dependent on geography or territoriality).

44. NEUMAN, *supra* note 10, at 6.

45. *Verdugo-Urquidez*, 856 F.2d at 1218.

46. *Eisentrager v. Forrestal*, 174 F.2d 961, 963-65 (D.C. Cir. 1949), *rev'd sub nom.* Johnson v. *Eisentrager*, 339 U.S. 763 (1950).

47. Justice Brennan argued in *Verdugo-Urquidez* that "[o]ur national interest is defined by those [constitutional] values and by the need to preserve our own just institutions. We take pride in our commitment to a Government that cannot, on mere whim, break down doors and invade the most personal of places." 494 U.S. at 285-86 (Brennan, J., dissenting).

48. *Id.* at 275 (quoting *Perez v. Brownell*, 356 U.S. 44, 57 (1958)).

49. James Madison, *Virginia Resolutions of 1798*, reprinted in 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 528, 556 (Jonathan Elliot ed., 2d ed. 1996).

50. 33 ANNALS OF CONG. 643, 645 (1819) [hereinafter ANNALS].

51. Transcript of Oral Argument at 24, *Clark v. Martinez*, 543 U.S. 371 (2005) (No. 03-878). The entire exchange between Justice Stevens and Deputy Solicitor General Kneedler is reprinted in Jeffrey Kahn, *Zoya's Standing Problem, or, When Should the Constitution Follow the Flag?*, 108 MICH. L. REV. 673, 716-17 (2005).

1901 case, even if the Constitution did not generally apply to inhabitants of certain territories controlled by the United States, it was not true that those individuals had “no [constitutional] rights which [Congress] was bound to respect.”⁵²

B. *Kennedy’s Boumediene Compromise and Its Contradictions*

Justice Kennedy’s opinion for the Court in *Boumediene* rejected both a universalist position that habeas corpus applies whenever the U.S. government detains someone anywhere in the world and the social compact view articulated by Justice Scalia in dissent that “aliens abroad have no substantive rights under our Constitution.”⁵³ Kennedy followed his concurrence in *Verdugo-Urquidez*, where he had rejected the social compact theory:

Though it must be beyond dispute that persons outside the United States did not and could not assent to the Constitution, that is quite irrelevant to any construction of the powers conferred or the limitations imposed by it. . . .

. . . .

. . . The force of the Constitution is not confined because it was brought into being by certain persons who gave their immediate assent to its terms.⁵⁴

In *Boumediene*, Kennedy argued that when the government acts abroad against aliens or citizens, its powers are not “absolute and unlimited,” but are subject “to such restrictions as are expressed in the Constitution.”⁵⁵ But for Kennedy and the Court, the acceptance of that principle is simply a starting point, because the real question is which constitutional limitations, restrictions, and standards apply to particular governmental actions against aliens abroad.⁵⁶

To determine which constitutional provisions are applicable in what contexts, the *Boumediene* Court adopted a “functional approach,” in which the question turned on objective factors and practical concerns, not formalism. In Part IV of the opinion, Justice Kennedy traced a history of the development of the functional test, in which the recognition, articulated by the Court in the Insular Cases, that the Constitution always applies to government action must be tempered by the practical “difficulties inherent in that position.”⁵⁷ For Kennedy, the Insular Cases recognized the “inherent practical difficulties of enforcing all constitutional provisions ‘always and everywhere.’”⁵⁸ So too, Kennedy relied on Harlan’s and Frankfurter’s concurrences in *Reid* for the proposition that practical considerations were decisive in deciding whether a

52. *Downes v. Bidwell*, 182 U.S. 244, 283 (1901).

53. *Boumediene v. Bush*, 553 U.S. 723, 842, 848 (2008) (Scalia, J., dissenting).

54. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 276 (1990) (Kennedy, J., concurring).

55. *Boumediene*, 553 U.S. at 765 (quoting *Murphy v. Ramsey*, 114 U.S. 15, 44 (1885)).

56. See *Verdugo-Urquidez*, 494 U.S. at 277 (Kennedy, J., concurring); *Balzac v. Porto Rico*, 258 U.S. 298, 312 (1922); *Downes*, 182 U.S. at 292 (White, J., concurring) (“In the case of the territories, as in every other instance, when a provision of the Constitution is invoked, the question which arises is, not whether the Constitution is operative, for that is self-evident, but whether the provision relied on is applicable.”).

57. *Boumediene*, 553 U.S. at 757.

58. *Id.* at 759 (quoting *Balzac*, 258 U.S. at 312).

jury trial was required in that case,⁵⁹ and read the Court's *Eisentrager* decision as seeking to balance the practical "constraints of military occupation with constitutional necessities."⁶⁰

The *Boumediene* functional compromise based on practical difficulties is in considerable tension with the separation of powers concerns that the Court claimed were central to its opinion. For example, the Court stated that if the extraterritorial application of the writ of habeas corpus turned on the government's formalistic sovereignty-based test, "it would be possible for the political branches to govern without legal constraint."⁶¹ To do so would allow for a "striking anomaly in our tripartite system of government, leading to a regime in which Congress and the President, not this Court, say 'what the law is,'" and "switch the Constitution on or off at will."⁶² But the Court's functional test permits and indeed encourages the government to do just that. If the government learns the lessons of *Boumediene*, it will hold prisoners in the future in, or as close to, an active war zone as possible, on a military base that the United States controls temporarily (even if for years) and not permanently, and where the practical obstacles to holding habeas hearings are potentially most severe. Indeed, in the *Bagram* case, the government argued that practical obstacles bar habeas review where the military has transferred a detainee captured in a non-war zone to a military facility located in an area of active military combat.⁶³ The circuit court adopted the government's position, at least where the petitioners cannot prove that the location of detention was deliberately chosen to avoid judicial review.⁶⁴ If the government is correct, practical obstacles to review would allow the Executive to operate in a law-free zone, and the functional test would lead to long-term detentions outside of the Court's purview.⁶⁵

Indeed, the Court's three-factor functional test for determining the reach of the Suspension Clause virtually ignores the separation of powers concerns that purportedly were crucial to its analysis.⁶⁶ The Court claims to have drawn on the factors the Court relied on in *Eisentrager*.⁶⁷ But *Eisentrager* never mentioned the centrality of habeas corpus as an indispensable or essential mechanism for policing separation of powers. Indeed *Eisentrager* only referred to separation of powers once, and then merely to note that the judiciary ought

59. *Id.* at 760.

60. *Id.* at 762.

61. *Id.* at 765.

62. *Id.* (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)).

63. *Al Maqaleh v. Gates*, 604 F. Supp. 2d 205, 228-29 (D.D.C. 2009), *rev'd*, 605 F.3d 84 (D.C. Cir. 2010).

64. *Al Maqaleh v. Gates*, 605 F.3d 84, 98-99 (D.C. Cir. 2010) (rejecting detainees' argument that, by transferring them from non-war zones to a war zone, the Executive could manipulate the applicability of the Constitution on the grounds that that factor is not addressed in the *Boumediene* test and that there was no evidence that the Executive "deliberately confined the detainees in the theater of war").

65. *Boumediene*, 553 U.S. at 843 (Scalia, J., dissenting) (recognizing a tension between the Court's "rationale and rule," because the rule would seem to lead to executive detentions without judicial review while the rationale would seem to preclude such a result).

66. *Id.* at 739, 742-43, 765-66.

67. *Id.* at 766.

not entertain challenges to the legality, wisdom, or propriety of the Commander-in-Chief's decision to send armed forces abroad.⁶⁸ As Judge Tatel pointed out at oral argument in the Bagram case, the test articulated in *Boumediene* does not appear to contemplate consideration of the very separation of powers concerns that motivated the decision.⁶⁹

Moreover, the *Boumediene* Court's use of pragmatic considerations to determine that a constitutional right does not apply abroad is at odds with traditional constitutional jurisprudence. As commentators have noted, pragmatic considerations normally enter constitutional analysis to determine how to apply and enforce a right, and not whether the right is applicable at all.⁷⁰ While courts routinely utilize balancing tests to determine whether an applicable right or constitutional limitation has been violated,⁷¹ and often rely on pragmatic considerations to bolster their interpretations of text, history and precedent,⁷² it is unusual for a court to use pragmatic, policy considerations as the primary metric for determining whether constitutional principles should be applicable to a given situation.⁷³

C. *The Normative Premise of the Boumediene Functional Compromise: The Separation of Foreign Affairs from Domestic Policy*

The Court's position in *Boumediene* that pragmatic considerations should

68. *Johnson v. Eisentrager*, 339 U.S. 763, 789 (1950). Only Justice Black in dissent pointed out the importance of habeas corpus as an instrument to protect against illegal imprisonment in our constitutional scheme. *Id.* at 797-98 (Black, J., dissenting).

69. See Transcript of Oral Argument, *supra* note 8, at 44, 49, 51 (noting that the *Boumediene* functional test factors do not appear to take into account potential executive manipulation of the location of detention).

70. NEUMAN, *supra* note 10, at 115 (stating that the concern that the federal government not be bound by impractical restraints can be accommodated in extraterritorial situations, as it already is in domestic situations, by a contextual assessment of factors); see also Burnett, *supra* note 10 (criticizing the pragmatic approach that the Court has taken when determining the threshold question of whether a constitutional provision is applicable in a domestic setting, when the Court has taken practical considerations into account solely for purposes of determining how to enforce the provisions it has held applicable); Lobel, *supra* note 27, at 871, 877-78 (stating that courts can articulate rights and balance requirements of justice with legitimate national security needs); David A. Martin, *Agora (Continued): Military Commissions Act of 2006: Judicial Review and the Military Commissions Act: On Striking the Right Balance*, 101 AM. J. INT'L L. 344, 360 (2007) ("[C]onstitutional rights apply, but they may apply in different ways, with different precise outcomes or applications, to noncitizens encountering U.S. authority outside the country.").

71. See, e.g., *Am. Trucking Ass'n v. Smith*, 496 U.S. 167, 203 (1990) (discussing the balancing test used for analyzing the "negative" Commerce Clause); *S.F. Arts & Athletics v. U.S. Olympic Comm.*, 483 U.S. 522, 537 n.16 (1987) (holding that a balancing test is the appropriate standard for regulating commercial speech and for time, place, and manner restrictions); *Bd. of Airport Comm'rs of City of L.A. v. Jews for Jesus*, 482 U.S. 569, 572 (1987) (describing the free speech tests used for public, limited public, and nonpublic forums as balancing tests).

72. *United States v. Balsys*, 524 U.S. 666, 690-99 (1998) (using pragmatic policy balancing to show that even if precedent was not dispositive of the issue of whether the Self-Incrimination Clause of the Fifth Amendment was applicable to a foreign prosecution—which the Court believed it was—the petitioner had not shown that balancing the competing interests would favor his claim); *McCleskey v. Kemp*, 481 U.S. 279 (1987); *Washington v. Davis*, 426 U.S. 229 (1976); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 51, 56-59 (1973).

73. Burnett, *supra* note 10. Compare *Boumediene v. Bush*, 553 U.S. 723 (2008), with *Mathews v. Eldridge*, 424 U.S. 319 (1976).

determine not only how to apply constitutional limitations to overseas U.S. actions against aliens, but also whether those limitations apply at all is thus at odds with traditional constitutional jurisprudence, a tension which requires some normative explanation. Kennedy's *Boumediene* compromise is likely normatively rooted in the perception that foreign affairs is different from the domestic order, and that the Constitution should thus be interpreted differently and more flexibly in the foreign policy arena. The three commonly articulated types of practical considerations for why constitutional restrictions ought not apply abroad are all premised on a basic distinction between the domestic and international arena. First, the Court has perceived practical difficulties in applying U.S. constitutional rules in territories governed by the United States that have different cultural, political, and legal traditions.⁷⁴ Second, as Justice Field articulated in *In re Ross*, international jurisdictional principles are generally based on territory or citizenship, and normally one country cannot exercise its jurisdiction in the territory of another.⁷⁵ However, Field's logic was flawed; because the United States cannot normally exercise lawful jurisdiction in another country, it does not follow that the Constitution ought not apply as a limitation on the conduct of U.S. officials when they do act—lawfully or not—in a foreign land.⁷⁶ The real concern of Justice Field in *In re Ross*, and other Justices articulating the same perspective is with constricting the flexibility of U.S. officials to act abroad by imposing constitutional rules in situations where the other nation has different rules that accord government officials greater discretion.⁷⁷

The third, and undoubtedly most important, pragmatic reason articulated for not applying constitutional rules to U.S. conduct abroad is that to do so would interfere with U.S. foreign policy interests. Harlan's explanation in *Reid* for his opposition to the plurality's decision that a trial by jury is required whenever the government indicts a civilian dependent of a soldier overseas is of this genre:

Our far-flung foreign military establishments are a new phenomenon in our national life, and I think it would be unfortunate were we unnecessarily to foreclose, as my four brothers would do, our future consideration of the broad questions involved in maintaining the effectiveness of these national outposts, in the light of continuing experience with these problems.⁷⁸

So too, Justice Rehnquist's rationale for not constraining searches by U.S. officials abroad sought to avoid restraints on U.S. policymakers when dealing with other nations.⁷⁹ Indeed, a crucial practical difficulty with applying the Constitution fully articulated by Justices in the *Insular Cases* was the United

74. *Boumediene*, 553 U.S. at 756-58.

75. *In re Ross*, 140 U.S. 453, 453 (1891).

76. See NEUMAN, *supra* note 10, at 86-87; see also Cleveland, *supra* note 18, at 237.

77. See *In re Ross*, 140 U.S. at 464 ("When, therefore, the representatives or officers of our government are permitted to exercise authority of any kind in another country, it must be on such conditions as the two countries may agree, the laws of neither one being obligatory upon the other.").

78. *Reid v. Covert*, 354 U.S. 1, 77 (1957).

79. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 275 (1990); see *supra* note 56 and accompanying text.

States's perceived needs as a rising world power to acquire territory through war or treaty without all of the restraints imposed by the Constitution.⁸⁰

Justice Kennedy's reliance in *Verdugo-Urquidez* on *United States v. Curtiss-Wright Export Corp.* for the proposition that the Court must interpret constitutional protections in light of the "undoubted power of the United States to take actions to assert its legitimate power and authority abroad" also suggests that he views the foreign arena as qualitatively different than the domestic order.⁸¹ Since *Curtiss-Wright* did not involve any rights aliens might have abroad, Kennedy must be relying on the *Curtiss-Wright* decision for its controversial conclusion that constitutional limitations must be interpreted differently when the government acts abroad than at home.⁸² The assertion that the government must be accorded more discretion when it acts internationally is uncontroversial. But to take the further step of claiming that the Constitution should be subjected to an entirely different mode of analysis in which pragmatic considerations are determinative of when constitutional rights apply abroad is suspect, and *Curtiss-Wright* has been correctly criticized for its drastic separation of the international and domestic orders.⁸³

The Court did have alternative approaches to address its foreign policy concerns. For example, the *Boumediene* Court clearly did not want to suggest that a prisoner captured on the battlefield could seek habeas review,⁸⁴ and even progressive commentators who generally support aliens' rights recoil at the notion that the Court could assert its habeas jurisdiction to review the treatment of foreign nationals in an active war zone.⁸⁵ Yet, even if enemy soldiers were

80. See *Downes v. Bidwell*, 182 U.S. 244, 279, 286 (1901).

81. *Verdugo-Urquidez*, 494 U.S. at 277 (Kennedy, J., concurring). In *Boumediene*, Justice Kennedy again cited to *Curtiss-Wright*, this time to acknowledge that the political branches must be accorded appropriate discretion in conducting the war on terrorism. *Boumediene v. Bush*, 553 U.S. 723, 796-97 (2008).

82. *United States v. Curtiss-Wright Corp.*, 299 U.S. 304, 315 (1936). Justice Sutherland also controversially argued in *Curtiss-Wright* that the government had authority to act in foreign policy that stemmed not from the Constitution, but from national powers accorded to the sovereign under international law. *Id.* at 319. While Kennedy therefore could have been suggesting that such powers were outside the scope of the Constitution and might trump whatever constitutional restraints exist, such an argument would directly conflict with his starting proposition contained in the plurality opinion in *Reid*—that the government may act only as the Constitution authorizes, both at home and abroad. *Reid*, 354 U.S. at 6. It is therefore doubtful that Kennedy was using *Curtiss-Wright* for that more extreme position.

83. See *Velasquez v. Frapwell*, 160 F.3d 389, 392-93 (7th Cir. 1998), *vacated in part on other grounds*, 165 F.3d 593 (7th Cir. 1999) (writing that *Curtiss-Wright's* historical discussion was "quite possibly incorrect[,]," even "shockingly inaccurate," and determining that the historical opinion was dicta and not binding (quoting Charles A. Lofgren, *United States v. Curtiss-Wright Corporation: An Historical Reassessment*, 83 YALE L.J. 1, 32 (1973))); David Gray Adler, *The Steel Seizure Case and Inherent Presidential Power*, 19 CONST. COMMENT. 155, 190 (2002) (criticizing the *Curtiss-Wright* decision); Lofgren, *supra*, at 29-32 (1973) ("Sutherland adduced no evidence, other than practice, that restrictions imposed by the Constitution on delegation of legislative power do not apply equally to delegation involving both domestic and foreign affairs. His evidence, other than practice, leads to precisely the opposite conclusion."); Robert J. Reinstein, *The Limits of Executive Power*, 59 AM. U. L. REV. 259, 323 (2009) ("Sutherland's extra-constitutional historical narrative, which is inconsistent with the premise that the Constitution is one of delegated powers, has been shown to be more creative than descriptive.").

84. *Boumediene*, 553 U.S. at 770-71.

85. See, e.g., Gerald L. Neuman, *The Abiding Significance of Law in Foreign Relations*, 2004 SUP. CT. REV. 111, 151 ("It cannot be expected that the Court would insert constitutional standards for

able as a practical matter to assert habeas jurisdiction after being captured on the battlefield, a proposition that seems dubious, the Court could adopt rules to preclude any such petitioner from either succeeding in a habeas proceeding or from interfering with military efficiency or operations. For example, the Court could have held that only prolonged detention provides an individual with a habeas claim abroad, or that where the government accords the prisoner his Geneva Convention rights, no more is required. That the courthouse door might be open to aliens abroad does not mean that the Court could not fashion rules based on both principle and practical concerns that would render it impossible for a battlefield detainee to succeed on a habeas petition.⁸⁶

Indeed, the same day it decided *Boumediene*, the Court's decision in another habeas case illustrated the possibilities for an alternative analysis as to the rights of aliens detained abroad. In *Munaf v. Geren*, a unanimous Court held that American citizens imprisoned in Iraq by the U.S. military operating pursuant to a U.N. mandate had a right to seek a writ of habeas corpus in U.S. courts.⁸⁷ The Court rejected the government's argument that the writ was inapplicable because the U.S. military was operating as part of a multinational force.⁸⁸ No Justice questioned whether habeas should be available to *citizens* being detained even in a foreign country in the midst of warfare. Nor did the functional test make any appearance in *Munaf*. Nonetheless, the Court's conclusion that the courthouse door was open to Munaf ultimately did him no good, because the Court expressed prudential concerns about interfering with a sovereign's prerogative to apply its criminal law to persons alleged to have committed crimes within its borders, and also "about unwarranted judicial intrusion into the Executive's ability to conduct military operations abroad."⁸⁹ These concerns did not lead the Court to hold that American citizens held abroad in certain circumstances had no right to seek habeas corpus, but rather that federal courts should not exercise their habeas jurisdiction to enjoin the military from transferring citizens detained in another sovereign's territory to that sovereign government for criminal prosecution.⁹⁰ Prudential concerns thus entered the picture in *Munaf* not to determine whether habeas jurisdiction was available, but rather to determine whether the writ should issue. It is unclear why prudential concerns should play such a different role when aliens rather than citizens are involved, except possibly that there are more potential cases involving aliens.

The Court also could have adopted an intermediate position based on principle and not pragmatics, by holding that habeas applies to any prisoners detained in foreign territory at a site where the United States exercises effective

treatment of foreign nations into the disorder of an active war zone overseas.").

86. See, e.g., Martin, *supra* note 70, at 360 (arguing that one possible doctrine is that constitutional rights apply abroad, but that "they may apply in different ways, with different precise outcomes or applications, to non-citizens encountering U.S. authority outside the country").

87. *Munaf v. Geren*, 553 U.S. 674 (2008).

88. *Id.* at 685-88.

89. *Id.* at 700; see also *Boumediene*, 553 U.S. at 750 (citing *Munaf* for the proposition that "prudential concerns . . . affect the appropriate exercise of habeas jurisdiction").

90. *Munaf*, 553 U.S. at 700.

control. Such a conclusion would be consistent with the jurisprudence of the European Court of Human Rights and the Inter-American Human Rights Commission and was suggested in *Boumediene* by the Court when it asserted that the “objective degree of control” exercised by the United States in a foreign place is important to determining whether habeas applies.⁹¹ An effective control test would also remove battlefield captures from the habeas equation, since presumably the Court would find that the military did not have effective control over a prisoner in the chaos of battle, but only after transferring the prisoner to some secure detention facility over which the United States maintained control.⁹² Indeed, the British House of Lords adopted that position in holding that provisions of the European Convention on Human Rights applied to a detainee held in a British military prison in Iraq.⁹³

D. *Boumediene’s Quest for Flexibility: The Functional Test’s Similarity to the Concerns Underlying the Political Question Doctrine*

Despite the arguments for the adoption of a more principled, normative approach to determine in what circumstances constitutional rights should apply to governmental actions against aliens abroad, and despite the criticism of the functional test as “inherently subjective,”⁹⁴ the functional test allows the Court to avoid being rigidly constrained by principle and to maintain flexibility,⁹⁵ which appealed to Justice Kennedy.⁹⁶ The normative underpinnings of the

91. *Boumediene*, 553 U.S. at 754, 763-64. The Inter-American Commission on Human Rights, for example, has stated that the obligations of the Inter-American Convention on Human Rights apply wherever a state exercises effective control over an individual, irrespective of whether the state is acting within its own territory. *Coard v. United States*, Case 10.951, Inter-Am. Comm’n H.R., Report No. 109/99, OEA/Ser.L/V/II.106, doc. 6 rev. ¶ 37 (1999), available at <http://www.cidh.oas.org/annualrep/99eng/Merits/UnitedStates10.951.htm>. The European Court of Human Rights has applied the European Convention on Human Rights where a state exercises effective control over territory or an individual. *Öcalan v. Turkey*, 37 Eur. H.R. Rep. 238, ¶ 93 (2003); *Banković v. Belgium*, 2001-XII Eur. Ct. H.R. 333, ¶ 71; see also *Cleveland*, *supra* note 18, at 269; *Cole*, *supra* note 7, at 58-59.

92. *Boumediene*, 553 U.S. at 753, 771.

93. *Al-Skeini v. Sec’y of State for Def.*, [2007] UKHL 26, [67], [2008] 1 A.C. 153 (appeal taken from Eng.) (U.K.).

94. *Boumediene*, 553 U.S. at 843 (Scalia, J., dissenting).

95. One could question whether a more principled application of constitutional rights to nonresident aliens could lead to the dilution of the substantive rights in the foreign context that might have the effect of diluting the protections afforded citizens domestically. NEUMAN, *supra* note 10, at 111; see Lobel, *supra* note 27, at 878. The possibilities for dilution of rights once they are applied in novel and more difficult circumstances are real. For example, the D. C. Circuit in one case assumed that the Fifth Amendment prohibits the government from obtaining coerced confessions abroad, but then nonetheless found very dubious governmental conduct that appeared coercive to be within constitutional parameters. *Id.* (discussing *United States v. Yunis*, 859 F.2d 953, 967-70 (D.C. Cir. 1988)). But an answer to this concern is that courts ought to exercise care in determining and stating what specific and unique practical concerns with imposing a right to new situations require a different enforcement or application of a right abroad than that required domestically, and not simply to abandon the limitations the Constitution imposes on government conduct abroad.

96. Another objection to the adoption of either an effective control or prolonged detention test might be that either could be seen as more directly conflicting with *Eisentrager*. Indeed, Justice Black’s dissent in *Eisentrager* argued for an effective control rule. See *Johnson v. Eisentrager*, 339 U.S. 763, 798 (1950) (Black, J., dissenting); see also Martin, *supra* note 70, at 360 (contending that the constitutional habeas right should apply to detainees at “long-term detention facilities under the control of U.S. officers”). The Court’s functional, pragmatic test allowed it to distinguish and not overrule *Eisentrager*.

functional test could thus be seen as similar to those underlying the controversial and confusing political question doctrine. As Harvard Professor Louis Jaffe once noted, many issues described by the courts as political are problems, “for which we do not choose, or have not been able as yet to establish, strongly guiding rules. We may believe that the job is better done without rules, or that even though there are applicable rules, these rules should be only among the numerous relevant considerations.”⁹⁷

While the *Boumediene* Court decisively rejected the government’s political question arguments, which would have accorded the Executive unlimited power to determine whether detainees could seek habeas corpus, its pragmatic test provides an escape mechanism—in some respects similar to that provided by the political question doctrine—for courts to hold that habeas does not apply in some yet to be determined detention setting in the future. That the political question doctrine is often invoked in the context of foreign policy⁹⁸ further suggests the analogy to *Boumediene*. As Justice Brennan stated in *Baker v. Carr*, even foreign policy matters do not warrant a broad rule of judicial abstention.⁹⁹ Rather, a functional analysis must be undertaken on a case-by-case basis.¹⁰⁰ The Court’s adoption of a case-by-case, pragmatic, functional test in *Boumediene* may thus be based on a recognition that the Court sometimes ought to use pragmatic considerations to avoid addressing or even trumping constitutional principles.¹⁰¹ To the Court, the application of the Constitution abroad may present one such circumstance.¹⁰²

The premises and principles of the political question doctrine, however, are often questioned and are difficult to apply, a slender reed of dubious legitimacy to support the *Boumediene* functional test.¹⁰³ Indeed, the political

Boumediene, 553 U.S. at 843 (Scalia, J., dissenting) (stating that the “functional” test usefully evades the precedential landmine of *Eisentrager*). Nonetheless, an alternative approach would not have required overruling *Eisentrager*, since Jackson’s *Eisentrager* opinion is ambiguous and could also be distinguished on the grounds that despite his broad statement that alien enemies abroad had no right to seek a writ of habeas corpus, the opinion actually reached the merits of the claim and held that petitioner’s rights had not been violated. See *Eisentrager*, 339 U.S. at 780-81, 790.

97. Louis L. Jaffe, *Standing To Secure Judicial Review: Public Actions*, 74 HARV. L. REV. 1265, 1303 (1961); see also ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH 186-87 (1962).

98. See, e.g., *Connecticut v. Am. Elec. Power Co.*, 582 F.3d 309, 322 (2d Cir. 2009) (claiming that foreign policy is one of the “two most highly litigated areas of the political question doctrine”).

99. *Baker v. Carr*, 369 U.S. 186, 211-12 (1962).

100. *Id.*

101. RICHARD A. POSNER, BREAKING THE DEADLOCK: THE 2000 ELECTION, THE CONSTITUTION AND THE COURTS 168-73 (2001) (arguing that in various cases, including *Bush v. Gore*, 531 U.S. 98 (2000), the Court used pragmatic considerations to trump constitutional principle).

102. In a somewhat related context, the Court held that an alien’s substantial fear of foreign criminal prosecution was beyond the scope of the Fifth Amendment’s Self-Incrimination Clause. *United States v. Balsys*, 524 U.S. 666, 697-98 (1998). Souter’s opinion for the Court relied in part on practical concerns that, for example, domestic law enforcement would suffer serious consequences if fear of foreign prosecution were recognized as sufficient to invoke the privilege. *Id.* at 698. Justices Breyer and Ginsburg dissented, arguing that whether the Bill of Rights was intended to have any effect on the conduct of foreign proceedings, it undeniably “prescribes a rule of conduct generally to be followed by our Nation’s officialdom,” *id.* at 701 (Ginsburg, J., dissenting), and that the Court was allowing “practical concerns” to “stand in the way of constitutional principle,” *id.* at 716-20 (Breyer, J., dissenting).

103. See, e.g., Louis Henkin, *Is There a Political Question Doctrine?*, 85 YALE L.J. 597, 611-12 (1976).

question doctrine has rarely been invoked by the Supreme Court, even in the area of foreign affairs, undoubtedly because of criticisms similar to those invoked against the functional test.¹⁰⁴ Moreover, as already discussed, the pragmatically driven functional test is at odds with the strong normative statements of fundamental principles and values invoked by the *Boumediene* Court to justify its decision.

The disconnect between the pragmatic inquiries set forth in the functional test and the fundamental norms that underlie the *Boumediene* opinion requires integrating the two disparate strands of the opinion. That project must begin with the recognition that pragmatic considerations such as the location or permanent status of a particular military base ought not be dispositive where certain fundamental rights or principles are involved. For example, the Constitution ought not permit United States officials to summarily execute or brutally torture a detainee, irrespective of where that detainee is being held.

A review of the cases that Justice Kennedy relied upon to formulate his functional test illustrates that those cases support not only the proposition that pragmatic considerations play a role in determining whether the Constitution applies abroad, but also indicate that a court must consider whether the constitutional principle involved is fundamental to liberty. Moreover, the cases suggest that determining which principles are so fundamental as to apply wherever the government acts should be made not simply by reference to American values and culture, but also by what the international community considers fundamental. It is to those cases that this Article now turns.

III. SUBSTANTIVE DUE PROCESS AND FUNDAMENTAL RIGHTS IN THE SUPREME COURT'S EXTRATERRITORIAL JURISPRUDENCE

The Court's richly detailed and careful consideration of the history and function of habeas review in our separation of powers framework contrasts sharply with its somewhat cursory analysis of the important cases addressing questions of the extraterritorial application of constitutional rights from which it derives the functional test.¹⁰⁵ Upon review of these cases, it becomes apparent that the Supreme Court decisions on which Kennedy relied did not rest merely on practical concerns, but also turned on an evaluation of whether the constitutional principle involved was fundamental—that is, whether the government, by denying a person that constitutional right, was acting in a manner that violated basic notions of fairness or essential aspects of liberty recognized by any civilized society. Those decisions support the proposition that essential aspects of liberty in this context must be informed by the norms that the international community considers fundamental.

The extraterritorial cases are consistent with, and in some respects based

104. Important cases involving United States foreign policy have been decided on the merits by the Supreme Court in the last sixty years. *See, e.g.*, *Regan v. Wald*, 468 U.S. 222 (1984); *Dames & Moore v. Regan*, 453 U.S. 654 (1981); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

105. Neuman, *supra* note 10, at 270 (terming the Court's discussion, in historiographical terms, a "flattened description of the extraterritorial application of the U.S. Constitution").

upon, the substantive due process jurisprudence the Court applied in the first half of the twentieth century. That jurisprudence read the Fourteenth Amendment's Due Process Clause to incorporate certain rights against state conduct where no "civilized system could be imagined that would not accord the particular protection"¹⁰⁶ where the rights were "of the very essence of a scheme of ordered liberty," or where "a fair and enlightened system of justice would be impossible without them."¹⁰⁷ That natural law, due process approach thus explicitly defined fundamental rights by reference to rights universally recognized by civilized nations.¹⁰⁸

The Court's incorporation approach changed in the 1960s to an inquiry into whether a particular right or procedure was "necessary to an Anglo-American regime of ordered liberty," leading to a divergence between the rights applicable as against the states and those restraining the federal government's action abroad.¹⁰⁹ Nonetheless, *Boumediene* and all of the decisions on which Kennedy relies are consistent with or based on the older due process jurisprudence for determining the applicability of constitutional norms to U.S. actions abroad. Thus, those extraterritorial decisions are most appropriately read to require that the extraterritorial application of a right to be based on a determination that the right not only reflects American procedures or values, but also, as the Ninth Circuit put it, is "fundamental in this international sense."¹¹⁰

A. *The Insular Cases' Recognition of the Distinction Between Fundamental and Nonfundamental Constitutional Principles*

The Insular Cases most clearly reflect the older, fundamental rights jurisprudence. While these cases distinguished between territories acquired by the United States that were to be incorporated into the United States and those "unincorporated territories" in which the Constitution would not apply fully, the Court also distinguished between those principles that were fundamental and those that were not. The former category of prohibitions would apply wherever the United States exercised authority. As Justice Brown's opinion in *Downes v. Bidwell*, the most important of the Insular Cases, put it, there "is a clear distinction between such prohibitions as go to the very root of the power of Congress to act at all, irrespective of time or place, and such as are operative only 'throughout the United States,' or among the several states."¹¹¹ For

106. *Duncan v. Louisiana*, 391 U.S. 145, 150 n.14 (1968) (explaining the traditional due process incorporation test).

107. *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).

108. *Id.*; see also *Twining v. New Jersey*, 211 U.S. 78, 110-11 (1908) (noting that jurisdiction and notice are the "two fundamental conditions [of due process] which seem to be universally prescribed in all systems of law established by civilized countries").

109. *Duncan*, 391 U.S. at 150 n.14.

110. *Wabol v. Villacrusis*, 958 F.2d 1450, 1460 (9th Cir. 1992).

111. *Downes v. Bidwell*, 182 U.S. 244, 277 (1901). In so arguing, Brown appears to have picked up on an argument made by Abbot Lawrence Lowell, who would later become president of Harvard, that "[i]t may well be that some provisions have a universal bearing because they are in form restrictions upon the power of Congress rather than reservations of rights." Abbot Lawrence Lowell, *The Status of Our New Possessions—A Third View*, 13 HARV. L. REV. 155, 176 (1899); see also NEUMAN,

Brown, while the Constitution did not apply to unincorporated territories, Congress was nevertheless bound by certain fundamental or natural rights, which apply “by inference and the general spirit of the Constitution” rather than by any “express and direct application of its provisions.”¹¹²

Justice White’s concurrence in *Downes*, joined by Justices Sharis and McKenna and subsequently adopted by a majority of the Court in *Dorr v. United States*¹¹³ and *Balzac v. Porto Rico*,¹¹⁴ also distinguished between fundamental rights and those that merely “regulate a granted power.”¹¹⁵ For Justice White, while the full panoply of constitutional rights and provisions only applied to fully incorporated territories and not those territories that Congress chose not to incorporate, he recognized, as did Justice Brown, that the colonized populations had to be afforded some constitutional protections.

For White, those protections stemmed from two sources. First, while White accorded Congress the “widest latitude of discretion” in exercising its power to create local governments in the territories, there may be “inherent, although unexpressed, principles which are the basis of all free government which cannot be with impunity transcended,” a formulation which accords with the Fourteenth Amendment due process inquiry of the era.¹¹⁶ That the law of nations or the practice of other societies would be relevant to such an inquiry was implicit in White’s formulation.

Second, Justice White not only relied upon “inherent, unexpressed,” fundamental principles to restrain government power over the territories, but also, unlike Justice Brown, recognized that there were some prohibitions in the Constitution that would be directly applicable because they were not

mere regulations as to the form and manner in which a conceded power may be exercised, but . . . are an absolute denial of all authority under any circumstances or conditions to do particular acts. In the nature of things, limitations of this character cannot be under any circumstances transcended, because of the complete absence of power.¹¹⁷

In elaborating what were “absolute withdrawals of power,”¹¹⁸ White quoted Justice Field in *Chicago Rock Island Railway v. McGlenn* for the proposition that any law supporting an established religion, abridging freedom of the press, or authorizing cruel and unusual punishment would automatically be void as violative of the Constitution.¹¹⁹ For that proposition, Field in turn

supra note 10, at 85 (arguing that “Lowell’s distinction between applicable and inapplicable provisions, based on verbal form rather than substance, had no future”).

112. *Downes*, 182 U.S. at 364 (quoting *Church of Jesus Christ of L.D.S. v. United States*, 136 U.S. 1, 10 (1890)); *see also id.* at 282 (suggesting application of “inherent and fundamental principles for the protection of the individual, even though there be no express authority in the Constitution to do so” (quoting *Knowlton v. Moore*, 178 U.S. 41, 109 (1900))).

113. 195 U.S. 138 (1904).

114. 258 U.S. 298, 305 (1922) (“[T]he *Dorr* Case shows that the opinion of Mr. Justice White of the majority in *Downes v. Bidwell*, has become the settled law of the court.”).

115. *Downes*, 182 U.S. at 295 (White, J., concurring).

116. *Id.* at 290-91.

117. *Id.* at 294.

118. *Id.* at 298.

119. *Id.* at 298 (quoting 114 U.S. 542, 546 (1885)).

had relied on Chief Justice Marshall's opinion in *American Insurance Co. v. Canter*, which invoked "the usage of the world," and also invoked Halleck's influential digest of international law.¹²⁰ As Part IV illustrates, White's articulation of "absolute withdrawals of power" is conceptually similar to current international law's conception of nonderogable, jus cogens norms—as is his and Justice Brown's notion of inherent fundamental norms.

The later Insular Cases involving the right to trial by jury also relied on the distinction between fundamental and nonfundamental rights. Thus, in a series of cases involving the right to a trial by jury in Hawaii, the Philippines, and Puerto Rico, the Court held that that right and the right to presentment by grand jury were inapplicable because they "are not fundamental in their nature, but concern merely a *method of procedure* which sixty years of practice had shown to be suited to the conditions of the islands."¹²¹ The Court repeated Justice White's formulation that inherent principles that are the basis of all free government constitutionally limited U.S. actions in the territories.¹²² The Court explicitly distinguished the guarantees of "certain fundamental personal rights declared in the Constitution, as for instance that no person could be deprived of life, liberty or property without due process," which had been applicable in the Philippines and Puerto Rico from the beginning of U.S. occupation, and which presumably was required irrespective of any practical difficulties that might arise in the application or enforcement of these rights.

B. *Substantive Due Process Concepts in the Court's Post-World War II Extraterritorial Jurisprudence*

Justices Harlan's and Frankfurter's concurrences in *Reid*, which Justice Kennedy relied on significantly in his concurrence in *Verdugo-Urquidez* and his majority opinion in *Boumediene*, are also premised on natural law, substantive due process notions similar to those that underlay the Court's decisions in *Downes* and the Insular Cases.¹²³ While Harlan rejected a rigid and abstract rule that Congress must act subject to all the limitations of the Constitution no matter how "impractical or anomalous" such a limitation would be in a particular practical context, he also relied heavily on the fundamental nature of the right to a jury trial in *capital* cases.¹²⁴ For Harlan, capital cases "stand on quite a different footing than other offenses," because "[i]n such cases the law is especially sensitive to demands for that procedural fairness which inheres in a civilian trial."¹²⁵ Citing *Powell v. Alabama*, wherein the Court held that a state must accord a defendant a right to counsel in capital

120. *Id.* at 298 (citing 26 U.S. (1 Pet.) 511, 511 (1828)).

121. *Dorr v. United States*, 195 U.S. 138, 144-45 (1904) (emphasis added) (quoting *Hawaii v. Mankichi*, 190 U.S. 197, 218 (1902)).

122. *Id.* at 147.

123. *See Reid v. Covert*, 354 U.S. 1, 53 (1957) (Frankfurter, J., concurring) (arguing that the Court has consistently enunciated the "fundamental right" test for issues dealing with constitutional restrictions on the power of Congress to make rules governing unincorporated territories); *id.* at 75 (Harlan, J., concurring).

124. *Id.* at 77 (Harlan, J., concurring) (emphasis added).

125. *Id.*

cases, Harlan argued that the process that is “due” in capital cases is different from what is required where the offender faces a fine or prison sentence; the distinction is “that between life and death.”¹²⁶ For Harlan that was “precisely the kind of distinction which plays a large role in the process of weighing the competing considerations” in determining whether constitutional safeguards apply to government action abroad. While he did also point out that the number of capital cases were so few as to present no insurmountable problems in according defendants in such cases a jury trial, the thrust of his discussion of capital cases focuses on the nature of the defendant’s interest, not on potential practical obstacles to providing a jury trial.

Harlan and Frankfurter’s focus on the fundamental nature of the capital defendant’s interest in *Reid* became even more pronounced in *Kinsella v. United States ex rel. Singleton*, where the Court extended the *Reid* holding to non-capital offenses.¹²⁷ In dissent, Harlan and Frankfurter argued that the Court “passe[d] over too lightly the awesome finality of a capital case,” a factor which they argued is critical to a determination of whether Congress has the power to provide for non-jury trials in non-capital cases.¹²⁸ For those two dissenters, the Court should stay its hand in dealing with considerations and problems “engendered by present disturbed world conditions,” and refuse to balance factors which they believed that the Court was ill equipped to assess, “except under the clearest sort of constitutional compulsion.”¹²⁹ Capital cases presented just that sort of compulsion, and in those cases, Harlan would require not a rational and appropriate basis justifying the exercise of congressional power, but rather, “a much more persuasive,” or compelling, showing that congressional power was necessary.¹³⁰ Thus, the principle that emerges from Harlan’s and Frankfurter’s opinions in *Reid* and *Kinsella* is not that pragmatic considerations should generally govern, but rather that reasonable, practical considerations could justify a determination that a particular right is inapplicable overseas, except where fundamental interests of the individual—which in *Reid* amounted to life or death—were at stake.

The *Eisentrager* decision is not inconsistent with the Insular Cases and Justices Harlan and Frankfurter’s due process jurisprudence, because that Court was not confronted with a claim that the military tribunal violated fundamental notions of due process; as Justice Kennedy pointed out in *Boumediene*, the *Eisentrager* petitioners had clearly been accorded a “rigorous, adversarial process to test the legality of their detention.”¹³¹ Indeed, while the *Eisentrager* Court asserted that the petitioners had no right to habeas corpus, nor were entitled to the full protection of the Fifth Amendment, it ultimately addressed the petitioners’ Fifth Amendment claims that the military commission that tried

126. *Id.* (citing 287 U.S. 45 (1932)).

127. *Kinsella v. United States ex rel. Singleton*, 361 U.S. 234 (1960).

128. *Id.* at 255 (Harlan, J., dissenting in part and concurring in part).

129. *Id.* at 258.

130. *Id.* at 256.

131. *Boumediene v. Bush*, 553 U.S. 723, 767 (2008).

them was without jurisdiction.¹³² While Justice Jackson did lean heavily on practical difficulties in affording habeas hearings to enemy aliens detained overseas, he also noted that the *Eisentrager* prisoners had been “fully informed of particulars,” of the charges against them, and had not pointed to any “prejudicial disparity . . . between the Commission that tried [them] and the procedures it used and the protections afforded an American soldier of the same rank,” thus suggesting that their trial had comported with basic due process principles.¹³³ Had the petitioners claimed to have been German civilians, totally unconnected to the German war effort who had received either no due process or a process that did not comport with fundamental notions of fairness and amounted to a “kangaroo trial,”¹³⁴ Justice Jackson’s position might well have been different.¹³⁵

So too, the Court’s holding in *Verdugo-Urquidez* is consistent with the Insular Cases’ principle that fundamental rights follow the flag. Both Justice Rehnquist’s majority opinion and Justice Kennedy’s concurrence cited *Downes*, with Justice Kennedy noting that the “wholly dissimilar traditions and institutions” with respect to a requirement of a warrant in Mexico supported the conclusion that the Warrant Clause did not apply to searches of aliens in that country.¹³⁶ That the warrant requirement was not universally accepted, and in particular not applicable in Mexico, was critical to Kennedy’s opinion. While Justice Kennedy relied on the idea that the conditions of that case made adherence to the Fourth Amendment’s warrant requirement “impracticable and anomalous,” his conclusion is consistent with finding that the warrant requirement—while fundamental in current Fourteenth Amendment incorporation doctrine—is not a fundamental right in the sense used by the Court in *Downes* and the other Insular Cases. Indeed, Kennedy discussed Harlan’s “due process” test articulated in *Reid* and recognized that “due process” did apply, but held that nothing approaching a violation of due process

132. *Johnson v. Eisentrager*, 339 U.S. 763, 785-88 (1950).

133. *Id.* at 786, 790.

134. At oral argument in the Bagram appeal, Judge Sentelle claimed that it would have made no difference in *Eisentrager* had the petitioners there been subjected to a “kangaroo trial.” Transcript of Oral Argument, *supra* note 8, at 34. Sentelle’s statement is inconsistent with Part IV of Jackson’s opinion. See *Eisentrager*, 339 U.S. at 786, 790.

135. The records from the *Eisentrager* trials illustrate that “there had been a rigorous, adversarial process to test the legality of [petitioners’] detention.” *Boumediene*, 553 U.S. at 767. Moreover, the reference in Jackson’s opinion to the practical difficulty of according rights during a military occupation to “irreconcilable enemy elements, guerilla fighters and ‘werewolves’” that Kennedy cites in *Boumediene* refers to the difficulty of granting *all* constitutional rights to such elements. See *id.* at 770; *Eisentrager*, 339 U.S. at 784-85 (stating that petitioners’ construction would require enemy aliens to be accorded freedom of speech, a right to bear arms, security against unreasonable searches and seizures, and a right to a jury trial). Indeed, Jackson cited *Downes v. Bidwell* for the proposition that “such extraterritorial application of organic law” could not have been intended, see *Eisentrager*, 339 U.S. at 784, and as has already been discussed, *Downes* held that not all constitutional rights were required to be extended to unincorporated territories, but only those that were fundamental.

136. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 268-69 (1990) (citing *Downes* for the proposition that only fundamental rights are guaranteed to inhabitants of unincorporated territories). Justice Kennedy did note that the claim that the protection of the Fourth Amendment extends to aliens in foreign nations is a weaker claim. *Id.* at 278 (Kennedy, J., concurring).

had occurred.¹³⁷ Had the warrant requirement been universally recognized, and considered a nonderogable right, Kennedy's analysis, and possibly his holding, would have changed.

Finally, the *Boumediene* Court, while articulating a version of the practicable and anomalous test, clearly recognized the fundamental nature of the petitioners' interest. The Court determined that habeas relief was fundamental in the American scheme of justice to protect against executive detention. The Court emphasized throughout its opinion the lengthy, prolonged confinement of the detainees with minimal procedural safeguards, thus underscoring the fundamental liberty interests involved in the detainees' claims.¹³⁸ Indeed, as the Court has noted elsewhere, the international community recognizes a violation of basic human rights norms where "as a matter of state policy, it practices, encourages or condones . . . prolonged arbitrary detention."¹³⁹ The *Boumediene* plaintiffs' claims fit comfortably within the fundamental rights jurisprudence of *Downes* and the second Justice Harlan in *Reid* and *Kinsella*, for no modern system of justice in any free country—either military or civilian—can be imagined in which people who claim to be civilians are locked up for many years without being accorded minimal due process.

C. *Differing Fundamental Rights Tests for Domestic and International Incorporation of the Bill of Rights*

The Ninth Circuit adopted the reading of the Insular Cases urged here in *Wabot v. Villacrusis*, where the court held that the only constitutional guarantees deemed fundamental for purposes of limiting U.S. government actions abroad in unincorporated territories are those that are "fundamental" in an "international sense."¹⁴⁰ There, the court had to distinguish between the incorporation doctrine that emerged in the 1960s, which viewed fundamental rights incorporated vis-à-vis the states as those reflecting American values, and the incorporation of fundamental norms for the governance of unincorporated territories abroad, which required a wider international consensus.

In *Wabot*, the plaintiffs claimed that the Equal Protection Clause prohibited the United States from imposing race-based restrictions on the acquisition of permanent and long-term interests in land in the Northern Mariana Islands, which under the Insular Cases was treated as an unincorporated territory of the United States in which only "fundamental"

137. *Id.* at 278. Perhaps Kennedy discussed due process because the *Verdugo-Urquidez* trial was to take place here, but in the context in which he raised due process, he seems to be discussing due process in the broader sense that Harlan and Frankfurter had in *Reid v. Covert*.

138. *Boumediene*, 553 U.S. at 771, 785, 794-95, 797-97. Similarly, Justice Souter's concurrence (joined by Justices Ginsburg and Breyer) emphasized a "fact insufficiently appreciated by the dissents is the length of the disputed imprisonment, some of the prisoners represented here today having been locked up for six years." *Id.* at 799 (Souter, J., concurring); see also *id.* at 800-01 ("[I]t is enough to repeat that some of these prisoners have spent six years behind bars.").

139. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 737 (2004) (emphasis added) (quoting RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 702 (1987)).

140. 958 F.2d 1450, 1460 (9th Cir. 1992).

constitutional rights apply.¹⁴¹ In determining what rights were fundamental, the court relied on its 1984 holding in *Commonwealth of Northern Mariana Islands v. Atalig* that the right to a jury trial did not apply in the Islands despite the Supreme Court's holding in *Duncan v. Louisiana*¹⁴² that the right was fundamental for purposes of Fourteenth Amendment incorporation with regard to the states.¹⁴³ In *Atalig*, the court had distinguished the Fourteenth Amendment incorporation test—which focuses on whether a right is necessary to an Anglo-American regime of ordered liberty—and the Insular Cases test—which recognized as fundamental “those . . . limitations in favor of personal rights,” which are “the basis of all free government.”¹⁴⁴ The “international sense,” that the Ninth Circuit referred to in *Wabol* was thus a recognition that a “basic and integral freedom” was one that reflected “the shared beliefs of diverse cultures,” in other words one that the entire international community recognized.¹⁴⁵ Only by viewing fundamental rights in this broader way would the court preserve “Congress’ ability to accommodate the unique social and cultural conditions and values of the particular territory.”¹⁴⁶

The Ninth Circuit then utilized Justice Harlan’s *Reid v. Covert* functional test, which determined that imposing the Equal Protection Clause would be “both impractical and anomalous in this setting.”¹⁴⁷ But the court’s invocation of the impractical and anomalous test functioned to support its conclusion that the cultural and social diversity reflected in the Mariana Islanders’ differing attitudes toward property did not violate any fundamental rule of international law and indeed furthered international norms.¹⁴⁸ The court noted:

It would truly be anomalous to construe the equal protection clause to force the United States to break its pledge to preserve and protect NMI culture and property. The Bill of Rights was not intended to interfere with the performance of our international obligations. Nor was it intended to operate as a genocide pact for diverse native cultures. . . . Its bold purpose was to protect minority rights, not to enforce homogeneity. Where land is so scarce, so precious, and so vulnerable to economic predation, it is understandable that the islanders’ vision does not precisely coincide with mainland attitudes toward property and our commitment to the ideal of equal opportunity to its acquisition. We cannot say that this particular aspect of equality is fundamental in the international

141. *See id.* at 1460 n.19.

142. 391 U.S. 145 (1968).

143. *Commonwealth of Northern Mariana Islands v. Atalig*, 723 F.2d 682 (9th Cir. 1984).

144. *Id.* at 690 (quoting *Dorr v. United States*, 195 U.S. 138 (1904)).

145. *Wabol*, 958 F.2d at 1460.

146. *Id.*

147. *Id.* at 1462.

148. Various lower courts have held, on a variety of rationales, that the Insular Cases’ distinction between protected fundamental rights and non-protected rights survives the Fourteenth Amendment incorporation cases. *See, e.g.*, *Commonwealth of the N. Mariana Islands v. Atalig*, 723 F.2d 682, 688-90 (9th Cir. 1984); *United States v. Christian*, 660 F.2d 892, 898-99 (3d Cir. 1981) (relying on the Insular Cases for the proposition that the Fifth Amendment grand jury requirement does not apply to the Virgin Islands); *King v. Morton*, 520 F.2d 1140, 1147 (D.C. Cir. 1975) (“[The Insular Cases] have never been overruled; specifically, they have not been overruled by the *Duncan* and *Baldwin* cases, which dealt with the right to trial by jury in states rather than unincorporated territories.”); *Gov’t of the Canal Zone v. Scott*, 502 F.2d 566, 568 (5th Cir. 1974) (relying on the Insular Cases for the proposition that the Fifth Amendment grand jury requirement does not apply to the Canal Zone).

sense.¹⁴⁹

Moreover, as the court made clear, the fundamental right to a fair trial protected by the Due Process Clauses was a fundamental right in the international sense.¹⁵⁰ Presumably, therefore, had the Pacific Islanders had a local custom that dispensed with any trial or proceeding to determine guilt or innocence, such a process would have been unconstitutional.

The Supreme Court's reluctance in *Boumediene* and other modern cases to reiterate the Insular Cases' fundamental rights jurisprudence explicitly is understandable—that due process jurisprudence is controversial, and its natural law foundations are disfavored. It was effectively discarded with regard to the application of the Bill of Rights to the states, and its contours are murky and ill defined. While the Court omitted any reference to international law as a guide to determine which norms were fundamental, perhaps because it was concerned about the perceived legitimacy of doing so, or because it feared substituting the entire panoply of international human rights norms for the Bill of Rights, the current Fourteenth Amendment incorporation jurisprudence was also undoubtedly unacceptable because it would deprive the Court of the flexibility to pick and choose which constitutional provisions to enforce and the contexts in which they would be applicable. Nonetheless, the Court's repeated reiteration in *Boumediene* that the detainees had been held for a prolonged period of time with few procedural safeguards suggests that the egregiousness of their long-term detention, and not merely the unique characteristics of Guantanamo, was an important and perhaps decisive factor motivating the Court.

Thus, in an important sense, Justice Kennedy's opinion in *Boumediene* is similar to his *Lawrence v. Texas* opinion for the Court: both are premised on fundamental rights jurisprudence that spoke clearly throughout the opinion but were never officially articulated nor elaborated as part of a "test."¹⁵¹ Professor Tribe's observation about the *Lawrence* decision could equally apply to *Boumediene*, which, like the title to Tribe's article on *Lawrence*, involved "The 'Fundamental Right' That Dare Not Speak Its Name."¹⁵²

While the Court's reluctance to ground any "test" on fundamental rights notions is understandable, fundamental norms nonetheless pervade the *Boumediene* opinion. Indeed, as demonstrated above, the extraterritorial cases are either explicitly based on a fundamental rights jurisprudence, or more recently are implicitly consistent with the jurisprudence's basic premise that there is certain conduct, so inimical to the idea of free government, that U.S. officials should be constitutionally barred from engaging in it wherever and against whomever they act. A test that requires courts to ignore the fundamental nature of the interest or right asserted in the name of practical considerations is even murkier and more subjective than one based on

149. *Wabot*, 958 F.2d at 1462.

150. *Id.* at 1460.

151. *Lawrence v. Texas*, 539 U.S. 558 (2003); Tribe, *supra* note 16.

152. Tribe, *supra* note 16.

fundamental rights, and focuses courts' attention on only one piece of the total picture.

The question presented by the line of cases from the Insular Cases to *Boumediene* is how to decide whether a constitutional limitation is fundamental and whether it should be enforced extraterritorially. The substantive due process test that underlies the Insular Cases and Justices Harlan's and Frankfurter's opinions in *Reid* focuses the inquiry on what principles are inherent in any civilized society, whatever their particular legal and cultural traditions. That test implies an international law inquiry into what norms cut across national boundaries and can be said to be truly universal and not particular to the United States. From that perspective, the Fourth Amendment warrant requirement and the Sixth Amendment provision for trial by jury are not fundamental, but the proscriptions against torture and summary execution contained in the Fifth and Eighth Amendments are.

While for purposes of domestic incorporation of the Bill of Rights with respect to the states, the substantive due process inquiry departed from the older cases in the 1960s to focus on rights fundamental to the Anglo-American tradition,¹⁵³ the older jurisprudence ought still apply to the incorporation of constitutional norms to U.S. actions outside U.S. territory. Thus the recognition that the domestic and international arenas are somewhat different and present different constitutional challenges should not require the abandonment of principle for pragmatics, but rather an internationalist inquiry that simultaneously addresses the cultural, legal, and practical differences and problems presented by applying constitutional norms to U.S. actions abroad. Such an inquiry flows from the extraterritorial cases relied on by *Boumediene*.

Fortunately, modern international law has evolved since World War II to permit courts to make a distinction between fundamental and ordinary norms recognized by the international community.¹⁵⁴ While the lines of that distinction are sometimes murky and ambiguous, the basic outlines are fairly clear. The international community has recognized that certain norms are so fundamental that it is never impractical to apply and enforce them. Consistent with the jurisprudence of the aforementioned cases, courts should look to that body of international law to aid the determination of whether a particular constitutional provision applies to U.S. government action against aliens abroad.

IV. APPLYING THE CONSTITUTION ABROAD: AN INTERNATIONAL FUNDAMENTAL RIGHTS APPROACH

Modern international law recognizes that there are certain basic norms of civilized society—referred to as jus cogens or nonderogable norms—that are so fundamental as to be binding on every nation in all situations, even in times of war or national emergency. The prohibitions on torture, genocide, slavery, extrajudicial execution, and prolonged arbitrary detention without judicial

153. See *supra* note 109 and accompanying text.

154. See *infra* Section IV.B.

review fit this description. From both a theoretical and functional perspective, a minimalist, yet principled, normative basis for determining which constitutional norms ought to be applicable when the U.S. government acts abroad could rely on those fundamental nonderogable principles of international law which cannot be violated under any circumstance.¹⁵⁵ This Part explains why such an international fundamental rights approach to the extraterritorial application of the Constitution makes sense both practically and doctrinally. It discusses the modern international law development of concepts of jus cogens and nonderogable norms and the historical role that the Framers and early leaders of our nation believed international law played in determining the constitutional authority of the political branches. This Part also reviews the Supreme Court's use of international law in interpreting the Constitution to illustrate that such an approach, while not relied on by the *Boumediene* Court, would not be inconsistent with the Court's prior jurisprudence.

A. *The Utility and Doctrinal Compatibility of an International Fundamental Norms Approach*

An approach to the extraterritorial application of the Constitution abroad that asked whether the constitutional principle at issue reflects a fundamental, nonderogable norm of international law would both preserve governmental flexibility in dealing with different cultures, societies, and legal systems, as well as the myriad problems that afflict foreign policy, yet also recognize that there are certain types of conduct that are so contrary to the fundamental norms of civilized society that the Constitution must prohibit the government from engaging in them whenever, wherever, and against whomever it acts. The cases the *Boumediene* Court relied on—*Verdugo-Urquidez*, *Eisentrager*, the Insular Cases, and the Harlan and Frankfurter opinions in *Reid*—are all premised on the proposition that when the government acts abroad, there may be circumstances when it acts in the context of a different legal regime that permits a practice that the Constitution would prohibit were the actions to occur here. In *Verdugo-Urquidez*, Mexican law did not require a search warrant;¹⁵⁶ in *Eisentrager*, military law and the international law of war permitted trial of war crimes committed by enemy combatants by military tribunal;¹⁵⁷ in the Insular Cases, the law of newly acquired territories did not provide for jury trials.¹⁵⁸

Unlike the rights at issue in those cases, there are some rights, such as the

155. I suggested such an approach, although I did not elaborate on it, in Jules Lobel, *Extraordinary Rendition and the Constitution: The Case of Maher Arar*, 28 REV. LITIG. 479, 497-99 (2008). Professor Neuman also has suggested that jus cogens might provide a reference point to decide which constitutional rights apply abroad, but has not elaborated on or analyzed the idea. Gerald L. Neuman, *Understanding Global Due Process*, 23 GEO. IMMIGR. L.J. 365, 395-96 (2009). For a related argument that fundamental international law norms ought to be constitutionally binding on U.S. actors, see Jules Lobel, *The Limits of Constitutional Power: Conflicts Between Foreign Policy and International Law*, 71 VA. L. REV. 1071 (1985).

156. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 262-63 (1990).

157. *Johnson v. Eisentrager*, 339 U.S. 763, 786 (1950).

158. *See, e.g., Downes v. Bidwell*, 182 U.S. 244, 269 (1901) (discussing the law of various territories regarding jury trials).

right to be free of torture, genocide, or slavery, that are treated as fundamental and never derogable by the international community as a whole. While nations obviously do engage in torture, genocide, and slavery, no country asserts the legal authority to do so, and laws of other nations prohibit such practices.¹⁵⁹ The cultural and legal diversity rationale partially underlying the *Boumediene* functional test is thus inapplicable to such nonderogable universal norms.

Moreover, the international community, including the U.S. government, has not merely accepted these rights as fundamental, but has agreed that it is never “practicable” to engage in such conduct as, for example, torture, summary execution, or genocide, irrespective of whatever “realistic,” “practical” foreign policy arguments are made to support such actions. To use fundamental international law norms to inform the Constitution’s reach would thus both provide a limiting normative principle and also meet the practical concerns that the Court focused on in *Boumediene*.

A fundamental international rights approach would also be consistent with the substantive due process, extraterritorial constitutional jurisprudence discussed in Part III and relied on by *Boumediene*, as well as the *Boumediene* opinion itself, which, while silent about international law, relied heavily on fundamental rights principles. As demonstrated in Section C of this Part, the approach urged here also comports with the intent of the Framers of the Constitution, who generally accepted that certain undefined “natural” or necessary principles of the law of nations limited the government’s foreign affairs powers set forth in the Constitution.

This international fundamental rights approach is also suggested by a number of relatively recent decisions by lower federal courts and the U.S. Supreme Court. The Ninth Circuit *Wabol* decision that constitutional rights applicable in unincorporated territories must be fundamental in the “international sense”¹⁶⁰ supports the approach urged here, as does a D.C. Circuit opinion recognizing in dicta that certain basic, nonderogable norms of international law may restrain our government in a constitutional manner.¹⁶¹ So too, the Supreme Court decision in *United States v. Balsys* suggests that the nonderogable nature of an international norm could play a role in determining the applicability of the corresponding constitutional principle in a context involving foreign governments.¹⁶² And the line of lower court cases affirmed by the Supreme Court in *Sosa v. Alvarez-Machain*—which recognized that federal courts have jurisdiction to hold foreign state actors liable for actions that violate international norms governing the universal prohibition of particularly heinous conduct—suggests that such norms at least provide a reference point for articulating which constitutional principles are applicable to U.S. officials when they act abroad.¹⁶³

159. See *Filártiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980).

160. *Wabol v. Villacrusis*, 958 F.2d 1450, 1460 (9th Cir. 1992).

161. *Comm. of U.S. Citizens Living in Nicar. v. Reagan*, 859 F.2d 929, 941-42 (D.C. Cir. 1988).

162. 524 U.S. 666, 695 n.16 (1998).

163. *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004); see also *Filártiga*, 630 F.2d. 876.

An international fundamental rights jurisprudence would not require the Court to apply all of the Bill of Rights provisions to U.S. government actions abroad, nor even all provisions of the Bill of Rights that can be said to represent customary international law, but rather, as the Court in *Boumediene* put it, “to use its power sparingly and where it would be most needed.”¹⁶⁴ This approach would require an integration of the fundamental rights strands of the opinion into the Court’s functional test. However, the Court left room for an elaboration of its functional test when it concluded that “at least three factors are relevant in determining the reach of the Suspension Clause.”¹⁶⁵

To be sure, utilizing international law to help determine which constitutional norms apply abroad would represent a major innovation in a decision that made virtually no mention of international law. So too, according fundamental rights jurisprudence the important influence suggested here would be in tension with the functional balancing factors test. My point is not that a fundamental international rights jurisprudence flows from or is required by *Boumediene*, but rather simply that *Boumediene* is not inconsistent with such a role for nonderogable international rights. This is so in large part because the practical, functional concerns that underlay the Court’s reluctance to apply habeas or other constitutional rights in all circumstances where the United States acts abroad are addressed by the international community’s recognition that certain particularly heinous or odious acts are never justified by such practical considerations.

Nor would the use of international law to inform the *reach* of constitutional norms to U.S. action against aliens abroad be subject to the same objections that have been raised against the Court’s use of international or foreign law as an aid in determining the *content* of Americans’ constitutional rights.¹⁶⁶ The question this approach raises is not whether “American law should conform to the laws of the rest of the world,” as Justice Scalia has put it,¹⁶⁷ or even more modestly—as the Court has, in fact, used foreign and international law¹⁶⁸—whether the views of other nations are helpful in interpreting the content of our constitutional principles. Rather, the Court would only be using nonderogable fundamental international norms to help determine which U.S. constitutional principles are so fundamental as never to

164. *Boumediene v. Bush*, 553 U.S. 723, 759 (2008).

165. *Id.* at 727 (emphasis added).

166. *Lawrence v. Texas*, 539 U.S. 558, 598 (2003) (Scalia, J., dissenting); *Atkins v. Virginia*, 536 U.S. 304, 325 (2002) (Rehnquist, C.J., dissenting) (criticizing the Court’s use of foreign views because under the Eighth Amendment, “American conceptions of decency . . . are dispositive” (quoting *Stanford v. Kentucky*, 492 U.S. 361, 369 n.1 (1989))).

167. *Roper v. Simmons*, 543 U.S. 551, 624 (2005) (Scalia, J., dissenting).

168. *See, e.g., id.* at 575-78 (majority opinion) (stating that international law is relevant to the determination of society’s evolving standards of decency under the Eighth Amendment); *see also id.* at 604-05 (O’Connor, J., dissenting) (“Over the course of nearly half a century, the Court has consistently referred to foreign and international law as relevant to its assessment of evolving standards of decency.”); *Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2002) (“[W]ithin the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved.”); *Lawrence*, 539 U.S. at 576 (invoking the decision of the European Court of Human Rights in *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. (ser. A) (1981), in support of recognition of a right of homosexual adults to engage in consensual intimate conduct).

be impracticable to apply abroad. Under this proposal, the Court would not actually apply international definitions of torture, cruel, inhumane or degrading treatment, genocide, prolonged arbitrary detention, or slavery, but would instead apply constitutional definitions of those terms, to the extent that the constitutional proscription was not broader than that provided by international law. The Senate, Congress, and several lower courts have used a similar technique to narrow the application of the International Covenant on Civil and Political Rights prohibition on cruel, inhumane, and degrading treatment to only prohibit conduct which would violate the U.S. Constitution.¹⁶⁹

There are a number of objections that could be made to the nonderogable fundamental international norms approach urged here. First, the development of the concept of nonderogable, peremptory norms is still relatively new and uncertain in international law, and the norms that qualify for such status are not well defined. Nonetheless, certain basic norms clearly are nonderogable, and others, such as prolonged arbitrary detention without judicial review, while not clearly defined as nonderogable, have also been viewed by authoritative sources as such.¹⁷⁰

Another objection is that using such a minimal standard as international nonderogable norms would entail the “dilution or elimination of rights that cannot be described as fundamental in any international sense.”¹⁷¹ I have sympathy with that objection, and indeed elsewhere I have argued that all of the Constitution’s provisions ought to apply wherever and whenever the government acts.¹⁷²

Nonetheless, it is now clear that the Supreme Court is unwilling to treat the Constitution abroad as it does at home, and will choose some constitutional rights to apply in certain situations and not others. The question then becomes whether it is preferable for the Court to make those decisions based on a purely practical or functional basis, or to establish a normative basis for determining that certain principles can never be violated, irrespective of where the government acts. In a judicial climate where the D.C. Circuit has in the past denied that the Constitution’s proscription against torture is applicable abroad,¹⁷³ and both the Second and D.C. Circuits have taken the view that a

169. See, e.g., International Covenant on Civil and Political Rights, Reservations, Understandings, Declarations, and Proviso, 138 CONG. REC. 8070-71, § I(3) (1992); *Xunca v. Gramajo*, 856 F. Supp. 162, 187 (D. Mass. 1995) (ruling that “any act by the defendant which is proscribed by the Constitution and by a cognizable principle of international law” as cruel, inhuman, or degrading treatment is sufficiently defined to be actionable under the Alien Tort Statute).

170. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 702 (1987); see also Marjorie M. Whiteman, *Jus Cogens in International Law, with a Projected List*, 7 GA. J. INT’L & COMP. L. 609, 625-26 (1977) (listing twenty acts the author believes are or should be outlawed under jus cogens).

171. Burnett, *supra* note 10, at 1013; see, e.g., *Atamirzayeva v. United States*, 77 Fed. Cl. 378, 387 (2007) (dismissing for lack of standing an alien’s complaint seeking compensation for the alleged taking of her property in Uzbekistan by the United States government), *aff’d*, 524 F.2d 1320 (Fed. Cir. 2008). The Fifth Amendment Compensation Clause does not represent a nonderogable international norm.

172. See Lobel, *supra* note 27.

173. See *Harbury v. Deutch*, 233 F.3d 596, 602-04 (D.C. Cir. 2000), *rev’d on other grounds sub nom. Christopher v. Harbury*, 536 U.S. 403 (2002); *In re Iraq and Afghanistan Detainees Litigation*, 479 F. Supp. 2d 85 (D.D.C. 2007).

Bivens action is not available for claims of torture involving U.S. foreign policy,¹⁷⁴ setting forth a clear standard proclaiming that torture anywhere is beyond the government's constitutional authority and that the judiciary should and must hold officials who authorize torture abroad accountable would be an important advance in constitutional doctrine.

In sum, the question of whether a particular constitutional norm is applicable in a specific context abroad cannot be decided exclusively or primarily by means of the functional or practical considerations set forth in the *Boumediene* test, but rather must rely substantially on the importance of the alien's asserted right or interest. Since the context in which the government is acting is international and will often involve different legal systems, the Court should refer to those international norms widely recognized as fundamental by the international community to aid in determining which constitutional principles should be applicable abroad.

This approach essentially reintegrates Justices Harlan and Frankfurter's substantive due process/fundamental rights approach that underlies the *Insular Cases* and the *Reid* concurrences into *Boumediene*'s functional test, but with a frame of reference provided by contemporary international law. It also draws on the modern substantive due process and Eighth Amendment jurisprudence that legitimately considers the views of the international community as to the constitutional principle at issue.¹⁷⁵ As in those cases, the question is not whether a particular international law principle is binding on the United States.¹⁷⁶ Rather the inquiry is whether the views of the international community support recognizing that a constitutional norm is so fundamental that it should be applicable to U.S. government actions against aliens abroad.

The approach urged here is both more muscular yet more modest than the Court's use of international law in its Eighth Amendment jurisprudence. It is more muscular because the Court's recognition that a particular constitutional principle is widely recognized in the international community as a fundamental norm would be an *independent* factor supporting its application extraterritorially, and not merely, as in the Court's domestic jurisprudence, a factor supporting or confirming the Court's independent conclusion that a particular practice is impermissible. Yet the approach is also more modest in that it does not use international law to support the Court's recognition of a new constitutional proscription, but rather simply the application of a well-established proscription in an international context.

Finally, an important objection to the approach urged here is that the *Boumediene* Court declined to employ international law in its functional test, despite numerous amici urging it to do so. The Court's reluctance to refer to international law in this controversial area is likely to continue in future cases. Nonetheless, as outlined in Parts II and III, a clear tension exists between the

174. See *Arar v. Ashcroft*, 585 F.3d 559, 574-75 (2d Cir. 2009) (en banc); *Rasul v. Myers*, 563 F.3d 527, 532 (D.C. Cir. 2009), cert. denied, 130 S. Ct. 1013 (2009).

175. See, e.g., *Graham v. Florida*, 130 S. Ct. 2011, 2033-34 (2010) (citing Eighth Amendment cases); *Lawrence v. Texas*, 539 U.S. 558, 576-77 (2003).

176. *Graham*, 130 S. Ct. at 2034.

Court's practical, functional test and the fundamental rights jurisprudence that undergirds its opinion. The Court inevitably will have to revisit this tension in the future, and will be forced to work out and explore the relationship between the fundamental nature of the alien's right and the practicalities of enforcing that right. The international law approach suggested here would be helpful to the Court in addressing that tension, and nothing in *Boumediene* precludes the Court from recognizing international law's utility in future decisions.

B. *The Modern Development of Fundamental, Nonderogable International Law Norms*

Contemporary international law has revitalized a distinction between ordinary and fundamental norms that was familiar to the Framers of the Constitution. Eighteenth-century international law scholars and American political leaders distinguished the "immutable" natural, necessary law of nations that was not premised on reciprocal observance, and could not be dispensed with, from the voluntary, positivistic part of international law from which nations could depart.¹⁷⁷ While the triumph of positivism and its political corollary of absolute sovereignty in the nineteenth and early twentieth centuries undermined the distinction between necessary and voluntary principles of law, the carnage wrought by the two world wars, as well as the imposition of criminal liability on the Nazi leaders at Nuremberg after World War II, led to a revival of concepts of fundamental international law norms that restrict sovereign power wherever and whenever the sovereign acts.

Modern international law increasingly draws hierarchical distinctions among customary norms.¹⁷⁸ The International Court of Justice has referred to "fundamental" or "peremptory" principles of customary law as a category distinct from ordinary custom or treaty norms.¹⁷⁹ Such fundamental norms of

177. Vattel separated the voluntary law of nations from the "immutable" law of nations, of which he said that states "can neither make any changes in it by their conventions, dispense with it in their own conduct, nor reciprocally release each other from the observance of it." EMER DE VATTEL, *THE LAW OF NATIONS*, at lviii (Joseph Chitty ed. & trans., Philadelphia, T. and J.W. Johnson, Law Booksellers, 5th American ed. 1839); see also MYRES S. MCDUGAL, HAROLD D. LASSWELL & LUNG-CHU CHEN, *HUMAN RIGHTS AND WORLD PUBLIC ORDER* 341 (1980) (stating that *jus cogens* distinguishes between positive law and the "necessary law of nations," which cannot be changed); 2 C. WOLFF, *JUS GENTIUM METHODO SCIENTIFICA PERTRACTATUM* 10 (Joseph Drake trans., Clarendon Press 1934) (arguing that the law of nations comes from the law of nature and is "necessary and immutable").

178. See, e.g., INTERNATIONAL LAW, CASES AND MATERIALS 107-08 (Lori F. Damrosch et al. eds., 4th ed. 2001); ALEXANDER ORAKHELASHVILI, *PEREMPTORY NORMS IN INTERNATIONAL LAW* (2006) (analyzing the impact of *jus cogens* norms on international law and security); Juan Antonio Carrillo Salcedo, *Reflections on the Hierarchy of Norms in International Law*, 8 EUR. J. INT'L L. 583, 586-88 (1997); Marri Koskenniemi, *Hierarchy in International Law: A Sketch*, 8 EUR. J. INT'L L. 566 (1997) (contemplating strategies to deconstruct hierarchies in international law); Prosper Weil, *Towards Relative Normativity in International Law*, 77 AM. J. INT'L L. 413, 421-30 (1983) (arguing that *jus cogens* and international criminal liability suggest new developments in structure of international norms). But see Dinah Shelton, *Normative Hierarchy in International Law*, 100 AM. J. INT'L L. 291 (2006) (recognizing that it may be appropriate today to recognize fundamental norms, but arguing that the concept is still disputed and not grounded in state practice).

179. *Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Rwanda)*, 2006 I.C.J. 6, ¶ 64 (Feb. 3); *United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran)*, 1979 I.C.J. 7, ¶¶ 38-40 (Dec. 15); *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*,

international law, unlike ordinary norms, are generally nonderogable and restrict not only a government's legal rights, but also its legal power to act.¹⁸⁰ An international norm is fundamental if, in addition to the consensus required for ordinary rules of international law,¹⁸¹ there is widespread agreement among states that the norm is peremptory and cannot be disregarded for any reason.¹⁸²

The revival of fundamental law notions in positive international law¹⁸³ is reflected in a number of different modern concepts and doctrines: the incorporation of the concept of *jus cogens* into the Vienna Convention on the Law of Treaties¹⁸⁴ and customary international law,¹⁸⁵ the development of individual criminal liability for a handful of international crimes,¹⁸⁶ the growth of the principle of universal jurisdiction,¹⁸⁷ and the adoption of provisions in multilateral treaties permitting no derogation even in time of national emergency.¹⁸⁸ While each of these international law concepts is somewhat different and addresses particular problems, they all reflect a growing international law theme that certain norms are of a higher nature and limit the normal discretion accorded to governments.

For example, the concept of *jus cogens* embodies fundamental, or peremptory, norms of international law and is incorporated into the Vienna Convention on the Law of Treaties. Article 53 of that Treaty provides:

A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law . . . from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.¹⁸⁹

Jus cogens represents "the body of those general rules of law whose non-observance may affect the very essence of the legal system to which they belong to such an extent that the subjects of law may not, under pain of

1986 I.C.J. 14, ¶¶ 100, 188 (June 27).

180. See, e.g., *Siderman v. Argentina*, 965 F.2d 699, 718 (9th Cir. 1992) ("International law does not recognize an act that violates *jus cogens* as a sovereign act."). Ordinary norms of international law, by contrast, can be analogized to contract obligations; states can violate those rules subject only to liability for damages or other sanctions. Of course, no law, international or constitutional, restricts the military or physical power of a government. See LOUIS HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* 168 (1972) (distinguishing between the power and the right to breach a treaty).

181. See *North Sea Continental Shelf (F.R.G./Neth.)*, 1969 I.C.J. 3, ¶¶ 74-77 (Feb. 20); *Asylum Case (Colom. v. Peru)*, 1950 I.C.J. 266, 276-78 (Nov. 20); CHARLES DE VISSCHER, *THEORY AND REALITY IN PUBLIC INTERNATIONAL LAW* 154, 156-57 (P. E. Corbett trans., rev. ed. 1968).

182. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 331 cmt. e (1987).

183. See U.N. Conference on the Law of Treaties, Official Records, 1st Sess., 56th mtg., at 327, U.N. Doc. A/CONF.39/11 (May 7, 1968) (statement of Sir Humphrey Waldock) (noting that "the International Law Commission had based its approach to the question of *jus cogens* on positive law much more than on natural law").

184. Vienna Convention on the Law of Treaties art. 60, May 23, 1969, 1155 U.N.T.S. 331.

185. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 102 n.6 (1987) (noting that the concept of *jus cogens* is "now widely accepted . . . as a principle of customary law (albeit one of higher status)").

186. See Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90; 1 INTERNATIONAL MILITARY TRIBUNAL, *TRIAL OF THE GERMAN MAJOR WAR CRIMINALS* 171 (1946).

187. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 404 (1987).

188. See *infra* notes 204-210 and accompanying text.

189. Vienna Convention on the Law of Treaties, *supra* note 184, art. 53.

absolute nullity, depart from them.”¹⁹⁰ While the norms that are considered jus cogens norms remain ill defined, and the Restatement suggests that the concept should therefore be applied cautiously,¹⁹¹ the Restatement nonetheless concludes that jus cogens norms include the prohibitions against genocide, murder (often referred to as summary execution), causing a person’s disappearance, torture, slavery, slave trading, and prolonged arbitrary detention.¹⁹²

Concepts similar to jus cogens were widely accepted during the eighteenth century under natural law theory, and they began to reappear in the early 1900s.¹⁹³ In 1919, professor and future Supreme Court Justice Sutherland noted that a treaty violating “fundamental principles of the law of nations” is not “within the legitimate power of any treaty-making agency.”¹⁹⁴ The concept achieved prominence in Sir Hersch Lauterpacht’s First Report on the Law of Treaties in 1953.¹⁹⁵ The notion of jus cogens received broad support from scholars,¹⁹⁶ the International Law Commission,¹⁹⁷ and many governments,¹⁹⁸ and is now incorporated as part of a widely ratified treaty that the U.S. government agrees generally represents customary international law.¹⁹⁹

190. Erik Suy, *The Concept of Jus Cogens in Public International Law*, reprinted in *THE CONCEPT OF JUS COGENS IN INTERNATIONAL LAW: PAPERS AND PROCEEDINGS* 17, 18 (1967).

191. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 331 n.4 (1987); see also Shelton, *supra* note 178 (expressing skepticism and caution about the validity and utility of the concept).

192. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 702 (1987); see also Whiteman, *supra* note 170, at 625-26 (listing twenty acts the author believes are or should be outlawed under jus cogens).

193. Alfred Verdross, *Forbidden Treaties in International Law*, 31 AM. J. INT’L L. 571, 571 (1937). See also sources cited in Alfred Verdross, *Jus Dispositivum and Jus Cogens in International Law*, 60 AM. J. INT’L L. 55, 55 n.1 (1966) [hereinafter Verdross, *Jus Dispositivum*].

194. GEORGE SUTHERLAND, CONSTITUTIONAL POWERS AND WORLD AFFAIRS 141-42 (1919).

195. H. Lauterpacht, *Report on the Law of Treaties*, [1953] 2 Y.B. INT’L L. COMM’N 90, 154, U.N. Doc. A/CN.4/63.

196. See HANS KELSEN, PRINCIPLES OF INTERNATIONAL LAW 322-23 (1952); LORD MCNAIR, THE LAW OF TREATIES 213-14 (1961); Grigory I. Tunkin, *Jus Cogens in Contemporary International Law*, 1971 U. TOL. L. REV. 107, 108-11 (1971) (summarizing the views of various scholars supporting concept of jus cogens); Verdross, *Jus Dispositivum*, *supra* note 193, at 56-57. However, there were notable exceptions. See Georg Schwarzenberger, *International Jus Cogens?*, 43 TEX. L. REV. 455 (1965). Some initially reticent scholars have now apparently accepted the concept. See Verdross, *Jus Dispositivum*, *supra* note 193, at 57 (discussing Paul Guggenheim).

197. *Summary Records of the 717th Meeting*, [1963] 1 Y.B. INT’L L. COMM’N 290, 292, U.N. Doc. A/CN.4/156.

198. See Sir Humphrey Waldock, *Fifth Report on the Law of Treaties*, [1966] 2 Y.B. INT’L L. COMM’N 1, 23, U.N. Doc. A/CN.4/183 (“[O]nly one Government—the Luxembourg Government—really questions the existence today of a concept of rules of *jus cogens* in international law.”). After the formulation at the 1963 session of the International Law Commission of what became Article 50 of the Draft Articles of the Law of Treaties, fifty-one governments commented directly on the concept of jus cogens as part of the draft. Of these, forty-three favored the concept, only one unambiguously opposed it, five indicated a somewhat negative view, and two did not indicate their final position. Egon Schwelb, *Some Aspects of International Jus Cogens As Formulated by the International Law Commission*, 61 AM. J. INT’L L. 946, 960 (1967).

199. Vienna Convention on the Law of Treaties, *supra* note 184. The U.S. objections to Article 53 concerned who would determine when a rule had reached the status of jus cogens, which was resolved by a provision referring disputes over jus cogens to the International Court of Justice. See SENATE COMMITTEE ON FOREIGN RELATIONS, 98TH CONG., 2D SESS., TREATIES AND OTHER INTERNATIONAL AGREEMENTS: THE ROLE OF THE UNITED STATES SENATE 50-51 (Comm. Print 1984). The United States has yet to ratify the Convention, but recognizes it “as the authoritative guide to current treaty law and practice.” Letter of Dep’t of State to President, S. EXEC. DOC. NO. 92-1 (1971).

Similarly, the development of international treaties and tribunals to criminalize and punish certain international law violations reflects the elevation of certain norms of international law to a more fundamental status.²⁰⁰ A closely related development involves the concept of universal jurisdiction, which allows any state to define and to punish certain offenses recognized by the international community as being of universal concern.²⁰¹ Certain treaties, such as the Convention on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, provide that any state may exercise its jurisdiction whenever a violator is found within its territory irrespective of where the delict was committed or of the nationality of the parties.²⁰² Universal jurisdiction is also related to the "essential distinction" recognized by the International Court of Justice in the *Barcelona Traction* case

between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*.²⁰³

Finally, human rights treaties now identify certain nonderogable rights that cannot be violated even in times of national emergency. For example, the European Convention on Human Rights and Fundamental Freedoms,²⁰⁴ the International Covenant on Civil and Political Rights,²⁰⁵ and the American Convention on Human Rights²⁰⁶ all contain clauses allowing their provisions to be suspended in certain periods of crisis. None of these treaties, however, allow any suspension of the right to life, the prohibition of torture or inhuman or degrading treatment, the freedom from slavery, or the proscription on ex post facto laws.²⁰⁷ The common status of these four rights as nonderogable in each of these treaties suggests that the principle that these rights cannot be violated even during national emergencies is now a rule of customary international law.²⁰⁸ So too, Common Article 3 of the Geneva Conventions identifies a core of norms that "are and shall remain prohibited at any time and in any place

The principles of Article 53 are thus "still effective as customary law," but can be applied "only with caution." RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 331 n.4 (1987).

200. See, e.g., Convention on the Prevention and Punishment of the Crime of Genocide art. 1, Dec. 9, 1948, 78 U.N.T.S. 277 (1951); Rome Statute of the International Criminal Court, *supra* note 186; International Convention on the Suppression and Punishment of the Crime of Apartheid art. 1, *adopted* Nov. 30, 1973, 1015 U.N.T.S. 243 [hereinafter Apartheid Convention].

201. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 404 (1987).

202. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, S. TREATY DOC. NO. 100-20, 1465 U.N.T.S. 85.

203. *Barcelona Traction, Light & Power Co. (Belg. v. Spain)*, 1970 I.C.J. 4, 32 (Feb. 5).

204. Convention for the Protection of Human Rights and Fundamental Freedoms art. 15(1), Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter European Convention].

205. International Covenant on Civil and Political Rights art. 4, *adopted* Dec. 19, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

206. American Convention on Human Rights art. 27(1), Nov. 22, 1969, 1144 U.N.T.S. 123 [hereinafter American Convention].

207. See American Convention, *supra* note 206, art. 27; ICCPR, *supra* note 205, art. 4; European Convention, *supra* note 204, art. 15.

208. Joan Hartman, *Derogation from Human Rights Treaties in Public Emergencies*, 22 HARV. INT'L L.J. 1, 15 (1981).

whatsoever” regarding individuals “taking no active part in hostilities,” including prisoners of war.²⁰⁹ These protections apply to noninternational armed conflicts, where the more restrictive provisions of the Geneva Conventions addressing international armed conflicts would not govern.²¹⁰

C. *The Framers’ and Early Leaders’ View of International Law as Providing Limits on the Political Branches’ Constitutional Powers*

An extraterritorial jurisprudence that relied on fundamental, nonderogable *jus cogens* norms of international law to inform the Constitution’s limitations on the federal government’s exercise of its foreign affairs powers abroad would be consistent with both the Framers’ intent and the practice of our early political leaders. For the twentieth-century development of a hierarchy of norms distinguishing between certain fundamental, nonderogable norms and ordinary norms essentially revives, on a more positivistic foundation, the eighteenth-century distinction between necessary international norms, which operated as limits on the constitutional foreign affairs powers of government, and voluntary rules, which could be superseded by the legislature. This Section discusses the Framers’ view that international law provided limits to executive and legislative powers, and that the Constitution must be interpreted consistently with that law. It also reviews the two most prominent early controversies involving aliens, which illustrate the role international law played in the arguments over the scope and limitations of the government’s constitutional authority to act against aliens.

The generation that drafted the Constitution and led the new nation viewed international law as an important component of fundamental natural law that provided legal restraints on government power.²¹¹ Domestic law and international law were not viewed as two wholly separate bodies of law, but

209. Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316.

210. *Id.*

211. 1 J.J. BURLAMAQUI, *THE PRINCIPLES OF NATURAL AND POLITIC LAW* 135-36 (T. Nugent trans., 7th ed. 1830); WILLIAM JOHN DUANE, *THE LAW OF NATIONS INVESTIGATED IN A POPULAR MANNER: ADDRESSED TO THE FARMERS OF AMERICA* (Philadelphia, William Duane 1809); H. GROTIUS, *THE LAW OF WAR AND PEACE* (L. Loomis trans., 1949); S. PUFENDORF, *ON THE LAW OF NATURE AND NATIONS* (C. Oldfather & W. Oldfather trans., 1934); *see also* Edwin Dickinson, *Changing Concepts and the Doctrine of Incorporation*, 26 AM. J. INT’L L. 239 (1932) (discussing the relationship of natural law to international law in seventeenth- and eighteenth-century thought); Jesse S. Reeves, *The Influence of the Law of Nature upon International Law in the United States*, 3 AM. J. INT’L L. 547 (1909) (discussing the influence of European natural law scholars on early American conceptions of international law). Justice Story wrote in 1822:

[E]very doctrine, that may be fairly deduced by correct reasoning from the rights and duties of nations, and the nature of moral obligation, may theoretically be said to exist in the law of nations; and unless it be relaxed or waived by the consent of nations, which may be evidenced by their general practice and customs, it may be enforced by a court of justice, whenever it arises in judgment.

United States v. La Jeune Eugenie, 26 F. Cas. 832, 846 (C.C.D. Mass. 1822) (No. 15,551). *But see* *The Antelope*, 23 U.S. (10 Wheat.) 66, 122 (1825) (holding that the slave trade, although contrary to the law of nature, was not prohibited by international law, and remained lawful for those whose governments had not prohibited it).

rather as interrelated branches of the law of nature.²¹²

The Framers, early government leaders, and international scholars distinguished between two types of international law. The basic, primary, or “necessary” international law stemmed from the law of nature and was “consequently immutable, insomuch that the people or sovereigns cannot dispense with it, even by common consent, without transgressing their duty,” while the voluntary laws could be modified by the legislature.²¹³ For example, in the important 1784 case of *Rutgers v. Waddington*, Alexander Hamilton argued that the New York Trespass Act of 1783 conflicted with the law of nations and was therefore “void.”²¹⁴ In his opinion for the court, Mayor James Duane agreed that no legislature could enact a statute in derogation of the “natural” law of nations—that part of international law arising from the law of nature.²¹⁵ Foreigners could rely on the natural law of nations, “which is part of the law of the land” and according to which “the [case] must be decided.”²¹⁶ By contrast, Duane thought it possible that the national, although not the state legislature could enact statutes in violation of the “voluntary” law of nations.²¹⁷ Although Mayor Duane formally denied any judicial power to reject legislative acts, he employed a technique, argued for by Hamilton, of construing the law “against the letter of the Statute to render it agreeable to natural justice.”²¹⁸

Supreme Court Justice James Wilson—a key figure at the Constitutional Convention and Pennsylvania ratifying convention and an important constitutional theorist of the time²¹⁹—also made the same distinction between

212. C. PICCIOTTO, *THE RELATION OF INTERNATIONAL LAW TO THE LAW OF ENGLAND AND OF THE UNITED STATES OF AMERICA* 107 (1915); Harold H. Sprout, *Theories as to the Applicability of International Law in the Federal Courts of the United States*, 26 AM. J. INT’L L. 280, 284 (1932).

213. BURLAMAQUI, *supra* note 211, at 138; *see also* Edmund Randolph, *Who Privileged from Arrest*, 1 Op. Att’y Gen. 26, 27 (1792) (arguing that the basic natural law obligations of the law of nations “commence[] and run[] with the existence of a nation, subject to modification on some points of indifference”); BURLAMAQUI, *supra* note 211, at 139 (“[M]axims of the law of nations have an equal authority with those of the law of nature”); VATTEL, *supra* note 177, at lviii-lix (arguing for the immutability of the “application of the law of nature to states” and, in turn, of international law).

214. 1 *THE LAW PRACTICE OF ALEXANDER HAMILTON* 378, 382 (J. Goebel ed., 1964).

215. *Rutgers v. Waddington* (N.Y. Mayor’s Ct. 1784), *reprinted in* SELECT CASES OF THE MAYOR’S COURT OF NEW YORK CITY 1674-1784, at 315 (R. Morris ed., 1935) [hereinafter *MAYOR’S COURT*].

216. *Id.*

217. According to Duane:

“The *primary law* of nations therefore is no other than the *law of nature*, so far as it is applicable to them. Whatever, in this behalf, reason dictates is a duty of natural justice, from the necessary law of nations.”

Thus far we could agree with the professor, that no state can by its separate ordinance, prejudice any part of such a law—nay, that all the states of the world united could not; because being of moral obligation, it is immutable. But when this doctrine is applied in general to all customs, which prevail *by tacit consent* as part of the law of nations; we do not find that he is warranted by authorities.

Id. (quoting a contemporary treatise on jurisprudence).

218. 1 *THE LAW PRACTICE OF ALEXANDER HAMILTON*, *supra* note 214, at 357, 415-18. Duane’s opinion stirred up considerable political opposition in New York. *See* *MAYOR’S COURT*, *supra* note 215, at 312-14; L. ERADES & WESLEY L. GOULD, *THE RELATION BETWEEN INTERNATIONAL LAW AND MUNICIPAL LAW IN THE NETHERLANDS AND IN THE UNITED STATES* 238-39 (1961).

219. CHARLES PAGE SMITH, *JAMES WILSON: FOUNDING FATHER 1742-1798*, at 280, 341 (1956); *see also* GARY L. MCDOWELL, *EQUITY AND THE CONSTITUTION* 52-53 (1982) (arguing that Wilson was “second only to Madison in his theoretical contributions to the final document”).

the necessary or natural law of nations and the voluntary law of nations. He did so in questioning congressional power to punish “persons not citizens of the United States” in a manner that might conflict with the “predominant authority of the law of nations.”²²⁰ Wilson argued that the natural law of nations was immutable; apart from “the voluntary or positive law of nations . . . no state or states can, by treaties or municipal laws, alter or abrogate the law of nations any farther.”²²¹

The Framers viewed the breadth and scope of the foreign policy powers granted the federal government by the Constitution as being limited by the natural law of nations. John Jay argued in *The Federalist Papers* that no explicit constitutional provision was required to deprive the President and Senate of the power to enter into a corrupt treaty, because any such treaty was “null and void by the law of nations.”²²² Similarly, writing after the Constitution was adopted, Hamilton argued that there were only two sources of limitations on the treaty power—constitutional limitations and “a natural exception to the power of making treaties, as there is [for] every other delegated power.”²²³ Thus, the Constitution’s distribution of power was already limited by “natural principles,” including the “natural” law of nations.

The clearest expression by the Framers that the powers delegated to the federal government were limited by certain fundamental or natural principles of international law came in the Virginia ratification debates. Southern states such as Virginia feared that the federal government might exercise the treaty power to give up navigation rights to the Mississippi River, and a substantial portion of the Virginia ratifying convention focused on the scope of the treaty-making power.²²⁴ Speaker after speaker addressed the Antifederalist concerns, arguing that despite the absence of explicit textual limitations, the treaty power was limited by the law of nations. Madison asserted that “neither the old Confederation nor the new Constitution involves a right to give up the navigation of the Mississippi. It is repugnant to the law of nations.”²²⁵ George Nicholas added that the rights to the river were secured by the law of nations, because a treaty depriving a state of “territorial rights is obviously repugnant to that law.”²²⁶ Governor Randolph noted that any relinquishment of the right to navigate the Mississippi would be contrary to the law of nations and therefore beyond federal power.²²⁷ Randolph responded to the opponents of the Constitution who had objected to the absence of any “clause which shall

220. 1 COLLECTED WORKS OF JAMES WILSON 334 (Kermit L. Hall & Mark David Hall eds., 2007).

221. *Id.* at 333.

222. THE FEDERALIST NO. 63, at 438 (John Jay) (Jacob E. Cooke ed., 1961).

223. Alexander Hamilton, *The Defence No. XXXVI* (1796), reprinted in 20 THE PAPERS OF ALEXANDER HAMILTON 3, 7 (Harold C. Syrett ed., 1974).

224. See ANDREW C. MCLAUGHLIN, A CONSTITUTIONAL HISTORY OF THE UNITED STATES 205 (1935).

225. See 3 THE DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION 345 (Jonathan Elliot ed., J.B. Lippincott 2d ed. 1891) [hereinafter DEBATES] (remarks of James Madison).

226. *Id.* at 357 (remarks of George Nicholas); see also *id.* at 502 (arguing that the law of nations is superior to any act or law of any nation and “mutually binding on all”).

227. *Id.* at 361-62 (remarks of Edmund Randolph).

preclude Congress from giving away this right”²²⁸ by arguing that “[t]here is a prohibition naturally resulting from the nature of things, it being contradictory and repugnant to reason, and the law of nature and nations.”²²⁹

The role of international law in the interpretation of the scope of federal power to act against aliens is also evident in the two most important early controversies involving the rights of aliens. The first dispute involved the Alien and Seditions Acts. Madison argued against the punishment of aliens who were not enemies, because the law of nations did not grant the U.S. government the power to banish or punish alien friends.²³⁰

While Madison also argued that the Act “subverts” the “positive provisions” of the Constitution contained in the Bill of Rights, his primary claim was that Congress had no power to enact the statute.²³¹ In response to the Federalist argument that the law of nations authorized the removal of aliens and that Congress was accorded the constitutional authority to define offenses against the law of nations, Madison asserted that the law of nations only authorized the banishment of enemy aliens, but not alien friends.²³² Madison believed that enemy aliens had no right under the Constitution precluding their removal, because “the act of Congress for the removal of alien enemies, *being conformable to the law of nations, is justified by the Constitution.*”²³³ In contrast, the removal of alien friends was not “within the purview of the law of nations,” and therefore “the act for the removal of alien friends, being repugnant to the constitutional principles of municipal law, is unjustifiable.”²³⁴ More generally, the war powers of the Constitution—the power of Congress to declare war, to authorize reprisals, to protect each state from invasion—read consistently with the law of nations, allowed for the removal of enemy aliens, but did not accord the federal government the power to remove alien friends.²³⁵

228. *Id.* at 362.

229. *Id.*; *see also id.* at 511 (remarks of Francis Corbin) (arguing that even if Congress yielded the Mississippi by a common treaty, the law of nations would be violated and “the cession would be nugatory”). It bears noting that even the Antifederalist arguments often recognized that international law implicitly limited the federal treaty power, although they argued for additional institutional checks. *See id.* at 350 (remarks of William Grayson) (agreeing that the rights to the Mississippi could not be alienated pursuant to the law of nations).

230. *See* Madison, *supra* note 49, at 556-57.

231. *Id.* at 553-54.

232. *Id.* at 556-57.

233. *Id.* at 557 (emphasis added).

234. *Id.* Madison distinguished between the law of nations and “the general practice of nations,” both of which, he claimed, “distinguish[] between alien friends and alien enemies.” *Id.* This distinction between the law of nations and general practice undoubtedly was premised on the difference between the natural or necessary law and voluntary practice or customs of nations.

235. Madison’s arguments were echoed by John Taylor, in introducing the resolution to the Virginia House of Delegates. Since “aliens, under the law of nations, were entitled and subjected to the sanctions of municipal law,” and since “the Constitution was a sacred portion of municipal law,” and because the “law of nations was . . . in contemplation whilst defining the judiciary power,” aliens could only be punished or removed in accordance with the judicial procedures established by the Constitution. *Resolutions of Virginia of December 21, 1798, and Debate and Vote Thereon, reprinted in THE VIRGINIA REPORT OF 1799-1800, TOUCHING THE ALIEN AND SEDITION LAWS; TOGETHER WITH THE VIRGINIA RESOLUTIONS OF DECEMBER 21, 1798, THE DEBATE AND PROCEEDINGS THEREON IN THE HOUSE OF DELEGATES OF VIRGINIA, AND SEVERAL OTHER DOCUMENTS ILLUSTRATIVE OF THE REPORT AND RESOLUTIONS 22, 115-16* (Richmond, J.W. Randolph 1850).

The Federalists argued that aliens had no rights under the Constitution and that international law did not provide aliens with any vested right.²³⁶ The Federalist response to Madison's report, thought to be written by John Marshall and General Henry Lee, did not, however, argue that aliens had no constitutional rights at all, but rather claimed, "[C]ertainly a vested right is to be taken from no individual without a solemn trial, but the right of remaining in our country is vested in no alien; he enters and remains by the courtesy of the sovereign power, and that courtesy may at pleasure be withdrawn."²³⁷ While the meaning of "vested rights" is unclear, implicit in this argument was the principle that, had international law provided rights for aliens who resided in a friendly country, Congress would have been without power to expel them.

International law played a similarly important role in the arguments over the breadth of the Executive's constitutional power in another important early controversy involving U.S. actions against aliens. In 1818, while commanding troops in the Seminole War in Florida, which was then Spanish territory, General Andrew Jackson utilized a military tribunal to try, convict, and execute two British subjects, Alexander Arbuthnot and Robert Christy Ambrister, on charges of inciting and aiding the Creek Indians to war against the United States.²³⁸

The House of Representatives initiated an inquiry into the propriety of Jackson's actions, which was referred to the Military Committee.²³⁹ A divided Committee determined that it could "find no law of the United States" authorizing the trial before a military court for offenses such as those alleged against Arbuthnot and Ambrister.²⁴⁰ The Committee also concluded that the court-martial proceeding was marred by serious procedural irregularities, suggesting that some notion of due process applied to the trial.²⁴¹ The minority report of the Committee, echoing a defense of Jackson by Secretary of State John Quincy Adams, argued that because the British citizens associated with savages who violated the laws of war, Jackson had lawful authority under the laws of nations to execute them.²⁴²

236. See NEUMAN, *supra* note 10, at 54-55.

237. Address of the Minority in the Virginia Legislature to the People of the State: Containing a Vindication of the Constitutionality of the Alien and Sedition Laws (1799), at 9-10, *cited in* NEUMAN, *supra* note 10, at 55.

238. See LOUIS FISHER, CONG. RESEARCH SERV., RL 32458, MILITARY TRIBUNALS: HISTORICAL PATTERNS AND LESSONS (2004), at 8-11, for a general discussion of this incident.

239. WALTER LOWRIE & MATTHEW ST. CLAIR CLARKE, 1 AMERICAN STATE PAPERS: MILITARY AFFAIRS 735 (1819); ABRAHAM D. SOFAER, WAR, FOREIGN AFFAIRS AND CONSTITUTIONAL POWER 363 (1976). Congressman Cobb and others thought the issue was a "proper subject of inquiry for the Committee of Foreign Relations" and moved that the Committee should investigate the matter with "instructions to inquire whether in said trials *the Constitution* and laws of the United States, or the law of nations, have been violated." ANNALS, *supra* note 50, at 370 (emphasis added).

240. ANNALS, *supra* note 50, at 516.

241. *Id.* at 517.

242. *Id.* at 527; see Letter from J.Q. Adams, Sec'y of State, to George W. Erving, Minister Plenipotentiary to Spain (Nov. 18, 1818), *reprinted in* 4 AMERICAN STATE PAPERS: FOREIGN RELATIONS 539, 544 (1834) (citing Vattel for the proposition that a nation engaged in a war with an "inhuman enemy [sic]" may execute prisoners). See also J. Andrew Kent, *A Textual and Historical Case Against a Global Constitution*, 95 GEO. L.J. 463, 532-33 (2007), for an insightful analysis of this incident.

The House debated a resolution to disapprove the trial and execution of Arbuthnot and Ambrister. Speaker of the House Henry Clay argued that Jackson's actions were without congressional authority and in derogation of international law.²⁴³ Clay's opponents, such as Congressman Smyth of Virginia, claimed that the "Constitution and laws were formed for the people of the United States" and had no force in Florida.²⁴⁴ Smyth and others who agreed with him noted that executive officials "may do beyond the jurisdiction of the United States whatever the law of nations or treaties authorize the United States there to do," implying, as the Federalists did in the Alien and Sedition Act debates, that the Executive's foreign affairs powers were limited by international law.²⁴⁵

Thus, even Jackson and his supporters appeared to agree that if the executions violated international law, as many of his critics asserted, his orders would have exceeded his lawful, constitutional authority. Jackson's critics, such as Clay and other members of Congress, went further and argued that even where the law of nations lays down a rule, such as the principle that captured spies can be executed, a military commander must be authorized by statute to establish a military tribunal to do so or he acts in excess of his constitutional authority.²⁴⁶ The House rejected the resolution by wide margins, undoubtedly due to Jackson's popularity and the animus toward the Indians, referred to as "savages," and anyone who aided them.²⁴⁷

These early incidents, as well as the Framers' statements, support the notion that international law was viewed during our founding period as limiting the political branches' constitutional authority with respect to aliens. While contemporary political and legal theory often accepts a sharp divide between the domestic and international law, so that international law can be viewed as a separate sphere not affecting the Constitution's allocation of power, that was not true at the Republic's beginning. The use of international law to aid in

243. ANNALS, *supra* note 50, at 644-45 (statement of Rep. Clay).

244. *Id.* at 693 (statement of Rep. Smyth).

245. *Id.* at 679. For other statements to the same effect, see *id.* at 1042 (statement of Rep. Baldwin) (stating that constitutional rights were inapplicable because the men were found and executed outside of the territorial limits of the United States, where our laws and Constitution have no operation, except when the law of nations applies); and *id.* at 778 (statement of Rep. Barbour) (stating that the "question must be settled according to the laws of war"). See generally Kent, *supra* note 242, at 533-34 (providing incisive analysis of the relevant positions).

246. ANNALS, *supra* note 50, at 644-46 (statement of Rep. Clay); *id.* at 751-52 (statement of Rep. Staus) (arguing that courts-martial derive their authority from statute); *id.* at 618 (statement of Rep. Nelson) (same); *id.* at 627-28 (statement of Rep. Johnson) (arguing that there was no inherent executive authority).

247. *Id.* at 1132-36. A little over a month after the House Committee submitted its report, a select Senate Committee issued a report on Jackson's actions in Florida, which did not address the legality or constitutionality of the executions. The Committee noted, however, that "humanity shudders at the idea of a cold-blooded execution of prisoners disarmed and in the power of the conquerors." *Id.* at 267. Moreover, the principle that Jackson had assumed—that, by joining in warfare against the United States while Britain was at peace with us, Arbuthnot and Ambrister "became outlaws and pirates liable to suffer death"—was, according to the Senate Committee, "not recognized in any code of national law. Nothing can be found in the history of civilized nations which recognized such a principle, except a decree of the Executive Directory of France, during their short career of folly and madness." *Id.* The Senate adjourned on March 3 without acting on the Committee report. LOWRIE & ST. CLAIR CLARKE, *supra* note 239, at 739-43.

determining the limits of the constitutional authority of the Executive and Congress to act against aliens abroad is thus consistent with the views held by the Founders and early leaders of the republic.

D. *The Court's Use of International Law in Interpreting the Extent of the Political Branches' Foreign Affairs Powers*

The Framers' and early leaders' views that the government's foreign affairs powers should be construed consistently with basic international law norms has found reflection in Supreme Court jurisprudence.²⁴⁸ For example, the Court has often recognized the principle articulated by Jay in *The Federalist Papers* and by the Federalists in the Virginia ratifying debates that the proper scope of a treaty should be determined by international law.²⁴⁹

The Court has also relied upon international law to inform the reach of the Constitution's war powers clauses.²⁵⁰ Chief Justice Marshall's majority opinion in the 1814 case of *Brown v. United States* held that the scope of the President's constitutional war powers should be construed consistently with the law of nations. Marshall argued that "a construction [of the Constitution] ought not lightly to be admitted which would give to a declaration of war an effect in this country it does not possess elsewhere."²⁵¹ Justice Story's dissent disagreed with Marshall's view of international law, but he too limited the Constitution's war powers to those "which, by the modern law of nations, are permitted and approved."²⁵² Moreover, Story noted that the President "has a discretion vested in him, as to the manner and extent; but he cannot lawfully transcend the rules of warfare established among civilized nations. He cannot lawfully exercise powers or authorize proceedings which the civilized world repudiates and disclaims."²⁵³

In *Miller v. United States*, involving a challenge to the 1862 Confiscation Acts authorizing the confiscation of rebel property, the Court relied on international law to determine that the Acts were a proper exercise of Congressional war powers.²⁵⁴ In dissent, Justices Field and Clifford also invoked international law but disagreed with the majority's reading of that law. They argued that the statutes exceeded Congress' war powers because they violated customary international law:

248. See Cleveland, *supra* note 18.

249. See *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 261 (1796) (Iredell, J.) ("The subject of treaties . . . is to be determined by the law of nations."); see also *De Gefroy v. Riggs*, 133 U.S. 258, 267 (1889) ("It would not be contended that [the treaty power] extends so far as to authorize what the Constitution forbids, or a change in the character of the government or in that of one of the States, or a cession of any portion of the territory of the latter, without its consent."); *Holmes v. Jennison*, 39 U.S. (14 Pet.) 540, 569 (1840) (Taney, J.) (concluding that the federal treaty power includes the power to enter into an extradition treaty because issues involving extradition "are a part of the law of nations"); Cleveland, *supra* note 18, at 14-16.

250. See *Brown v. United States*, 12 U.S. (8 Cranch) 110 (1814).

251. *Id.* at 125.

252. *Id.* at 145 (Story, J., dissenting).

253. *Id.* at 153.

254. 78 U.S. (11 Wall) 268, 305-13 (1870).

The war powers of the government have no express limitation in the Constitution, and the only limitation to which their exercise is subject is the law of nations. . . . And it is in the light of that law that the war powers of the government must be considered. The power to prosecute war granted by the Constitution, as is well said by counsel, is a power to prosecute war according to the law of nations, and not in violation of that law. . . . [T]he law of nations . . . is no less binding upon Congress than if the limitation were written in the Constitution. The plain reason of this is, that the rules and limitations prescribed by that law were in the contemplation of the parties who framed and the people who adopted the Constitution.²⁵⁵

More recently, in *Hamdi v. Rumsfeld*, both Justice O'Connor's plurality opinion and Justices Souter and Ginsburg's partial concurrence and dissent relied on international law to inform the scope of the President's power to detain enemy combatants. The plurality relied on "longstanding law-of-war principles" both to affirm the Executive's statutory authority to detain an American citizen captured in Afghanistan and to cabin the breadth of that authority, at least in the context of that case.²⁵⁶ Justice Souter's opinion used international law more assertively, claiming that the President could not rely on powers granted by the laws of war if he was, at the same time, transgressing the limits imposed by those laws.²⁵⁷

Lower federal courts have generally relied on the laws of war to determine the scope of the President's authority to detain individuals in the conflict with Al Qaeda and the Taliban,²⁵⁸ although a D.C. Circuit panel recently rejected the premise that the war powers granted the President in the 2001 Authorization for Use of Military Force (AUMF) "are limited by the international laws of war."²⁵⁹ The panel claimed that "while the international laws of war are helpful to courts when identifying the general set of war powers to which the AUMF speaks, their lack of controlling legal force and firm definition render their use both inapposite and unadvisable when courts seek to determine the limits of the President's war powers."²⁶⁰ However, an en banc majority of the D.C. Circuit, in a concurrence explaining the denial of en banc review, pointedly declared this discussion unnecessary to the decision,

255. *Id.* at 315-16 (Field, J., dissenting).

256. *Hamdi v. Rumsfeld*, 542 U.S. 507, 516-21 (2004) (defining an enemy combatant for purposes of this case as someone "part of or supporting forces hostile to the United States or coalition partners" in Afghanistan and who "engaged in an armed conflict against the United States there" (quoting Brief for Respondents at 3, *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (No. 03-6696), available at http://www.jenner.com/files/tbl_s69NewsDocumentOrder/FileUpload500/216/Brief_Respondents.pdf)).

257. *Id.* at 551 (Souter, J., concurring in part and dissenting in part).

258. See *Al-Marri v. Pucciarelli*, 534 F.3d 213 (4th Cir. 2008); see also *Gherebi v. Obama*, 609 F. Supp. 2d 43, 70-71 (D.D.C. 2009) (holding that the government has the authority to detain individuals who were part of or substantially supported Al Qaeda and/or the Taliban, provided that those terms "are interpreted to encompass only individuals who were members of the enemy organizations' armed forces, as that term is intended under the laws of war, at the time of their capture" (emphasis added)); *Hamlily v. Obama*, 616 F. Supp. 2d 63, 74, 76 (D.D.C. 2009) (concluding that under the law of war, the government has the authority to detain individuals who were "part of . . . Taliban or Al Qaeda forces" or "associated forces," but not to detain those who merely provided "substantial support" to these groups).

259. *Al-Bihani v. Obama*, 590 F.3d 866, 871 (D.C. Cir. 2010), *reh'g en banc denied*, 619 F.3d 1 (D.C. Cir. 2010).

260. *Id.* at 871-72.

seemingly depriving it of binding precedential effect.²⁶¹

U.S. courts have often utilized international law as a one-way ratchet to accord, affirm, or broaden governmental power to act abroad. However, the rationales expressed by courts in using international law to affirm government power should also apply where international law provides limits to the foreign affairs powers of the government. A modest use of international law consistent with the Court's prior use of international law would be for courts to use those nonderogable, *jus cogens* norms to help determine which constitutional proscriptions limit the political branches' constitutional authority when they act against aliens abroad.

E. *The Relevance of Nonderogable Norms of International Law to Determining Which Constitutional Rights Apply Extraterritorially*

The Supreme Court and lower federal courts have hinted at the role nonderogable, *jus cogens* international norms might play in determining the constitutional limitations on government actions abroad. In *United States v. Balsys*, the Supreme Court referred to nonderogable norms in the context of a decision holding that the privilege against self-incrimination only applied to domestic and not foreign prosecutions.²⁶² The *Balsys* Court held that a resident alien facing a deportation hearing was not entitled to assert a claim of privilege even where he faced a reasonable fear of foreign prosecution if deported, distinguishing the federal/state prosecution context in which both the state and the federal government were bound by the principle against self-incrimination. In contrast, the Court noted that there was no international law principle against compelled self-incrimination, and therefore in many situations the witness' exercise of the privilege against self-incrimination would have no impact on any proceedings in foreign court.²⁶³ Moreover, even where, as in *Balsys*, the countries involved were signatories to the International Covenant on Civil and Political Rights and therefore recognized a right against compelled self-incrimination, the Court noted that the significance of that acceptance is "limited by its provision that the privilege is derogable and accordingly may be infringed if public emergency necessitates."²⁶⁴

The Court's opinion in *Balsys* thus reflects the same practicable and anomalous concerns expressed by Justice Kennedy in *Verdugo-Urquidez*: the incongruence of imposing a constitutional norm on the conduct of U.S. officials where the foreign state was not so bound.²⁶⁵ Yet the Court suggested that the situation would be different if a nonderogable norm of international law was implicated. For in that situation, the foreign context would have been no different than the domestic one, in which both jurisdictions are bound by the

261. 619 F.3d at 2 (Sentelle, J., concurring in denial of rehearing en banc).

262. 524 U.S. 666 (1998).

263. *Id.* at 695-96.

264. *Id.* at 695 n.16.

265. That the coerced self-incrimination took place in the United States was of no importance to the Court, nor was the citizenship of the witness. *Id.* at 671.

same nonderogable norm.²⁶⁶

The recognition by the Supreme Court and lower federal courts that federal courts have jurisdiction to hold foreign state actors liable for actions taken against their own citizens in violation of a narrow set of international norms that define universally accepted, particularly heinous conduct also suggests that such norms might at least provide a reference point for articulating those constitutional norms which could be applicable to U.S. officials' treatment of foreigners abroad.²⁶⁷ The Second Circuit's holding in *Filártiga v. Peña-Irala* that "for purposes of civil liability the torturer has become—like the pirate and slave trader before him—*hostis humani generis*, an enemy of all mankind," suggests that our Constitution should be read to forbid U.S. officials from torturing anyone, irrespective of the citizenship of the victim and the place where the torture takes place.²⁶⁸ For it seems anomalous for United States courts to adjudicate the responsibility of foreign governmental officials for the torture of aliens abroad, yet accord U.S. officials immunity for the very same act. Indeed, the D.C. Circuit suggested as much in *Committee of United States Citizens Living in Nicaragua v. Reagan*:

Such basic norms of international law as the proscription against murder and slavery may well have the domestic legal effect that appellants suggest. That is, they may well restrain our government in the same way that the Constitution restrains it. If Congress adopted a foreign policy that resulted in the enslavement of our citizens or of other individuals, that policy might well be subject to challenge in domestic court under international law. Such a conclusion was indeed implicit in the landmark decision in *Filártiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980), which upheld jurisdiction over a suit by a Paraguayan citizen against a Paraguayan police chief for the death by torture of the plaintiff's brother.²⁶⁹

To be sure, these decisions at most suggest or perhaps foreshadow an approach to the extraterritorial application of the Constitution that utilizes fundamental, nonderogable norms of international law. But they do illustrate some judicial support for such an approach.

V. THE USE OF INTERNATIONAL LAW BY CANADIAN AND EUROPEAN COURTS IN THE EXTRATERRITORIAL APPLICATION OF CONSTITUTIONAL OR HUMAN RIGHTS

The Canadian Supreme Court, the European Court of Human Rights and

266. The Court held in *Balsys* that the foreign analogy must be to the era when the privilege against self-incrimination had not yet been held to be incorporated by the Fourteenth Amendment Due Process Clause into state proceedings, and therefore when federal prosecutors were not required to afford the privilege to those who faced a fear of state prosecution. *Id.* at 695.

267. *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004); *Filártiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980). The norms for which jurisdiction has been recognized under the Alien Tort Statute are somewhat broader than just jus cogens norms, encompassing all customary international law norms of sufficiently definite content. *Sosa*, 542 U.S. at 732.

268. *Filártiga*, 630 F.2d at 890; see also *Sosa*, 542 U.S. at 761-62 (Breyer, J., concurring) ("[R]ecognition of universal jurisdiction in respect to a limited set of norms is consistent with principles of international comity.")

269. *Comm. of U.S. Citizens Living in Nicar. v. Reagan*, 859 F.2d 929, 941-42 (D.C. Cir. 1988).

the House of Lords have each utilized either substantive or jurisdictional international law to decide the extraterritorial application of basic constitutional or human rights norms. Of course, none of this jurisprudence is binding on the Supreme Court. Moreover, these courts have not adopted the specific fundamental norms approach urged in this Article. Nonetheless, the fact that other, closely allied nations with developed legal systems have relied on international law to inform their jurisprudence on the extraterritorial application of their basic rights supports our courts' use of international law to decide such questions. An analysis of these foreign judicial decisions yields important lessons that ought to inform the post-*Boumediene* efforts of U.S. courts to determine in what circumstances constitutional norms apply extraterritorially.

A. *The Canadian Supreme Court's Use of International Law in Determining the Extraterritorial Application of the Canadian Charter*

The first Canadian case to suggest that international human rights norms should play a role in the extraterritorial application of the Canadian Charter of Rights and Duties was *R. v. Hape*, decided in 2007.²⁷⁰ In *Hape*, the Supreme Court of Canada addressed the issue of whether the Charter's guarantee against unreasonable search and seizure applied to a warrantless search of a Canadian businessman conducted by Canadian police officers outside of Canadian territory so as to exclude the seized evidence from being introduced at the businessman's trial in Canada.²⁷¹

The majority in *Hape* echoed Justice Kennedy's position in *Verdugo-Urquidez* (although that case involved a Canadian citizen, not an alien), holding that it is "evident from a practical standpoint that the *Charter* cannot apply to searches and seizures in other countries."²⁷² The Court relied heavily on international law to hold that the Charter did not apply, reasoning that the extraterritorial application of the Charter to a search by Canadian police abroad without the foreign state's consent would be inconsistent with limitations on a state's enforcement jurisdiction,²⁷³ would constitute an interference with the other state's sovereignty,²⁷⁴ and would violate principles of comity.²⁷⁵ The majority recognized, however, that international jurisdictional law did not really provide an answer to the question that the case presented, since applying the Charter's limitations would not require a Canadian police officer to act extraterritorially in violation of the laws of the foreign nation, but merely would require them *not* to act extraterritorially when such actions would violate the Charter's proscription.²⁷⁶ That solution, however, was unacceptable to the Court for practical reasons because it would limit Canada's ability to

270. *R. v. Hape*, 2007 SCC 26, [2007] 2 S.C.R. 292 (Can.).

271. *Id.*

272. *Id.* paras. 88-89 (LeBel, J.).

273. *Id.* paras. 57-59.

274. *Id.* para. 84.

275. *Id.* paras. 50-52.

276. *Id.* para. 97.

investigate and prosecute transnational crime.²⁷⁷

While holding that the Charter did not apply to a search and seizure abroad (of either a Canadian citizen or an alien), the Court recognized that the deference required by the principle of comity and sovereignty “ends where clear violations of international law and fundamental human rights begin.”²⁷⁸ That fundamental human rights exception was applied by the Court a year later in *Canada (Justice) v. Khadr*.²⁷⁹

In *Khadr*, a Canadian citizen held at Guantanamo Bay sought an order requiring the government to disclose documents relating to interviews conducted by Canadian officials at Guantanamo. The government argued that the Charter did not apply outside of Canada. A unanimous Court held that where Canadian officials act abroad “in conformity with Canada’s international obligations, the Charter has no application.”²⁸⁰ However, “[I]f Canada was participating in a process that was violative of Canada’s binding obligations under international law, the *Charter* applies to the extent of that participation.”²⁸¹ The Court made clear that the Charter bound Canadian officials acting abroad to the extent those officials were involved in international law violations,²⁸² and that notions of “fundamental justice are informed by Canada’s international human rights obligations.”²⁸³ In 2010, the Canadian Supreme Court reiterated its previous holding and issued declaratory relief that Canada had violated the Charter, but reversed a lower court order requiring Canada to seek Khadr’s repatriation to Canada because of the incompleteness of the evidentiary record, “the limitations of the Court’s institutional competence,” and the need to respect the foreign policy powers of the Executive.²⁸⁴

The *Khadr* Court, however, relied heavily on the fact that the U.S. Supreme Court had held that the detainees had been illegally denied access to habeas corpus and that the military commission procedures under which Khadr

277. *Id.* para. 98.

278. *Id.* para. 52; *see also id.* para. 51 (stating that “the need to uphold international law may trump the principle of comity”); *id.* para. 100 (leaving open the possibility that participation by Canadian officers in activities in another country that would violate Canada’s international human rights obligations might justify a remedy under the Charter). Some commentators have severely criticized the Court’s *Hape* decision as reflecting a step backward in Canadian law, which had in the past applied the Charter to Canadian governmental action against Canadian citizens abroad, irrespective of any international law violations. *See, e.g.,* Chimène I. Keitner, *Rights Beyond Borders*, 36 YALE J. INT’L L. 55, 86-87 (2011). I agree with Keitner’s critique of *Hape*’s territorial analysis of the Charter’s application abroad and also recognize, as Justice Binnie pointed out in his concurring opinion in *Hape*, that the content of international law proscriptions would be weaker than the corresponding Charter requirements. *R. v. Hape*, 2007 SCC 26, para. 186, [2007] 2 S.C.R. 292, para. 186 (Binnie, J., concurring). Nonetheless, the recognition that the Charter applies where clear international norms are violated, if vigorously enforced, would provide significant extraterritorial protection to aliens. Whether the *Hape* exception will be seriously enforced is, however, subject to doubt. *See infra* notes 286-289 and accompanying text.

279. 2008 SCC 28, [2008] 2 S.C.R. 125 (Can.).

280. *Id.* para. 19.

281. *Id.*

282. *Id.* para. 26.

283. *Id.* para. 29.

284. *Canada (Prime Minister) v. Khadr*, 2010 SCC 3, para. 46, [2010] 1 S.C.R. 44, para. 46 (Can.).

was to be prosecuted violated the Geneva Conventions.²⁸⁵ In addition, Khadr was a Canadian citizen, although that factor did not enter into the Court's rationale.

However, a subsequent case decided by the Canadian Federal Court of Appeal has cast doubt on the breadth and scope of the *Khadr* rulings. In *Amnesty International Canada v. Canada*, a unanimous court of appeal held that the Charter did not apply during the armed conflict in Afghanistan to the detention of non-Canadians by the Canadian Forces or to their transfer to Afghan authorities even if such transfer exposed them to a substantial risk of torture.²⁸⁶ The court distinguished *Khadr* on the grounds that (1) in *Khadr* no deference to U.S. law was required because of the holdings of the U.S. Supreme Court with respect to Guantanamo Bay and (2) Khadr was a Canadian citizen, whereas the Afghan detainees were foreigners with no attachment whatsoever to Canada.²⁸⁷

The Canadian Supreme Court refused to hear Amnesty International's appeal, thus contributing to the lack of clarity as to the meaning and reach of its *Khadr* opinion.²⁸⁸ Undoubtedly, the *Hape* exception and the *Khadr* ruling will require clarification in future Supreme Court decisions.²⁸⁹ Nonetheless, at least in certain circumstances, the Canadian Court has used substantive international human rights norms to determine whether Canada's constitutional rights will apply to governmental actions abroad. While the theory underlying the *Hape* and *Khadr* decisions is somewhat different from that proposed here, those opinions lend support to the substantive use of international law to determine the extraterritorial reach of the Constitution.

B. *The Effective Control Jurisprudence of the European Court of Human Rights and the British Courts*

The European Court of Human Rights and the British House of Lords have utilized a jurisdictional approach to determine the extraterritorial application of the European Convention on Human Rights. This approach focuses on whether government officials exercise "effective control" either over the territory or the individual alien upon whom they are acting, a test that has also been applied internationally by other human rights bodies.²⁹⁰ As noted in Part II, the "effective control" test has several important advantages and, if adopted by U.S. courts, could lead to a considerable clarification and improvement of *Boumediene's* functional approach.²⁹¹ First, the test has gained significant traction internationally. Second, application of the effective control

285. *Id.* paras. 21-23.

286. *Amnesty Int'l Can. v. Canada* (Chief of the Def. Staff), 2008 FCA 401, [2009] 4 F.C.R. 149 (Can.).

287. *Id.* paras. 9-14.

288. *Amnesty Int'l Can. v. Canada*, [2009] 1 F.C.R. 1 (Can.).

289. Keitner, *supra* note 278, at 91 (articulating the confusion the *Khadr* opinion has resulted in and suggesting that the Canadian Supreme Court will need to revisit the *Hape* ruling).

290. See cases and authorities cited *supra* note 91; see also Keitner, *supra* note 278, at 96-106.

291. See Note, *supra* note 18.

test would seem to require that United States troops and officials apply the full panoply of constitutional protections at securely controlled United States military bases around the world, or where U.S. officials are acting in territory subject to de facto control by the United States. Moreover, an effective control test is consistent with *Boumediene*'s functional test's emphasis on practical questions such as control.

Nonetheless, despite these advantages, the effective control doctrine has two serious drawbacks that the international law/fundamental norm test proposed here seeks to overcome. The first is that the question of what constitutes "effective control" is very controversial and has been subject to confusing and contradictory interpretations. For example, while the European Court has held that Turkey exercised effective control over Northern Cyprus sufficient for the application of the European Convention of Human Rights to claimed violations committed in that territory,²⁹² the Court, in its *Banković v. Belgium* decision concerning NATO's bombing of the Serbian Radio and Television station in Belgrade during the 1999 airstrikes against Yugoslavia, took a narrow view of effective control.²⁹³ The Court in *Banković* stated that the extraterritorial jurisdiction of the Convention was "exceptional,"²⁹⁴ recognized only effective control over territory and not the exercise of state authority and control over persons, and held that NATO's control of the airspace over Yugoslavia did not give rise to effective control necessary for the Convention to apply. The decision has been widely criticized.²⁹⁵

Subsequent decisions of the European Court have taken a more expansive view of "effective control." For example, in *Öcalan v. Turkey* the Court held that the Convention's protections could be applied to Turkey's arrest and forcible extradition of a Turkish national from Kenya,²⁹⁶ and in *Issa v. Turkey*, the European Court of Human Rights applied the effective control standard to Turkish acts in Iraq where the victims were under State agents' "authority and control," even though Turkey clearly did not control the territory of northern Iraq.²⁹⁷

The House of Lords' decision in *Al-Skeini v. Secretary of State for Defence* recognized that there was a clear conflict between cases such as *Issa* and *Banković*, and chose to adopt *Banković*'s narrower reading of the Convention's extraterritorial applicability.²⁹⁸ The Law Lords accepted the government's concession that the Convention applied to actions taken at a British military base in Basra,²⁹⁹ but held that it did not apply to soldiers'

292. *Loizidou v. Turkey*, 23 Eur. H.R. Rep. 513, ¶ 56 (1997).

293. *Banković v. Belgium*, 2001-XII Eur. Ct. H.R. 333.

294. *Id.* ¶ 61.

295. MICHAL GONDEK, *THE REACH OF HUMAN RIGHTS IN A GLOBALISING WORLD: EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS TREATIES* 169 (2009); Cleveland, *supra* note 18, at 265-66.

296. *Öcalan v. Turkey*, 37 Eur. H.R. Rep. 238 (2003).

297. *Issa v. Turkey*, 41 Eur. H.R. Rep. 567, ¶ 71 (2005).

298. *Al-Skeini v. Sec'y of State for Def.*, [2007] UKHL 26, [67], [75], [2008] 1 A.C. 153, [67], [75] (Lord Rodger) (appeal taken from Eng.) (U.K.); *id.* [131] (Lord Carswell).

299. *Id.* [61] (Lord Rodger). The House of Lords' conclusion that the European Convention

actions on the streets of Basra.³⁰⁰ To make matters more confusing, the Canadian Appeals Court held in the *Amnesty International* case that under the *Banković* test, the Canadian Charter of Rights and Duties did not apply to claims asserted by Afghans detained by Canada in Afghanistan because Canada did not have “effective control” over Afghan territory.³⁰¹ That result conflicts with the House of Lords’ decision in *Al-Skeini*.

The second difficulty with the effective control test is the all-or-nothing approach that the European Court of Human Rights and the British House of Lords have adopted. Both courts have reasoned that the Convention’s obligations must be applied in their entirety or not at all: they cannot be “divided and tailored” according to the particular violation that has occurred.³⁰²

This all-or-nothing test led the House of Lords and the European Court to view effective control quite narrowly in both *Banković* and *Al-Skeini*. As the House of Lords majority observed, “the idea that the United Kingdom was obliged to secure observance of all the rights and freedoms as interpreted by the European Court in the utterly different society of southern Iraq is manifestly absurd.”³⁰³ Therefore, only where a European state exercises such full control as to warrant the extension of all the rights contained in the European Convention would any of those rights apply. This is precisely the conundrum that the *Boumediene* Court sought to avoid in its case-by-case functional test. The *Banković* and *Al-Skeini* decisions have been criticized for adopting the view that the Convention applies in its entirety or not at all.³⁰⁴

One of the judges in the court of appeals decision in *Al-Skeini* suggested a view of effective control that would take into account the particular right at issue, and would thus allow the effective control jurisprudence to move closer to the position urged in this Article. Judge Sedley recognized that he was bound by the *Banković* opinion’s rejection of the possibility that only certain Convention rights applied to a particular situation, but disagreed with that approach. For Judge Sedley, “[T]he nature of the breach may condition or determine whether the responsibility of the State is extraterritorially engaged,” and such responsibility need not apply to the full panoply of rights covered by the Convention.³⁰⁵ Sedley noted that it was particularly important that the issue

applies to the United Kingdom’s custody of an Iraqi detainee at a military base in Iraq has been affirmed by a Chamber of the European Court in another case involving the United Kingdom, on the grounds that the United Kingdom exercised “total and exclusive de facto and subsequently de jure control” over the base. *Al-Saadoon v. United Kingdom*, App. No. 61498/08, ¶ 88 (Eur. Ct. H.R. Mar. 2, 2010), available at <http://echr.coe.int/echr/en/hudoc> (follow “HUDOC database” hyperlink, then search for “Al-Saadoon,” then follow link to case title).

300. *Al-Skeini*, [2007] UKHL 26, [83]-[84] (Lord Rodger); *id.* [92] (Lord Hale); *id.* [151] (Lord Carswell).

301. See Keitner, *supra* note 278, at 91.

302. *Al-Skeini*, [2007] UKHL 26, [79] (Lord Rodger); *Banković v. Belgium*, 2001-XII Eur. Ct. H.R. 333, ¶ 75.

303. *Al-Skeini*, [2007] UKHL 26, [78] (Lord Rodger).

304. Keitner, *supra* note 278, at 101 n.273; see also Cleveland, *supra* note 18, at 264-65 (pointing out that the *Banković* decision is inconsistent in this regard with the jurisprudence of the Inter-American Commission and the U.N. Human Rights Committee).

305. *Al-Skeini v. Sec’y of State for Def.*, [2005] EWCA (Civ.) 1609, [201], [2007] Q.B. 140 [201] (appeal taken from Eng.) (U.K.) (Sedley, J.).

in *Al-Skeini* involved the “right to life,” suggesting that the negative nature (as opposed to the affirmative obligations contained in the Convention) and importance of that right should be taken into account.³⁰⁶ Judge Sedley did not believe that because the United Kingdom was unable to guarantee all of the Convention rights in Iraq, “it is required to guarantee nothing.”³⁰⁷ To him, the United Kingdom should be required to abide by “essential civil rights,” even in the “near chaos of Iraq.”³⁰⁸

The *Al-Skeini* House of Lords decision has been appealed to the European Court of Human Rights, which heard arguments in the case in June 2010.³⁰⁹ A critical question that the Court may resolve is whether the Convention applies extraterritorially only where the state exercises effective control over a territory or particular place, or additionally where the state exercises authority and control over an individual. The Court has, at times, held that the latter type of control is sufficient, but has expressed concern that a broad ruling to that effect would render the Convention applicable to virtually any governmental act against an individual worldwide.³¹⁰ One possible method of addressing that concern is the approach taken in this Article and suggested by Judge Sedley in the court of appeal in *Al-Skeini*, of limiting the rights applicable extraterritorially to those which are “essential,” nonderogable, or fundamental.³¹¹

In sum, these Canadian and European decisions support the use of international law to inform the extraterritorial application of rights. In addition, the difficulty that the European courts have encountered in determining the circumstances in which a nation exercises “effective control” sufficient to warrant the extraterritorial application of rights strongly suggests, as Judge Sedley recognized in *Al-Skeini*, that the future development of extraterritorial jurisprudence must analyze not merely functional factors such as the degree of control exercised over a particular location, but also the nature of the individual’s interest affected by the government’s action, and whether the individual’s right is one that is nonderogable in any circumstance under international law.

306. Judge Sedley could “see good grounds of principle and of substantive law for holding that, at least where the right to life is involved, [the Convention’s rights] extend beyond the walls of the British military prison and include the streets patrolled by British troops.” *Id.* para. 205 (emphasis added).

307. *Id.* para. 197.

308. *Id.* para. 196. Sedley pointed out that “[n]o doubt it is absurd to expect occupying forces in the near-chaos of Iraq to enforce the right to marry vouchsafed by Art.12 or the equality guarantees vouchsafed by Art. 14,” but that doesn’t mean that no rights at all should apply. *Id.*

309. Oral Argument, *Al-Skeini v. United Kingdom*, App. No. 55721/07 (Eur. Ct. H.R. June 9, 2010), available at http://www.echr.coe.int/ECHR/EN/Header/Press/Multimedia/Webcasts+of+public+hearings/webcastEN_media?&p_url=20100609-1/lang/.

310. *Banković v. Belgium*, 2001-XII Eur. Ct. H.R. 333, ¶ 75.

311. The Court is troubled by the application of the Convention generally to extraterritorial uses of force by European states, as in the situation that was presented by *Banković*. One method of addressing those concerns substantively would be to cabin the extraterritorial application of the Convention in those situations to a deliberate targeting or killing of a civilian, akin to summary execution.

VI. THE APPLICATION OF A FUNDAMENTAL NORMS, INTERNATIONAL LAW
APPROACH TO POST-*BOUMEDIENE* CASES INVOLVING EXECUTIVE
DETENTION AND TORTURE

Several recent, post-*Boumediene* U.S. cases raising the question of the Constitution's reach beyond our borders illustrate both the confusion courts have faced in applying *Boumediene*'s functional test as well as the potential utility of an approach utilizing fundamental international norms to aid in determining the applicability of constitutional norms to U.S. actions abroad. This Part discusses the D.C. Circuit's application of *Boumediene*'s multifactor functional test to the petitions for habeas corpus brought by four foreign nationals detained for over six years at the U.S. military base at Bagram Airfield Military Base in Afghanistan,³¹² and that court's treatment of claims that U.S. officials tortured aliens in Guantanamo, Iraq and Afghanistan.³¹³

A. *Bagram and Prolonged Executive Detention Abroad*

In the Bagram case, *Al Maqaleh v. Gates*, the district court opinion, the appellate briefs, and the oral argument before the D.C. Circuit focused extensively on the objective degree of control asserted by the United States at Bagram, the duration of its presence there, and the potential practical difficulties with asserting habeas jurisdiction over a base located within an active war zone.³¹⁴ The district court grappled with the question of whether the degree of control that the United States exercises over Bagram is more comparable to Guantanamo Bay or Landsberg Prison in post-World War II Germany, the prison where the *Eisentrager* petitioners were detained. The court concluded that the Bagram situation did not align squarely with either Guantanamo or Landsberg, but that the United States did exercise sufficient control to warrant the assertion of habeas jurisdiction.³¹⁵ The court also found that the process utilized by the military to determine whether detention was proper fell well short of what the Supreme Court found inadequate at Guantanamo, and that while the practical difficulties of applying habeas in a war zone were greater than those involved at Guantanamo, they were still not substantial enough to deny habeas review. Therefore, habeas review was available for the three non-Afghan detainees,³¹⁶ but not the Afghan citizen because of potential frictions with the Afghan government due to the possibility that he would eventually be transferred to Afghan control.³¹⁷

The district court recognized that "it may seem odd" that different

312. *Al Maqaleh v. Gates*, 604 F. Supp. 2d 205 (D.D.C. 2009), *rev'd*, 605 F.3d 84 (D.C. Cir. 2010).

313. *Rasul v. Myers*, 563 F.3d 527 (D.C. Cir. 2009).

314. *Al Maqaleh*, 604 F. Supp. 2d 205; Brief for Petitioners-Appellees, *Al Maqaleh v. Gates*, 605 F.3d 84 (D.C. Cir. 2010) (No. 09-5265), 2009 WL 6043974; Brief for Respondents-Appellants, *Al Maqaleh v. Gates*, 605 F.3d 84 (D.C. Cir. 2010) (No. 09-5265), 2009 WL 6043972; Transcript of Oral Argument, *Al Maqaleh v. Gates*, 605 F.2d 84 (D.C. Cir. 2010) (No. 09-5265).

315. *Al Maqaleh*, 604 F. Supp. 2d at 221-26.

316. *Id.* at 226-31.

317. *Id.* at 229-30.

conclusions can be reached for different detainees at Bagram based on the foreign nation of which they are a citizen, but found that to be a predictable outcome of *Boumediene*'s functional test.³¹⁸ The court also believed that the length of petitioners' detention without review "tacitly informed *Boumediene*'s analysis," but held that "[b]ecause the Supreme Court did not include the length of detention in its explicit list of factors" the court could "not separately consider that circumstance here" but merely could use it in some undefined way to possibly "shade other factors."³¹⁹ On appeal, the government's brief omitted virtually any mention of the length of detention, focusing exclusively on questions of U.S. control over the base and the practical difficulties of allowing habeas jurisdiction for detainees imprisoned on a base located in a theater of war.³²⁰ In their brief, the detainees were thus forced to address mainly practical and objective factors rather than the point that the detainees had been held for over seven years without adequate process.³²¹

The district court also held that for those detainees who were apprehended outside of Afghanistan, far from any Afghan battlefield and brought to the theater of war to be detained at Bagram, the potential for executive manipulation of the court's jurisdiction was a factor recognized by *Boumediene* as supporting the assertion of habeas jurisdiction.³²² As already noted, at the appellate oral argument, Judge Tatel claimed that the *Boumediene* Court never mentioned that factor in its functional test, and that he did not "see how, bound as we are by *Boumediene* . . . we can sort of add that additional factor."³²³

The court of appeals reversed the district court, applying the three factors set forth in *Boumediene*'s functional test.³²⁴ The court held that Bagram's location in an active theater of war posed practical obstacles to the issuance of a habeas writ and that the United States does not exercise de facto sovereignty over Bagram; therefore the second and third factors set forth in the functional test weigh overwhelmingly against affording habeas jurisdiction to detainees at Bagram.³²⁵ Jurisdiction was denied even though the petitioners alleged that they had been captured outside of Afghanistan, first detained at some unknown facility, and then transferred to Bagram. In short, the court concluded that persons detained by the U.S. government indefinitely for many years with little or no due process who claimed to be civilians and not enemy combatants had no right to seek habeas review to challenge their detention.

Two basic rationales underlay the circuit court's decision in *Al Maqaleh*.

318. *Id.* at 209.

319. *Id.* at 216-17.

320. Brief for Respondents-Appellants, *Al Maqaleh v. Gates*, 605 F.3d 84 (D.C. Cir. 2010) (No. 09-5265), 2009 WL 6043972.

321. Brief for Petitioners-Appellees, *Al Maqaleh v. Gates*, 605 F.3d 84 (D.C. Cir. 2010) (No. 09-5265), 2009 WL 6043974.

322. *Al Maqaleh*, 604 F. Supp. 2d at 220.

323. Transcript of Oral Argument at 49, 51, *Al Maqaleh v. Gates*, 605 F.3d 84 (D.C. Cir. 2010) (No. 09-5265). Judge Sentelle appeared to express the same point. *Id.* at 45.

324. *Al Maqaleh v. Gates*, 605 F.3d 84, 95-99 (D.C. Cir. 2010).

325. *Id.* at 97-98.

The first was a rejection of what the court termed petitioners' "extreme understanding" that U.S. control of Bagram was "sufficient to trigger the extraterritorial application of the Suspension Clause."³²⁶ To the court, petitioners' position would potentially lead to "the extraterritorial extension of the Suspension Clause to noncitizens held in any United States military facility in the world, and perhaps to an undeterminable number of other United States-leased facilities as well."³²⁷ The court pointed out that it had engaged in an extended dialogue at oral argument seeking "some limiting principle that would distinguish Bagram from any other military installation," but counsel was unable to produce such a distinction.³²⁸ The court therefore focused on the nature and location of the Bagram Airfield Military Base, factors that carry heavy weight in *Boumediene's* functional test and which the court found strongly favored denying habeas jurisdiction. The *Al Maqaleh* court also articulated a second underlying rationale to reject habeas jurisdiction: that since the Bagram Airfield Military Base lies within a more active theater of war than did the Landsberg Prison at issue in *Eisentrager*, to permit habeas jurisdiction there would be inconsistent with *Eisentrager*, which was not overruled by *Boumediene*.³²⁹

The basic problem with the circuit court's holding in *Al Maqaleh* is that it discounted the importance of the petitioners' constitutional rights and interests and viewed practical factors such as the location of the Bagram base in an active war zone as virtually dispositive. The theory articulated in this Article explains why the petitioners' interests should be weighed heavily in the decision as to whether they can seek the writ: prolonged executive detention without even minimal due process not only violates our own Constitution but also contravenes a fundamental principle of international law.

Indeed, the petitioners did propose several limiting principles for habeas petitions, but those limits were not based on distinguishing Bagram from other secure U.S. military bases around the globe, but rather on distinguishing these particular petitioners' interest from those of other detainees held anywhere in the world. The petitioners proffered three distinctions: (1) they had received little or no due process;³³⁰ (2) they had already been detained for many years—as was also the case with the *Boumediene* petitioners—and their detention was indefinite and likely to extend for many more years;³³¹ and (3) they had been transferred to Bagram from places of capture and detention that were not within an active theater of war.³³²

The question of whether detainees at a particular military facility should be able to seek the writ of habeas corpus should not turn primarily on the location and characteristics of the particular military facility—assuming that

326. *Id.* at 95.

327. *Id.*

328. *Id.* (citing Transcript of Oral Argument, *supra* note 323, at 30-47).

329. *Id.* at 97-98.

330. Transcript of Oral Argument, *supra* note 8, at 40-41.

331. *Id.* 41.

332. *Id.* 43-45.

the facility is under U.S. effective control—but rather on the importance, fundamentality, and universal recognition of the individual’s right allegedly denied by the government. That proposition is supported by the cases relied on by *Boumediene*, particularly the Insular Cases and Harlan’s concurrence in *Reid* wherein he did not seek to distinguish one military base from another, but rather capital crimes from other offenses.

“Freedom’s first principles,” relied on in *Boumediene*,³³³ should prohibit the United States from indefinitely and possibly permanently detaining individuals using a woefully inadequate process, particularly in an untraditional war in which both logic and empirical evidence indicate that the risk of a wrongful detention is significant.³³⁴ The government certainly had a “reasonable time” to determine whether the *Al Maqaleh* petitioners should be detained as enemy combatants. The petitioners were detained in a secure facility under U.S. effective control. Whatever practical difficulties might arise in providing for review are both surmountable and far outweighed by the detainee’s interest in avoiding an arbitrary prolonged, indefinite, and perhaps lifelong detention.³³⁵

Nonetheless, the D.C. Circuit rejected the limiting principles offered by the petitioners that would avoid worldwide habeas jurisdiction for any prisoner detained by the United States yet recognize jurisdiction for at least some detainees at Bagram held for a prolonged time period without minimal due process protections. The court recognized that the Bagram petitioners had been accorded even less process than the *Boumediene* petitioners had received, but discounted that factor when weighing it against Bagram’s location in a war zone.³³⁶ The court’s opinion completely ignored the length of the petitioners’ detention, and indeed, at oral argument, Judge Edwards stated that a test that allowed for federal jurisdiction over a habeas petition filed by a noncitizen held for ten years without any process at Bagram would constitute “a big reach from what the Supreme Court has said.”³³⁷ Thus, the length of detention and lack of any process were essentially rendered irrelevant. As to the third distinction affecting these specific prisoners—their capture and initial detention outside of any active theater of war—the court recognized that a transfer of a detainee into an active war zone might implicate the separation of powers rationale of *Boumediene*. However, the separation of powers concerns would only arise if

333. *Boumediene v. Bush*, 553 U.S. 723, 797 (2008).

334. See *Hamdi v. Rumsfeld*, 542 U.S. 507, 520 (2004). As of the beginning of 2010, of the forty habeas cases involving Guantanamo detainees that have been adjudicated on the merits, district court judges had granted the writ thirty-one times, a rate of over seventy-five percent. Baher Azmy, *Executive Detention, Boumediene, and the New Common Law of Habeas*, 95 IOWA L. REV. 445, 499-500 (2010).

335. Where a national government has requested that one of its citizens detained by the United States be transferred to its jurisdiction for criminal prosecution, the prudential factors set forth in *Munaf v. Geren*, 553 U.S. 674 (2008), require the Court to decline to issue the writ. Moreover, in that circumstance, the United States is not detaining the person indefinitely, but only for a reasonable time pending transfer. The situation is quite different, however, where, as in Afghanistan, the government does not claim that any particular individual will be transferred to Afghan control, but only that some undefined subset of detainees will be transferred at some time in the future.

336. *Al Maqaleh*, 605 F.3d at 96-97.

337. Transcript of Oral Argument, *supra* note 323, at 54-55.

the government was to “deliberately” transfer a detainee in a theater of war instead of somewhere else in order to evade review.

The court’s error in refusing to consider the length of petitioners’ detention can be highlighted by the following example. Suppose the U.S. military decided to execute a prisoner detained at Bagram without any trial or due process whatsoever. The court’s opinion in *Al Maqaleh v. Gates* appears to hold that habeas jurisdiction would not lie to hear a petition by the condemned man who claimed he was an innocent civilian to stop a patently unlawful execution, because Bagram is within the theater of war and not under the de facto sovereignty of the United States. But such a result seems contrary to all of the extraterritorial cases relied on by *Boumediene* and the *Boumediene* decision’s underlying rationale.

The *Al Maqaleh* circuit decision has thus been aptly criticized as creating a law-free zone or legal black hole at Bagram.³³⁸ The alternative approach proposed here is consistent with both *Boumediene* and *Eisentrager*.³³⁹ Where the detainee’s interests are fundamental, as recognized by the international community and the United States, they cannot be disregarded as cavalierly as the D.C. Circuit did in *Al Maqaleh* simply because the detention facility lies in a war zone.

The normative approach set forth in this Article would explain why habeas review ought to be available for a prisoner contesting indefinite, prolonged detention without any process that meets at least minimal constitutional standards. The right to be free from prolonged arbitrary detention without access to meaningful, timely, and effective judicial review is universally recognized as a basis of all free governments. As the brief for the petitioners in *Rasul v. Bush* argued, while the Court in *Johnson v. Eisentrager* took pains to note that “[t]he practice of every modern Government” is to refuse the protection of the “organic law” to enemy aliens convicted by a military trial, in the twenty-first-century world, every modern government condemns prolonged executive detention without legal process.³⁴⁰ The authoritative Restatement (Third) of Foreign Relations Law lists a “state policy . . . that practices, encourages, or condones . . . prolonged arbitrary detention” as incompatible with nonderogable jus cogens norms.³⁴¹ While the right against

338. *See supra* notes 11-13.

339. The D.C. Circuit ignored the argument that the detainees in *Al Maqaleh* had interests that differed from the interests of the petitioners in *Eisentrager*, which might have served to distinguish the two cases. As Justice Kennedy explicitly pointed out in *Boumediene*, in *Eisentrager*, the German prisoners had been accorded basic due process protections and there had been a rigorous, adversarial process to test the legality of their detention. *Boumediene v. Bush*, 553 U.S. 723, 767 (2008). As the *Al Maqaleh* court recognized, no such due process protections had been afforded the Bagram petitioners. *Al Maqaleh*, 605 F.3d at 96-97. To uphold the district court’s decision would therefore require the court to distinguish, rather than overrule, *Eisentrager* and to accord greater weight to the petitioners’ due process interests, as opposed to the location of the detention facility.

340. Petitioners’ Brief on the Merits at 24, *Rasul v. Bush*, 542 U.S. 466 (2004) (No. 03-334). The author helped in the drafting of the Petitioner’s Brief. *See also* Brief of Amici Curiae Professors of International Human Rights Law, *Al Maqaleh v. Gates*, 605 F.3d 84 (D.C. Cir. 2010) (Nos. 09-5265, 09-5266, 09-5277), 2009 WL 6043975 (arguing that the prohibition against prolonged arbitrary detention is a jus cogens norm of customary international law).

341. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 702 cmt. n & n.11 (1987).

prolonged arbitrary detention is not listed as nonderogable in the major human rights treaties, the United Nations Human Rights Committee, which monitors the International Covenant on Civil and Political Rights,³⁴² the European Court of Human Rights,³⁴³ and the Inter-American Court of Human Rights³⁴⁴ have all declared that the guarantee of judicial review of detention is a nonderogable right which must apply even in times of war or national emergency. The principle that “no person should be detained for an indefinite period of time” requires that “[w]here persons are detained without charge, the need for their continued detention shall be considered periodically by an independent review tribunal.”³⁴⁵

The Supreme Court in *Sosa v. Alvarez-Machain* determined that a general prohibition of any arbitrary detention “expresses an aspiration that exceeds any binding customary rule having the specificity we require [to create] a private cause of action” under the Alien Tort Claims Act.³⁴⁶ The Court, however, explicitly distinguished a state policy of prolonged arbitrary detention, which while still not clearly defined, would at least in certain circumstances violate a fundamental norm of international law.³⁴⁷

The primary questions to be answered in the pending Bagram case therefore ought not to be related to the nature and duration of the U.S. control over the Bagram Airfield Military Base, its location in a war zone, or the practical difficulties in hearing a petition for a writ of habeas corpus. Rather, the court should have determined whether a state policy of detaining individuals for many years without minimal due process or court review where their status is disputed implicates a fundamental nonderogable right recognized

342. The United Nations Human Rights Committee, which monitors compliance with the ICCPR, has held that Articles 9(1) (prohibiting arbitrary detentions) and 9(4) (guaranteeing judicial review of detentions) apply to all deprivations of liberty, and that Article 9(4) is nonderogable, even in times of armed conflict. See U.N. Secretariat, *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, cmt. 8, ¶ 1, U.N. Doc. HRI/GEN/1/Rev.1 (1994); Human Rights Comm’n, General Comment 29: States of Emergency (Article 4), ¶ 16, U.N. Doc. CCPR/C/21/Rev.1/Add.11 (Aug. 21, 2001).

343. The European Court of Human Rights has enunciated that the right of judicial review of a claimed arbitrary detention is applicable even in times of a declared national emergency. See *Öcalan v. Turkey*, 37 Eur. H.R. Rep. 238, ¶¶ 42, 109-10 (2003) (requiring prompt judicial review of the detention of an alleged terrorist accused of being responsible for thousands of deaths); see also *Aksoy v. Turkey*, 23 Eur. Ct. H.R. 553 (1996) (holding that, although Turkey had lawfully declared a national emergency, it could not hold a suspected terrorist for fourteen days without judicial intervention); *Chahal v. United Kingdom*, 23 Eur. Ct. H.R. 413, ¶ 131 (1997) (ruling that concern for national security, though legitimate, “does not mean . . . that the national authorities can be free from effective control by the domestic courts whenever they choose to assert that national security and terrorism are involved”).

344. The Inter-American Court of Human Rights has ruled that the right to judicial remedies, including habeas corpus and other forms of judicial review available to detainees, are not derogable because they are essential to protect all other nonderogable rights. *Judicial Guarantees in States of Emergency* (Arts. 8, 25 and 27(2) American Convention on Human Rights), Advisory Opinion OC-9/87, Inter-Am. Ct. H.R. (ser. A) No. 9, ¶¶ 24, 41 (Oct. 6, 1987); *Habeas Corpus in Emergency Situations* (Arts. 7(6), 25(1) and 27(2) American Convention on Human Rights), Advisory Opinion OC-8/87, Inter-Am. Ct. H.R. (ser. A) No. 8, ¶¶ 42, 44 (Jan. 30, 1987).

345. See United Nations Econ. & Soc. Council, *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, ¶ 70, U.N. Doc. E/CN.4/1985/4, Annex (Sept. 28, 1984).

346. 542 U.S. 692, 738 (2004).

347. *Id.* at 737.

under both international law and the U.S. Constitution. If it does, the privilege of petitioning for writ of habeas corpus should extend to any individual so detained wherever he or she might be detained. At minimum, habeas should be available absent compelling, overriding practical difficulties not of the government's own making.

Several objections could be raised to the approach urged here. The first, articulated by the D.C. Circuit, is that what I am advocating is essentially worldwide habeas for any detainee imprisoned at a U.S. military base anywhere in the world. That objection is, however, incorrect, for as already noted, only those detainees who claim to be subjected to long-term prolonged detention with only minimal due process are protected by what the Restatement recognizes to be a fundamental, *jus cogens* norm of international law. However, narrowing the class of detainees entitled to seek habeas in such a manner still could require U.S. courts to assert jurisdiction over a great many potential habeas applications, particularly in a case of a future full-scale war.

There are several other answers to the objection. The British already have apparently accepted an even broader rule in the *Al-Skeini* case discussed in Part IV, treating military bases analogously to embassies—and therefore as subject to the European Human Rights Conventions proscriptions—thus covering all detainees held at British military bases. Moreover, in the kind of long-term guerilla warfare we are currently waging in Afghanistan and elsewhere, where the enemy is often indistinguishable from civilians, the risks of erroneous, potentially permanent deprivation of a person's liberty should outweigh practical problems of according a habeas hearing. In a future, potentially more traditional war involving regular armies and thousands of prisoners of war, virtually all the detainees are likely to be captured on the battlefield wearing uniforms and thus presenting no serious habeas problems. Were a future army to attempt to flood our courts with habeas petitions from such captured soldiers, the courts could undoubtedly develop rules to allow those cases to be dealt with summarily in a manner that is not significantly different from a jurisdictional dismissal. Moreover, it is likely that in a situation involving thousands of prisoners, many of those enemy prisoners would be held—as German prisoners were during World War II—in the United States for security reasons, and thus even under the D.C. Circuit's ruling would be entitled to seek habeas.

A second possible objection could be that it is not so clear that the norm against prolonged executive detention without judicial process is a nonderogable, *jus cogens* norm of international law. For example, the major human rights treaties do not explicitly list that proscription as being nonderogable, and the norms that are treated as *jus cogens* are not clearly set forth in any international treaty or resolution. However, as already mentioned, the authoritative Restatement of Foreign Relations lists prolonged arbitrary detention as a *jus cogens* norm, and the European Court of Human Rights and other international organs have treated the norm as nonderogable, even in war or emergency situations, although the basis for that treatment is somewhat

ambiguous.³⁴⁸ Moreover, irrespective of the norm's technical status under international law, our courts can certainly recognize that, unlike the warrant requirement or a jury trial, the international community not only accepts the norm as universal, but clearly treats it as having some sort of elevated or fundamental status.

Finally, one can argue that the definition of "prolonged" confinement is vague. When does a detainee's right to seek habeas commence: after one week in detention, or one month, or one year? The European Court has treated fourteen-day detention without judicial process as prolonged.³⁴⁹ That time period seems too short, however, in the wartime context that exists in Afghanistan. One obviously cannot sharply define an exact time frame that would constitute "prolonged," but it would seem that, once a detention has stretched on for many months with no end in sight, it qualifies as prolonged. The point is to distinguish battlefield detention and to accord the detaining authorities sufficient time to determine whether the detainee should not be released.

B. *The Extraterritorial Application of the Constitutional Prohibition of Torture*

The second major arena of conflict with respect to the application of *Boumediene*'s extraterritorial test is over the question of whether the Constitution prohibits U.S. officials from engaging in torture or cruel and inhumane treatment against aliens abroad. Lower courts have avoided definitively deciding that question in several post-*Boumediene* opinions, and the functional test may lead to confusion in analyzing the issue. The approach suggested here presents a clear answer: the proscription against torture is clearly a jus cogens nonderogable right, which ought to apply whenever and wherever the U.S. government acts.

Prior to *Boumediene*, the D.C. Circuit and district courts in that circuit had consistently held that the constitutional proscription of cruel and inhumane punishment did not reach U.S. officials who tortured aliens abroad.³⁵⁰ In *Rasul v. Myers*, first decided by the D.C. Circuit just prior to the Supreme Court's holding in *Boumediene*, the court reiterated that rule in dismissing a *Bivens* damage action brought by former detainees at Guantanamo against high government officials for alleged torture they suffered during their detention.³⁵¹

The Supreme Court vacated the *Rasul* dismissal after the *Boumediene* decision, ordering the D.C. Circuit to review its decision in light of *Boumediene*.³⁵² However, in *Kiyemba v. Obama*, the D.C. Circuit held that the Court's *Boumediene* decision only involved the applicability of the Suspension

348. See *supra* notes 341-345 and accompanying text.

349. *Aksoy v. Turkey*, 23 Eur Ct. H.R. 553 (1996).

350. See *supra* note 173 and cases cited therein.

351. *Rasul v. Myers*, 512 F.3d 644, 663-65 (D.C. Cir. 2008), *vacated and remanded*, 129 S. Ct. 763 (2008), *aff'd on remand*, 563 F.3d 527 (D.C. Cir. 2009), *cert. denied*, 130 S. Ct. 1013 (2009).

352. *Rasul v. Myers*, 129 S. Ct. 763 (2008).

Clause to Guantanamo and did not affect prior circuit law that the Due Process Clause did not apply to aliens without property or presence within the United States.³⁵³ When the D.C. Circuit revisited *Rasul*, it noted 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.”³⁵⁴ While the court is technically correct that *Boumediene* explicitly addressed only the Suspension Clause, *Boumediene*’s extended discussion of the Constitution’s extraterritorial reach clearly undermined the circuit’s prior holdings that the Constitution simply did not apply to aliens tortured abroad. The Court’s review of its prior extraterritorial jurisprudence in *Boumediene* made clear that “these decisions undermine the Government’s argument that, at least as applied to noncitizens, the Constitution necessarily stops where de jure sovereignty ends.”³⁵⁵

The D.C. Circuit, however, chose not to rest its decision on the ground that the Constitution does not apply to torture of aliens abroad, holding instead that the defendants were entitled to qualified immunity, because reasonable officials would not have known that the prohibition against torture applies to Guantanamo until at least after *Boumediene* was decided in 2008. Indeed, the court’s dicta suggests that, even now, it is not clearly established that the constitutional proscription against torture applies to Guantanamo or any other U.S. military base abroad, and that U.S. officials who engaged in torture abroad now would still be entitled to qualified immunity.³⁵⁶

The Supreme Court denied *Rasul*’s petition for certiorari.³⁵⁷ Moreover, the D.C. Circuit is poised once again to reject a damages action brought by aliens for torture, this time by detainees allegedly tortured in Iraq and Afghanistan whose claims were dismissed by the district court.³⁵⁸ Thus, U.S. officials who torture aliens abroad are effectively immunized.

The framework proposed here leads to three conclusions about this D.C. Circuit line of cases. First, the proscription against torture is a paradigmatic jus cogens, nonderogable norm of international law, and the constitutional proscriptions against cruel and inhumane treatment should therefore be applicable to U.S. actions against aliens abroad. Moreover, every nation in the world, including the United States, has agreed as a legal matter that it is never “practicable” to use torture, even during war or national emergency.³⁵⁹

353. *Kiyemba v. Obama*, 555 F.3d 1022, 1026-27 (D.C. Cir. 2009), *vacated*, 130 S. Ct. 1235 (2010).

354. *Rasul v. Myers*, 563 F.3d 527, 529 (D.C. Cir. 2009), *cert. denied*, 130 S. Ct. 1013 (2009).

355. *Boumediene v. Bush*, 553 U.S. 723, 755 (2008).

356. *Rasul*, 563 F.3d at 529 (stating that the circuit’s prior law that the Constitution does not apply to U.S. actions against aliens abroad remains undisturbed by the Supreme Court’s opinion in *Boumediene*, with the exception of the Suspension Clause which does apply in some circumstances).

357. *Rasul*, 563 F.3d 527.

358. *Ali v. Rumsfeld*, Nos. 07-5178, 07-5185, 07-5186, 07-5187 (argued Jan. 13, 2011). As Judge Edwards said at oral argument in the *Ali* case: “You can’t prevail under the law of the circuit. It’s not your fault.” *D.C. Circuit Appeals Ready To Void Torture Suit*, BLOG OF LEGAL TIMES (Jan. 13, 2011), <http://legaltimes.typepad.com/blt/2011/01/dc-circuit-appeals-ready-to-void-torture-suit.html> (quoting Judge Edwards).

359. ICCPR, *supra* note 205, art. 4; Convention Against Torture and Other Cruel, Inhuman or

Second, it has for years been a clear violation of international law and U.S. criminal law for a U.S. official to torture an alien abroad, and it violates the Constitution to torture an alien detained here. Thus, the rationale for according government officials qualified immunity for acts that a reasonable official would not have known were unconstitutional at the time ought not apply to this situation.³⁶⁰ The torturer, like the state officials who utilized the hitching post until recently, ought to have generally known that what they were doing was without authority and thus unconstitutional.³⁶¹

Third, the Supreme Court should take one of the cases involving this issue and decide the underlying constitutional question of whether the proscription against torture applies abroad, even if it ultimately decides that the official is entitled to immunity.³⁶² Thus far, the Court has declined to review several recent cases raising this issue.³⁶³ To do so is to effectively immunize former or current officials from civil liability for acts that our government and the world officially state are unacceptable.

VII. CONCLUSION

The Supreme Court's decision in *Boumediene v. Bush* rejected the Bush administration's categorical position that aliens located abroad have no constitutional rights. The Court's articulation, however, of a functional, pragmatic test to determine whether a constitutional norm is applicable to U.S. actions against aliens abroad is in considerable tension with the fundamental norms jurisprudence that undergirds the opinion. In the first major application of the *Boumediene* functional test, the D.C. Circuit utilized the test to reach a result at odds with the normative underpinnings of *Boumediene*.

The *Boumediene* test must be reformulated to reintegrate the fundamental

Degrading Treatment or Punishment, *supra* note 202.

360. In *Davis v. Scherer*, 468 U.S. 183, 194 n.12 (1984), the Supreme Court held that “neither federal nor state officials lose their immunity by violating the clear command of a statute or regulation—of federal or of state law—unless that statute or regulation provides the basis for the cause of action sued upon.” However, in this context, the fact that federal criminal law, international law, and United States treaty law all prohibit the torture of aliens abroad is not irrelevant to the constitutional inquiry. Those provisions are highly relevant to the question of whether officials who torture had “fair warning” that their conduct “shocks the conscience” and violates the Constitution. See, e.g., *Hope v. Pelzer*, 536 U.S. 730, 743-44 (2002) (noting that defendants’ own regulation suggests that the defendants were “fully aware of the wrongful character of their conduct”). That torture is universally condemned should provide U.S. officials with fair warning that engaging in such activity is “antithetical to human dignity” and “obvious cruelty.” *Id.* at 745.

361. See *Hope*, 536 U.S. 730 (holding that state officials who tied prisoners to the hitching post were not entitled to qualified immunity).

362. See *Pearson v. Callahan*, 129 S. Ct. 808, 818 (2009). In *Pearson*, the Supreme Court held that lower courts ought to have the flexibility to decide the merits of whether a constitutional right existed before deciding whether that right was clearly established for qualified immunity purposes. The Court noted that it is often beneficial to order decisionmaking in this way, particularly “with respect to questions that do not frequently arise in cases in which a qualified immunity defense is unavailable.” *Id.* The situation in which U.S. officials are sued for torturing aliens abroad falls into that category, because such suits do not often arise in injunctive actions.

363. *Arar v. Ashcroft*, 130 S. Ct. 3409 (2010) (denying certiorari from the Second Circuit’s dismissal of Arar’s *Bivens* action, which alleged that U.S. officials sent him to Syria to be tortured there); *Rasul v. Myers*, 563 F.3d 527 (D.C. Cir. 2009), *cert. denied*, 130 S. Ct. 1013 (2009) (dismissing a Guantanamo detainee’s damage action against U.S. officials for torture and illegal detention).

norms strands of the opinion into a workable and principled test. The nature of the alien's interest and right must be accorded more weight in the analysis as to whether the right applies. To do so by utilizing international law's fundamental, nonderogable norms to determine which constitutional protections apply abroad would both allay the Court's practical concerns and ground its test on the important normative principle that underlay its *Boumediene* opinion.