The purpose of this Article is to explore the meaning and justification of what I have previously called the “global due process” approach to the extraterritorial application of U.S. constitutional rights. More than a decade and a half ago Justice Anthony Kennedy employed this approach in his concurring opinion in United States v. Verdugo-Urquidez, and more recently it provided the foundation for his Opinion of the Court in Boumediene v. Bush (decided after the conference for which this Article was written). The Justices have had relatively little occasion to specify its meaning in detail, and neither the judiciary nor scholarly literature has provided a normative explanation of the approach that would persuade its critics or would assist in determining its operation.

Having been one of the critics, I am very conscious of the fact that the “global due process” methodology currently involves a troubling degree of indeterminacy, presumably to be narrowed over time by the exercise of judicial discretion. I will discuss here some of the alternatives that could add more specificity to the methodology and could partly channel that discretion. These include possible references to international human rights law, either directly or by analogy.

The Article begins by reviewing the origins of the “global due process” approach (Part I), and reflecting more generally on the relevance of geography to constitutional drafting and interpretation (Part II). Against this background, an initial exegesis of the Verdugo opinion is offered in Part III, followed by questions about how the approach would operate in detail (Part IV). Part V considers the coherence of the approach with post-Verdugo developments in U.S. constitutional law prior to Boumediene, and Part VI compares the approach with analogous doctrines in international and foreign law.
law. Assisted by this comparison, Part VII explores alternatives for the fuller working out of the global due process methodology. Finally, Part VIII concludes with a short description of the later application of this methodology as a “functional approach” in *Boumediene*, and addresses the extent to which that decision provides answers to the questions raised earlier in the Article.

I. ORIGINS OF GLOBAL DUE PROCESS

To review briefly what should be well known, the text of the Constitution left its intended geographic reach uncertain. As the nation expanded westward across the North American continent, both the view that the Constitution should be limited to the states and the view that the Constitution extended to new territorial acquisitions received support. From the middle to the end of the nineteenth century, courts routinely held that generally phrased constitutional limitations applied in the territories as well as in the states. In 1901, however, that understanding was overthrown by the Insular Cases, which adopted a new distinction between “incorporated territories” intended for eventual statehood and “unincorporated territories” to be held in subordinate status, for the explicit purpose of facilitating colonial expansion. The doctrine of the Insular Cases also distinguished between “fundamental” and “nonfundamental” constitutional limitations, applying the former but not the latter in unincorporated territories. The doctrine of the Insular Cases has never been overruled, although (as I shall describe later), its methodology and rationale appear to have been transformed in the late twentieth century, after its racist and colonialist premises became unacceptable.

The Insular Cases also stand for another important principle, that the Constitution as such applies to the U.S. government wherever it acts. The Constitution is the source of federal power, and in that sense it applies everywhere, although particular constitutional provisions may have more limited geographic scope, just as they may have limited substantive or personal scope. In some cases the geographic limitations are explicit, but in other cases they are implied. The Insular Cases doctrine was intended to provide a methodology for interpreting constitutional limitations to decide which ones applied in unincorporated territories.

Until the 1950s, the Supreme Court never held that any constitutional right was available, even to a U.S. citizen, outside the borders of the United

4. For my own prior account of these events, see GERALD L. NEUMAN, STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW 72-108 (1996)
5. The term “Insular Cases” refers both to a set of cases decided in 1901, establishing the framework for governance of overseas territories acquired in the Spanish-American War, and the succeeding series of cases that further elaborated that framework. The doctrine first expounded in Justice Edward Douglass White’s concurring opinion in *Downes v. Bidwell*, 182 U.S. 244, 287 (1901), gained the adherence of the majority in *Dorr v. United States*, 195 U.S. 138 (1904).
Fundamental constitutional rights “followed the flag” in the sense of applying in newly acquired territory, but they went no further. This approach, earlier defended in terms of turn-of-the-century territorial understandings of conflict of laws, became increasingly troubling as the United States maintained a long-term overseas military presence on a non-colonial basis in the wake of the Second World War. Moreover, extraterritorial regulation and extraterritorial law enforcement increased during the second half of the twentieth century, and technological developments in communication and transportation both facilitated the exercise of government power and increased the feasibility of respecting constitutional limitations.

The Supreme Court overthrew this restricted geographical understanding of constitutional rights in *Reid v. Covert* (1957), holding that the Constitution prohibited court-martial of U.S. citizen civilians who had accompanied their
military spouses to England and Japan. Justice Black’s plurality opinion argued—consistently with his advocacy of total incorporation of the Bill of Rights into the Fourteenth Amendment—that the entire Bill of Rights should apply to U.S. citizens everywhere. Justices Harlan and Frankfurter concurred in the judgment, arguing—consistently with their advocacy of reliance on judicial expertise in selecting which elements of the Bill of Rights should be incorporated into Fourteenth Amendment “due process”—that extraterritorial application of constitutional rights to citizens should proceed with caution on a situation-by-situation basis; as Harlan wrote, “the question of which specific safeguards of the Constitution are appropriately to be applied in a particular context overseas can be reduced to the issue of what process is ‘due’ a defendant in the particular circumstances of a particular case.” Although Black acquired a majority of the Court for his more categorical approach a few years later, the Supreme Court had little to say about extraterritorial constitutional rights for several decades thereafter.

During this period lower courts were uncertain whether the Supreme Court had overthrown strict territoriality of constitutional rights for U.S. citizens only, or for foreign nationals as well. The Bill of Rights is also ambiguous with regard to the personal scope of application of constitutional rights, which may not be surprising given that it was drafted for a society divided on the subject of race-based slavery. Before the Civil War, lower courts generally assumed that white foreigners were protected by the Bill of Rights, but the Supreme Court never decided a case that turned on the issue. The abolition of slavery and the adoption of the Fourteenth Amendment made it possible for the Court to affirm the universal application of individual rights to all persons within the territorial jurisdiction of the states in *Yick Wo v. Hopkins*. The Court employed this insight—illustrating the process that Vicki Jackson has called “holistic interpretation”—in construing the Fifth and Sixth Amendments in *Wong Wing v. United States*. The modern Court

9. “Everywhere” may be too strong, as even Black appeared to accept an exception for trials by military commissions in occupied enemy territory. See Reid v. Covert, 354 U.S. at 35 n.63 (distinguishing Madsen v. Kinsella, 343 U.S. 341 (1952)). The Court also appeared to assume the continuing validity of *Madsen* in Hamdan v. Rumsfeld, 126 S. Ct. 2749 (2006).
10. 354 U.S. at 75.
12. See Neuman, supra note 5, at 104. One pedantic clarification: in this article, I often use the term “foreign national” rather than “alien,” especially when referring to non-U.S.-citizens outside the United States. I do not mean thereby to exclude stateless persons, or to include U.S. dual nationals.
13. See id. at 60-61.
15. See Vicki C. Jackson, Holistic Interpretation: Fitzpatrick v. Bitzer and our Bifurcated Constitution, 53 STAN. L. REV. 1259, 1267 (2001) (favoring the “possibilities of a more holistic form of constitutional interpretation in which parts of the Constitution adopted at different time periods are read together to create a principle with respect to the former parts that differs from the reading those parts previously had”).
16. 163 U.S. 228, 238 (1896) (“Applying this reasoning to the Fifth and Sixth Amendments, it must be concluded that all persons within the territory of the United States are entitled to the
has emphasized that the Fifth Amendment protects aliens even if their “presence in this country is unlawful, involuntary, or transitory.” The Constitution also protects aliens who have never been in the United States from interference with their property in the United States, or from being unfairly subjected to the jurisdiction of a state court. On the other hand, in cases where a foreign national had no territorial contact to the United States, it was unclear after Reid v. Covert how much of the previous regime survived.

A divided Court addressed this issue in United States v. Verdugo-Urquidez (1990), denying the applicability of the Fourth Amendment to any search of a non-resident foreign national’s property in a foreign country. Chief Justice Rehnquist wrote nominally for a majority of the Court, but the necessary fifth vote was provided by Justice Kennedy, whose concurrence relied on very different reasoning. Rehnquist reasoned that the Bill of Rights applied extraterritorially only to a limited degree. He emphasized that Black’s opinion in Reid v. Covert had spoken only for a plurality, and that the concurring opinions of Harlan and Frankfurter denied the full applicability of the Bill of Rights abroad, even to citizens. In part, Rehnquist argued that the protection of the Fourth Amendment was by its terms limited to “the people,” a term that he had difficulty defining, and whose limiting effect Kennedy’s concurrence rejected. In part, Rehnquist relied on the absence of Supreme Court precedent confirming the application of the Bill of Rights to extraterritorial government action against aliens. He considered it relevant that Verdugo-Urquidez allegedly lacked “significant voluntary connection” with the United States. And in part, Rehnquist emphasized that extraterritorial application of the Fourth Amendment might have negative consequences for government action to protect important American interests abroad, especially when it involved the use of armed force.

Kennedy’s concurrence rejected the plurality’s suggestion that the Fourth Amendment’s protection was limited to “the people,” but also denied that the protection guaranteed by those amendments . . .

20. 494 U.S. at 270 (Rehnquist, C.J.).
21. 494 U.S. at 265 (Rehnquist, C.J.); 494 U.S at 276 (Kennedy, J., concurring).
22. 494 U.S. at 271 (Rehnquist, C.J.). The claim that Verdugo-Urquidez’s lack of a voluntary connection with the United States sufficed to deny him a Fourth Amendment right is morally troubling in two respects: first, if Verdugo lacked significant voluntary connection with the United States, then subjecting him to U.S. narcotics laws would appear problematic; and second, for the United States to kidnap foreign nationals, bring them to the United States, and then deny them constitutional rights precisely on the basis of their involuntary presence, is deeply repugnant, and resonant with slavery. Fortunately, the Court did not so hold.
23. 494 U.S at 273-75 (Rehnquist, C.J.).
Constitution “create[d] . . . any juridical relation between our country and some undefined, limitless class of noncitizens who are beyond our territory.” Instead, the relevant question was “what constitutional standards apply when the Government acts, in reference to an alien, within its sphere of foreign operations.” Kennedy saw Harlan’s concurrence in *Reid v. Covert* as articulating the appropriate methodology for answering the question and he quoted the opinion at length. He found that extraterritorial application of the Fourth Amendment’s warrant requirement to the search of a nonresident alien’s home would be “impracticable and anomalous” in Harlan’s terms, because of the “absence of local judges or magistrates available to issue warrants, the differing and perhaps unascertainable conceptions of reasonableness and privacy that prevail abroad, and the need to cooperate with foreign officials.” He left open what protection might be afforded abroad to a U.S. citizen, “as to whom the United States has continuing obligations,” and he emphasized that Verdugo himself was fully protected by constitutional rights at trial. Again quoting Harlan, he concluded that Verdugo had been afforded the process due to him.

Three dissenting Justices argued for the “mutuality” approach, which I have previously defended, and which would extend the Bill of Rights as written to foreign nationals abroad in those situations where the United States seeks to subject them to legal obligations under its laws. As Justice Brennan explained, affording extraterritorial constitutional rights to foreign nationals when the United States exercises governance over them extends the rationale that James Madison had articulated for affording constitutional rights to aliens present within U.S. territory. However, the Court has never given majority support to the full implementation of this rationale.

II. WHY EXTRATERRITORIALITY MATTERS TO CONSTITUTIONAL RIGHTS

When a government acts outside its own borders, difficult questions of constitutional interpretation frequently arise. Both constitutional provisions that set forth rights of individuals and constitutional provisions that set forth powers or limitations on powers can equally raise the problem of geographical scope. Indeed, in some cases it may be difficult to decide whether a given constitutional provision is best characterized as embodying a right or a limitation. To see how extraterritorial location affects constitutional inter-

24. 494 U.S. at 275 (Kennedy, J., concurring).
25. 494 U.S. at 278 (Kennedy, J., concurring).
26. Id.
27. Id.
28. 494 U.S. at 279 (Brennan, J., joined by Marshall, J., dissenting); 494 U.S. at 297 (Blackmun, J., dissenting); see Neuman, supra note 5, at 108-17.
29. 494 U.S. at 284 (Brennan, J., dissenting).
30. The distinction between powers and limitations on powers also presents problems, because any definition of a power implies limits on its substantive scope.
pretation, it is helpful to consider first the situation of the drafter of a constitutional provision, and then the situation of the interpreter of a provision.

Why would the designer of a constitution wish to place a geographical limitation on the reach of a provision? A number of interrelated reasons might be suggested, some of which apply equally to citizens and other persons, and some of which may vary with citizenship. First, different conditions might prevail at different locations, affecting the consequences of applying the constitutional provision. These conditions could involve objective physical differences (such as whether action occurs on the high seas, for example), or objective cultural differences with regard to dominant local practices in the private sphere. These conditions might also involve objective differences with regard to existing structures within the public sphere that affect how the provision will operate.31 Alternatively, the differences might be subjective, the varying preferences of local populations for particular rules.

Second, from a slightly different perspective, the government being constituted may face different legal or practical constraints on its action at different locations. De jure, the government may enjoy lesser powers in locations where it is not the sole sovereign. De facto, the government may have less ability to effectively exercise powers that it enjoys in theory, because it lacks auxiliary powers, has insufficient supporting institutions, cannot gather relevant information, or faces greater hostility or resistance.

Third, a government may be viewed as having different duties in different locations. Such a conclusion might result from distinct normative assumptions. The constitution might be motivated by animosity or the desire to dominate particular locations or the people who inhabit them. Or the constitution might neutrally presume that each political community bears special duties toward its own territory and its own citizens or its own resident population (which does not necessarily imply that it owes no duties elsewhere or to others). Or it might be concluded that, in locations where government possesses lesser powers, it should correspondingly be subject to lesser responsibilities.

Fourth, a geographical limitation might be based on no other reason than the fact that some powerful group within the society perceived the limitation as serving its interests, and was able to achieve its preferred outcome in the process of constitutional negotiation.32

To the extent that these reasons suggest that the appropriate constitutional rule on a particular subject might properly differ from place to place, drafters

31. In part, this means that structural variations permitted or required by one constitutional provision may create reasons for related variations in another constitutional provision.

32. See, e.g., the Migration or Importation clause of Article I, section 9, whose effect was limited to “the states now existing.” U.S. CONST. art. 1, § 9.
of constitutions face a set of choices: to draft separate provisions imposing differing rules at different kinds of locations, to find a single general formula that produces the right result when the relevant data are plugged in, to adopt a compromise that may overprotect in some locations and underprotect in others, or to provide the right rule for one or more locations while leaving the rest unaddressed.

In light of such reasons, the drafter would do well to bear in mind three possible aspects of the future constitutional norm. First, the norm once adopted will possess a consensual aspect, resulting from the political process that led to the drafting assignment and the political process that will bring about its ratification and entry into force as positive law. (The drafter may therefore have both a responsibility to draft in accordance with the instructions given, and some responsibility to draft in a manner that will inform the process of ratification.) Second, the norm may possess a suprapositive aspect, if it is intended to give effect in positive law to an extralegal normative conception regarding the powers and duties of government and the rights of human beings. (Individual rights provisions are particularly likely to reflect such normative conceptions—directly or indirectly—and not merely consensual bargains.) Third, the constitutional norm will possess an institutional aspect, as a positive legal rule imposing duties on government actors, possibly subject to review by the courts. The rule may need to be designed in a manner that facilitates compliance by the dutyholders and effective judicial oversight.

The constitution drafter may find it necessary to compromise among these three aspects of the proposed constitutional norm. Consensual processes may have produced decisions regarding the geographical scope of the norm that are wrong or inconsistent from the suprapositive perspective; or nuanced suprapositive analyses of the norm’s range of application may be too complicated to set forth in constitutional text or to provide an institutionally workable rule. The drafter may then choose a specific solution that strikes a balance among these conflicting considerations, or may draft at a level of generality that fails to resolve the conflicts.

Turning from the process of drafting to the process of interpreting


34. As time passes thereafter, later generations may also give consensual legitimation to the norm, either in its original form or with modifications.

35. Thus, for example, the right to jury trial could be understood as a complex positive arrangement, indirectly serving to protect a suprapositive right to fair trial, or (less likely) as directly embodying a suprapositive right to trial specifically by jury.

When James Madison introduced his proposals for the Bill of Rights in the House of Representatives, he described trial by jury as a positive protection for natural rights rather than as a natural right itself: “Trial by jury cannot be considered as a natural right, but rather a right resulting from a social compact, which regulates the action of the community, but is as essential to secure the liberty of the people as any one of the pre-existent rights of nature.” 1 Annals of Cong. 437 (1789).
ambiguous provisions, we should recognize that a drafter’s decisions about which provisions to include and how to phrase them may have depended on a prior assumption—express, tacit, or unconscious—about the locations or persons to which they will apply. For that reason, it is important to interpret the geographic scope of constitutional provisions in the context of a particular constitution, or a particular constitutional tradition.

The consensual, suprapositive, and institutional aspects of a constitutional provision are also relevant to interpreters of constitutions. Different theories of constitutional interpretation may give them different weights under different circumstances, but all three play important roles in U.S. constitutional practice. “Originalist” or “textualist” readings, or attempts to decipher the political consent of later generations, may privilege the consensual aspect. Normative readings of constitutional provisions as embodying or being informed by external values illustrate the suprapositive aspect. The institutional aspect supports the widely recognized distinction between constitutional provisions themselves and doctrinal rules implementing them.36

After two centuries of U.S. constitutionalism, attention to all three aspects remains useful in efforts to elucidate the intended geographical and personal scope of constitutional provisions, or to supply answers to questions that the drafters overlooked, and that precedent has not settled. The Constitution contains a number of provisions that make express reference to their geographical and personal field of application,37 but most do not, and uncertainties have recurred over time.

Constitutional rights provisions are particularly likely to be associated with suprapositive norms, and those norms may potentially be relevant to all human beings regardless of whether they are within a state’s territory. For that reason, the rest of this article will restrict its attention to the scope of provisions guaranteeing constitutional rights.

III. AN INITIAL INTERPRETATION OF GLOBAL DUE PROCESS

Against this background, how might we unpack the “global due process” methodology expressed in Justice Kennedy’s concurring opinion in Verdugo? Perhaps as follows:


37. One might, for example, conclude that the venue clause of the Sixth Amendment is unambiguously limited to prosecutions for crimes committed within a state. See United States v. Dawson, 56 U.S. (15 How.) 467 (1854).

Even an express description of the geographical scope of a constitutional provision may be undermined by a determined interpreter. To give a now-obsolete example, the Eighteenth Amendment imposed Prohibition in seemingly broad language upon “the United States and all territory subject to the jurisdiction thereof,” U.S. Const. amend. XVIII. Nonetheless, its implementation was successfully resisted in the Philippines, relying on a provision of the territory’s organic act, which required express mention of the Philippines to make federal laws applicable there. See 35 Op. Att’y Gen. 281, 284 (1927) (discussing the practice).
The United States Constitution, particularly after the Civil War Amendments, should not be understood as expressing disdain for the human dignity and moral rights of others in the world. Nonetheless, it is a national constitution, one among many, and it was drafted at an earlier stage of history and technology with primary attention to its domestic application. Some rights may have been drafted in a manner unsuitable to extraterritorial application as a result. Moreover, the U.S. constitutional rights do not create duties owed to the world at large. That does not mean that, say, a randomly chosen Australian could never be the beneficiary of a constitutional right, but it does mean that special circumstances are required before she would be. Decisions by the United States government to grant foreign aid to one country but not another, or to enter into a treaty with one country but not another, do not implicate equal protection principles on behalf of the disadvantaged population at all. Decisions of the United States to go to war against a particular country are not limited by equal protection or substantive due process rights of that country’s population. In special circumstances, however, (though Kennedy’s opinion does not describe them) extraterritorial U.S. action against a foreign national abroad may suffice to bring constitutional rights into play.

Kennedy was willing to consider the search of Verdugo-Urquidez’s property as potentially implicating constitutional rights, but he ultimately rejected the applicability of the Fourth Amendment’s Warrant Clause to extraterritorial searches of nonresident foreign nationals’ property as “impracticable and anomalous.” (The opinion is ambiguous regarding the Unreasonable Searches Clause, but probably expresses the same conclusion.) In part, this characterization results from the absence of supporting institutions for the warrant procedure in foreign countries, and the need to cooperate with foreign officials, who may be governed by entirely different standards and procedures. (U.S. searches without the permission of the local government violate the foreign state’s rights under international law—which does not mean that they do not occur.) In that sense, imposition of the warrant requirement would be “impracticable.” It should be recalled here that the warrant requirement does not directly express the suprapositive aspect of the Fourth Amendment right—we do not regard it as a moral imperative as such—but rather it indirectly protects the suprapositive aspect by means of a consensually adopted institutional guarantee, originally drafted with domestic application in mind.

The conclusion that application of the Fourth Amendment was “impracti-

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38. I use the term “moral rights” here rather than “human rights” to avoid the impression that I am referring to the positive international law of human rights.
39. That is, an equal protection claim would not be merely nonjusticiable, and would not be governed by the rational basis test—the equal protection principle of the due process clause would not apply at all.
40. These examples are my own extrapolations, and are not given by Justice Kennedy.
cable and anomalous” also results in part from the differing expectations of privacy that foreign nationals may have within their own cultures and legal systems, which could lead to differences in the appropriate standards of “reasonableness,” the exceptions to the warrant requirement, or even the appropriate definition of “search,” and might make the outcome of cases unpredictable. These differences add a further dimension of impracticability to the application of U.S. constitutional norms, and may make observance of U.S. standards of privacy in some foreign cultures “anomalous,” because their standards are lower or because their distinctions do not parallel U.S. distinctions. This concern should not be overstated—surely no one appreciates the intrusion of police into their homes without consent—but rather than undertake the complex task of adapting the Fourth Amendment to foreign cultures, Kennedy made the institutional choice of accepting a bright line rule: no extraterritorial application of the Fourth Amendment to (nonresident) foreign nationals.

Many of the above considerations would also weigh against extraterritorial application of the Fourth Amendment to searches of U.S. citizens’ property, but the opinion leaves this question open.41 We may assume, however, that U.S. citizens retain their belief in U.S. privacy values even when present in countries with different customs, and we might regard as legitimate the citizens’ expectation that their own government (which has “continuing obligations”) would behave consistently toward them. Thus application may be less “anomalous” and the institutional balance might be struck differently with citizens.

If the opinion rejects the application of the reasonableness standard as well the Warrant Clause, then that conclusion deserves additional comment. One might think that “unreasonable” was as flexible a standard as a court might need to adapt a constitutional norm to overseas application. Indeed, Kennedy himself as circuit judge, only a few years earlier, had written an opinion asserting that the reasonableness of an overseas search of a U.S. citizen, conducted as a joint venture with foreign officials, depended on its compliance with local law, and that good faith belief in its compliance would be sufficient to prevent the application of the exclusionary rule.42 Nonetheless it might be argued that even a flexible rule may be impracticable because of its unpredictability ex ante.

IV. Questions about the Meaning of Global Due Process

After Verdugo, numerous ambiguities in the global due process approach

41. Both the concurrence and the Rehnquist opinion also leave open the extraterritorial Fourth Amendment rights of aliens who are lawful residents of the United States.
42. United States v. Peterson, 812 F.2d 486 (9th Cir. 1987).
remained to be resolved. Does the Bill of Rights as a whole no longer apply extraterritorially with regard to U.S. citizens? If so, then what determines the availability of a right to citizens: is there a dichotomous choice for each right between global application and limitation to U.S. territory, or do a citizen’s extraterritorial rights vary from location to location, or from circumstance to circumstance (as Harlan and Kennedy’s discussions suggested)? Do distinctions between different modes of government action, such as law enforcement, military action, intelligence gathering, and foreign aid, enter into the determination whether a citizen’s constitutional right applies extraterritorially?

While the Rehnquist opinion in Verdugo asserted that the concurrences in Reid v. Covert, rather than the plurality, were controlling regarding citizens, the Kennedy concurrence addressed that claim only obliquely. Both Rehnquist and Kennedy reaffirmed the continuing validity of the Insular Cases. If indeed the rights of citizens in foreign territory are governed by the Harlan concurrence rather than by the Bill of Rights as written, then that would lessen (but perhaps not eliminate altogether) the anomaly of providing greater rights to citizens outside the United States than to citizens in unincorporated territories.

Parallel ambiguities remained with regard to the extraterritorial rights of foreign nationals. The Kennedy concurrence implicitly rejected the “mutuality” argument of the dissenters that the Fourth Amendment should apply to Verdugo-Urquidez as soon as the U.S. government treated him as one of “the governed” by enforcing its criminal narcotics laws against him. In silently rejecting this argument, Kennedy did not take a position on whether his own favored approach would always apply more narrowly than mutuality, and so would not apply in non-governance contexts, or whether instead it would sometimes apply more broadly than mutuality, for example in certain military, defense intelligence, or foreign aid contexts. In other words, he did not resolve whether treating a foreign national abroad as one of the governed would be a necessary but not sufficient condition for the extension of a constitutional right.

Limiting the reach of extraterritorial rights to governance contexts could be seen as analogous to the doctrine enunciated by the European Court of Human Rights (ECHR) in the well-known Banković decision. There the ECHR explained that the obligations of states under the European human rights convention applied only to persons “within their jurisdiction,” and that

43. My point here does not relate to the degree of discretion involved in applying the approach, but rather to the fact that the Justices have not yet specified certain important details of the approach, with regard to citizens as well as foreign nationals.

44. For example, the doctrine may still be that the rights to grand and petit jury under the Fifth and Sixth Amendments need not apply in unincorporated territories, but do apply to civilian citizens abroad.

NATO air strikes against Serbia did not place people injured or killed by those strikes within the jurisdiction of participating European states. “Jurisdiction” within the meaning of the European convention, as in international law generally, was primarily territorial, but it also extended to certain exercises of governing power outside the state’s own territory.

The Bankovic decision was more akin to the mutuality approach than to the global due process approach, because the ECHR reasoned that when a person is within a European state’s jurisdiction, all the human rights protected by the European convention apply. The ECHR rejected the claim that it should calibrate the state’s human rights obligations to the degree of control that the state exercised. Nonetheless, the ECHR’s proposition that the extraterritorial applicability of rights depends upon the mode of interaction between the state and the individual might be considered a persuasive argument within the global due process analysis as well.

The question whether extraterritorial rights of foreign nationals under the global due process approach vary from country to country also remained unresolved. In Verdugo, Kennedy suggested a uniform answer for the Fourth Amendment. Nothing in the opinion gives reason to expect that a more restrictive rule would apply in France or Uzbekistan or Colombia. However, it is conceivable that the concurrence should be understood as treating Mexico within the paradigm of a generic foreign country, without precluding the possibility that some special circumstances increasing U.S. power within a particular foreign territory might lead to a different result. But whatever the outcome in other countries, it does not necessarily follow that the answers with regard to other constitutional rights would be as uniform as for the Fourth Amendment.

V. Subsequent Support for Global Due Process

Did the global due process approach receive increased support from related developments as the years passed since the Court decided Verdugo? In

46. This aspect of Bankovic was qualified subsequently in Ilașcu v. Moldova and Russia, 2004-VII Eur. Ct. H.R., App. No. 48787/99 (Grand Chamber), dealing with the special situation of a state (Moldova) that had lost control of a portion of its territory to a separatist government supported by a neighboring state (Russia). The Grand Chamber majority held that individuals detained by the separatist government were still within the “jurisdiction” of Moldova, but that Moldova’s duties toward them were reduced by its lack of effective control over the region. Those duties amounted to positive obligations to take diplomatic and other measures to secure their rights.

47. That is, he wrote that “the Constitution does not require United States agents to obtain a warrant when searching the foreign home of a nonresident alien” in one sentence, while adding that the warrant requirement “should not apply in Mexico as it does in this country” in the next.

48. The fact that inquiries into the applicability of constitutional rights to unincorporated territories under the Insular Cases now proceed territory by territory rather than categorically might provide analogical support for similar inquiries regarding foreign countries; lower courts have linked this shift in methodology to Harlan’s concurrence in Reid v. Covert. See infra note 50 and accompanying text. Extraterritorial application would be more likely to depend on certain broad functional categories of location, which could remain stable over time, rather than on particular named countries.
this section, I will examine some developments within U.S. constitutional law and their possible effect from an internal perspective. In the following section (VI), I will look at the question from the comparative perspective.

1. One legal trend providing analogical support for global due process arises from the maintenance and continuing evolution of the selective approach to constitutional rights in U.S. territories under the Insular Cases doctrine. The negotiated accession of the Commonwealth of the Northern Mariana Islands (NMI) to the United States has given the doctrine a new valence, as courts have bent to uphold variations in constitutional norms affirmatively sought by local populations, in some instances as express conditions for the extension of full U.S. sovereignty over their territory. In Wabol v. Villacrusis, contemporaneous with Verdugo, the Ninth Circuit upheld descent-based limitations on the right to acquire long-term interests in land in the NMI. The court held that the right to equal protection, though applicable generally in the NMI, had to be unbundled into particular equality rights, and that the right not to be discriminated against in connection with land purchases should not be regarded as fundamental there, as local conditions made it impractical and anomalous. The right was not “fundamental in [an] international sense” that “incorporate[d] the shared beliefs of diverse cultures.” A three-judge district court similarly unbundled the right to equal protection in upholding another divergent feature of the NMI Compact, the unequal apportionment of the CNMI Senate, in Rayphand v. Sablan, a decision summarily affirmed by the U.S. Supreme Court in 2000. Invoking the criteria employed in Wabol, the lower court rejected the applicability of Supreme Court precedent requiring equal apportionment of senators in the states. This reorientation of the Insular Cases doctrine toward genuine accommodation of territorial preferences increases its coherence with U.S. constitutional theory, and may in turn support additional flexibility in related areas of doctrine.

49. The Ninth Circuit’s initial opinion in Wabol was issued in 1990, shortly before the Supreme Court decided Verdugo; an amended opinion followed in 1992, but does not cite Verdugo.

50. 958 F.2d 1450, 1461 (9th Cir. 1992) (invoking Justice Harlan’s concurrence in Reid v. Covert). It should be noted that the reasoning of the decision depended in part on local conditions—the scarcity of land and the role of land in indigenous culture in Micronesia. The shift in methodology, permitting the applicable constitutional rights to vary from unincorporated territory to unincorporated territory, represents another modern change in the Insular Cases doctrine, though one that pre-dates Verdugo. See Torres v. Puerto Rico, 442 U.S. 465, 470–71 (1979) (inquiring specifically into whether Fourth Amendment should be applicable to Puerto Rico); King v. Morton, 520 F.2d 1140, 1147–48 (1975) (remanding for determination of whether local conditions made trial by jury impracticable and anomalous in American Samoa); King v. Andrus, 452 F. Supp. 11 (D.D.C. 1977) (concluding on remand that it would not); cf. Commonwealth of Northern Mariana Islands v. Atalig, 723 F.2d 682 (9th Cir. 1984) (upholding rejection of trial by jury in CNMI courts, asserting rather than explaining that local conditions justified this).

51. 958 F.2d at 1460.

2. Lower courts have varied in their reaction to the Verdugo decision’s emphasis on the concurrences in Reid v. Covert, which would call for a contraction of the extraterritorial rights of U.S. citizens. A divided panel of the Ninth Circuit held in United States v. Barona that extraterritorial searches of U.S. citizens conducted as joint ventures with foreign officials need not be supported by probable cause.53 In contrast, a Third Circuit panel assumed that the Fourth Amendment continues to apply fully to citizens abroad, on the ground that only a plurality of the Supreme Court—not including Justice Kennedy—indicated otherwise in Verdugo.54 In his widely noted 2000 decision in the embassy bombings trial symbolically captioned United States v. Bin Laden, Judge Leonard Sand observed that the opinions in Verdugo cast doubt on the applicability of the Warrant Clause to citizens abroad, and he crafted an exception for overseas searches conducted primarily for purposes of gathering foreign intelligence.55

3. The inconsistent suggestions in Chief Justice Rehnquist’s opinion in Verdugo that foreign nationals without a significant voluntary connection to the United States may not be entitled to any constitutional rights even in the United States have been repeatedly rejected by lower courts conducting trials of defendants charged with extraterritorial crimes. Like Verdugo-Urquidez himself, later defendants have received the protection of the Bill of Rights with regard to their Article III trials. Another influential ruling by Judge Sand in the embassy bombings case held that Miranda rights limit the admissibility of confessions produced by U.S. agents’ interrogations of foreign nationals in foreign custody abroad;56 at the same time, Sand held that the Miranda rules must be adjusted in the context of foreign custody to reflect accurately local limitations on access to counsel.57

4. Some lower courts, however, rejected the global due process approach in favor of Rehnquist’s view that most foreign nationals have no constitutional

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54. United States v. Boynes, 149 F.3d 208, 211 n.3 (3d Cir. 1998).
57. Id. at 185-89. The Second Circuit, affirming the embassy bombing convictions after the Boumediene decision, in the Terrorist Bombings of U.S. Embassies case, that the Warrant Clause of the Fourth Amendment does not apply extraterritorially, even as to U.S. citizens, although the requirement of reasonableness does.
rights while they remain abroad. The D.C. Circuit in particular enthusiastically expounded the theory that foreign persons without “presence or property” in the United States are not entitled to the protection of the due process clause. 58 That court took this argument to its logical extreme in 2000, holding that the due process clause afforded a U.S. citizen’s foreign husband no protection against torture by U.S. agents in Guatemala. 59

The contradiction between Rehnquist’s Hobbesian argument and the treatment of criminal defendants by Article III courts has become concrete and visible in the legal struggle over military trials at Guantanamo (which, however, should not be considered extraterritorial in the context of applying constitutional rights). 60 If the Executive can arrest people anywhere in the world and transport them thousands of miles to another extraterritorial location for trial and execution without constitutional constraint, but must observe the Constitution as written at all trials on the mainland, then the normativity of the Constitution operates at the whim of the Executive. Justice O’Connor rightly characterized such a possibility as “perverse” in Hamdi v. Rumsfeld; 61 she was writing in the context of citizens, but the label applies equally to the broader context.

5. Has Supreme Court methodology regarding the relationship between the Bill of Rights and the Fourteenth Amendment strengthened the foundation of the global due process approach? Perhaps not much has changed since 1990 in that regard. The selective incorporation of the Bill of Rights into the Fourteenth Amendment clause by clause remains dominant; Hugo Black’s total incorporation approach has made no headway among the Justices, and there has even been some talk of disincorporating a clause (the Establishment Clause). 62 Disputes over the doctrine of substantive due process have continued, but the Court does not treat the selective incorporation of the Bill of Rights as exhausting the substantive content of the due process clause of the Fourteenth Amendment. It still employs the discretionary judgment that Black criticized in identifying the rights protected by that doctrine. 63

6. Some minor analogical support may also be derived from the Supreme


60. See Rasul v. Bush, 542 U.S. at 487 (“Guantanamo Bay is in every practical respect a United States territory.”) (Kennedy, J., concurring in the judgment); Gerald L. Neuman, Closing the Guantanamo Loophole, 50 Loyola L. Rev. 1 (2004) (analyzing the status of Guantanamo, prior to the Rasul decision); but see infra Epilogue, (discussing how the Boumediene decision treated Guantanamo within an extraterritorial framework).


Court’s 1998 decision in *United States v. Balsys*, which construed the privilege against self-incrimination as inapplicable where the only potential self-incrimination would involve prosecution in a foreign country. (Balsys was a resident alien, but the Court made clear that the interpretation applies equally to citizens.) Among other considerations, the Court weighed the costs and benefits of applying the privilege to foreign incrimination, and expressed concern that the administration of justice in the United States would suffer because the U.S. government had no power to grant immunity from the use of compelled testimony in a foreign criminal trial. The Court noted that the privilege against self-incrimination was not applied under the domestic law of all foreign countries, and that international law did not require them to apply it (or did so with exceptions). As a result, the ultimate benefit to the individual of enforcing the privilege was uncertain because the foreign government might later compel the testimony itself. The Court expressed discomfort with the idea of judicially imposing a rule that would require the U.S. government to negotiate immunization arrangements with foreign governments. At the same time, however, the Court left open the possibility that a denser network of international coordination in criminal prosecution might require a different interpretation of the privilege. Justice Stevens, concurring, expressed concern that a contrary rule would “confer power on foreign governments to impair the administration of justice in this country” by manipulating the consequences of testimony; he recognized that the Court itself could “craft exceptions” to prevent this, but insisted that “it seems far wiser to adhere to a clear limitation on the coverage of the Fifth Amendment.” Justice Stevens’ express preference for resolving the issue by a bright line rule rather than examining each situation also informed the majority’s analysis.

*Balsys* thus declined to extend the content of a U.S. constitutional right, even within the United States, because of divergence between U.S. and foreign law and the consequences that interaction with foreign governments might have for U.S. law enforcement. In that sense, the categorical denial of the applicability of the privilege to transnational self-incrimination paralleled Justice Kennedy’s categorical denial of the applicability of the Warrant Clause to transnational searches of nonresident foreign nationals’ property

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65. Justice Souter’s Opinion of the Court also invoked textual/structural arguments and ambiguous historical evidence in favor of this result, which Justices Scalia and Thomas found sufficient, before turning to the considerations discussed above.
66. 524 U.S. at 694, 697-98.
67. 524 U.S. at 697.
68. 524 U.S. at 695 n.16.
69. 524 U.S. at 697.
70. 524 U.S. at 696-97.
71. 524 U.S. at 698-99. The Court described intensified cooperation as effectively making the foreign prosecutor an agent of the US government.
72. 524 U.S. at 701 (Stevens, J., concurring).
under the global due process approach in Verdugo.73

7. The argument for the global due process approach has probably been strengthened by the militarization of counterterrorism policy since 2001. One possible disadvantage of the mutuality approach is its employment of a sharp dichotomy between situations in which the government imposes legal obligations on foreign nationals and situations in which it acts nonjuristically, such as foreign surveillance and war. That important distinction, like other legal distinctions, had a contestable boundary. The armed conflict between the United States and Al Qaeda has made this contestable boundary highly salient and possibly momentous in consequences. (Meanwhile, to the discomfort of the Bush administration, international law over the course of the 1990s eroded this distinction by deepening the juridification of the law of armed conflict, expanding the role of international criminal justice in its implementation, and strengthening the connections between human rights law and the law of armed conflict.)

From the early twenty-first century perspective, a global due process approach may have two contrasting advantages. First, depending on how the approach is defined, global due process may depend less on the distinction between law enforcement and armed conflict, or may make the distinction a matter of degree rather than a dispositive threshold.74 Second, global due process may afford greater flexibility in calibrating the level of constitutional protection to the exigencies of the circumstances. In other words, global due process may offer either more protection or less protection than mutuality in a given instance. (Again, current uncertainty about the specification of the methodology makes prediction more difficult.)

VI. COMPARATIVE INSIGHTS REGARDING GLOBAL DUE PROCESS

A number of comparative developments in foreign law and international law, before or since the Verdugo decision, may provide additional insights into the justification and the content of the global due process approach. The examples given here, regarding adaptation of rights systems for the purpose of cooperation in Europe, adaptation of rights in situations of conflict, and European responses to the problem of extraregional diversity, do not point in a single direction, but rather indicate possible alternatives in the further specification of global due process methodology.

A. Adaptation for Cooperation

One basic concern underlying the global due process approach is that every nation must operate in a world in which other states have different

73. Justice Kennedy joined the majority opinion in Balsys in full.
74. For example, global due process might make it unnecessary to categorize punishment of enemy combatants for war crimes either as law enforcement or as war, but might treat it as both.
Conceptions of individual rights (or none at all). This concern has also been raised within national constitutions abroad, and within human rights regimes. One response has been to permit a limited adjustment of local rights to the needs of international cooperation, recognizing that a transnational organization cannot comply with all the rights norms of all its members simultaneously.

The *Solange* jurisprudence of the Federal Constitutional Court of Germany provides one leading example of this approach. In the early stages of the European Union, the Constitutional Court found that the EU lacked standards and mechanisms for the protection of individual rights, and that so long as (*solange*) that absence persisted, actions of German officials compelled by EU commands should be reviewed for compliance with individual rights under the German Constitution. Partly as a result of this pressure, the European Court of Justice (ECJ) developed a doctrine of implied individual rights constraints derived from the European human rights convention and the constitutional traditions of the member states, a reform that later treaty amendments have extended. In 1986, the Constitutional Court responded with its *Solange II* decision, holding that so long as the EU mechanisms provided a level of individual rights protection “substantially similar to” that of the German constitution, the FCC would no longer review official acts required by EU law for their consistency with German constitutional rights. The *Solange* doctrine goes further in some respects than the global due process approach, in that it permits a limited displacement of constitutional rights standards even within the national territory. At the same time it is much narrower, focusing on the EU context. But it expresses the important insight that in an interdependent world, strict compliance with the positive embodiments of human rights in diverse national constitutions may pose an unjustified barrier to international cooperation, and that an accommodation may provide adequate alternative protection.

Other European countries have adopted their own versions of *Solange II*. In 2004, the French Constitutional Council held that when French statutes merely transposed EU directives into French law as required, the Constitutional Council would not review the statutes for their consistency with individual rights guaranteed by both the French Constitution and EU law. Such rights are protected by the ECJ, although its interpretation of those

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75. The name “European Union” was not adopted until the early 1990s, but for ease of discussion I will apply it anachronistically. Also, although the discussion in text focuses on the rights dimension of the *Solange* jurisprudence, the Constitutional Court addressed the need for democratic participation in the European lawmaking process as well.

76. 37 BVerfGE 271, [1974] 2 CMLR 540 (1974) (*Solange I*). I use the term “individual rights” rather than “fundamental rights” to avoid confusion with the notion of a limited subset of “fundamental rights” under the Insular Cases doctrine.

77. 73 BVerfGE 339, [1987] 3 CMLR 225 (1986) (*Solange II*).

rights may differ from the interpretation prevailing in French constitutional law. The Constitutional Council has reserved, however, its responsibility to review such statutes for compliance with distinctively French constitutional principles, those “inherent to the constitutional identity of France,” such as laïcité (the French version of separation of church and state).

The European Court of Human Rights recently articulated yet another kind of Solange standard, designed to manage its collegial relationship with the ECJ in a period when the European Union is not yet formally a party to the European human rights convention. The European Court of Human Rights held that a state would be presumed not to have violated a human right if its action was dictated by EU law, so long as the EU continued to provide protection for human rights, “as regards both the substantive guarantees offered and the mechanisms controlling their observance, in a manner which can be considered at least equivalent to that for which the Convention provides.” The Court explained that “equivalent” should be understood as “comparable,” not “identical,” because “any requirement that the organisation’s protection be ‘identical’ could run counter to the interest of international co-operation pursued.” The Court then added that the presumption could be rebutted in a specific case by showing that the protection afforded to the right was “manifestly deficient,” a highly deferential standard.

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The German, French, and European doctrines illustrate three different strategies for facilitating a system of mutually beneficial transnational cooperation through institutional modification of their respective regimes for the protection of individual rights. The ECHR’s Bosphorus decision offers an institutional accommodation to the possibility of divergent application of the “same” rights by the ECJ under conditions in which the EU system formally recognizes the “same” rights as the ECHR (as well as others), and in which the ECJ attempts to coordinate its interpretation of those rights with the case law of the ECHR. The German Solange II approach takes into account the fact that the same suprapositive rights are likely to receive

80. Bosphorus Hava Yollari Turizm v. Ireland, 2005-VI Eur. Ct. H.R., App. No. 45036/98 (Grand Chamber), para. 155. The standard described in the text was not limited formally to the EU, but was stated in a generality that could potentially apply to other international organizations, in the unlikely event that they could meet its criteria.
81. Id. para. 156. Though deferential, this opportunity for review is more than the German Solange II doctrine provides in individual cases. Several concurring judges in the Bosphorus case criticized the standard adopted by the majority as too deferential.
82. Id. Th. “same” in scare quotes, because until the EU becomes a party to the European human rights convention, the rights recognized by the ECJ are local copies of the convention rights in a different positive legal system, with a different scope of application, and subject to different competing influences in their interpretation and application.
different positive embodiments in different legal regimes, and it appears to accept the displacement of the national version of those rights within the sphere of EU law on condition that a roughly equivalent package of individual rights is sufficiently protected by the EU regime. That approach does not require that each suprapositive right protected in German constitutional law be equivalently protected in the EU system. The recent French approach, on the other hand, operates more selectively than the German approach. It accommodates the differential positivization of suprapositive rights by deferring to the ECJ’s interpretation and application of rights protected in both systems in sufficiently similar terms, while reserving the power to enforce distinctive French rights, with particular emphasis on those that are important to the national constitutional identity.

B. Adaptation to Conflict

While the Solange jurisprudence addresses the effect of varying constitutional rules on international cooperation, another concern relates to the effect of varying constitutional rules on international rivalry or hostility. Especially in contexts of armed conflict—assuming that the global due process approach makes any constitutional rights apply extraterritorially in that context—Justices may hesitate to declare the United States to be unilaterally bound by rules that do not bind its adversary or that its adversary openly violates.

Traditionally the law of war involved rules of reciprocity that limited states’ obligations to those observed by their adversaries. During the late twentieth century, the law of armed conflict lost much of its reciprocal character as regulating relationships between states as collectivities and took on more of an objective character as protecting the rights or interests of human beings. A high proportion of the treaty norms (though not all) have come to be regarded as customary international law binding on all states. Treaties and customary law have also greatly reduced the scope of the reciprocity-based remedy of reprisal—the justified violation of a norm by one side in response to a violation by the other side, for the purpose of discouraging further violations. An increasing body of law governs internal armed conflicts, waged between governments and non-state entities that are not parties to treaties; the primary impact of such conflicts falls within the state’s own territory and on its own population, to whom it already owes obligations under international human rights law.

The infusion of human rights approaches into the law of armed conflict has

85. See id. at 244. Universality could be regarded as a form of reciprocity, although the emphasis and effect may be different.
87. The rules of internal armed conflict bind both the state and the insurgent, by virtue of the state’s sovereignty over its nationals and its territory, although insurgents sometimes deny this.
been accompanied by increasing assertion that the law of human rights also operates in the context of armed conflict, even outside a state’s own territory. The International Court of Justice has expressed this view in two advisory opinions, and more recently in a contentious case between the Democratic Republic of the Congo and Uganda. Some human rights are subject to derogation in wartime, and some human rights provisions should receive their detailed meaning in wartime from the *lex specialis* of the law of armed conflict. But states’ exercise of jurisdiction outside their own territory is constrained by human rights obligations.

The ICJ’s advisory opinion on the Wall agreed with the U.N. Human Rights Committee’s current interpretation of the International Covenant on Civil and Political Rights as imposing obligations on states when they exercise jurisdiction, within or outside their territory. The United States has contested this interpretation, which reads the language of Article 2(1) of the Covenant, “all individuals within its territory and subject to its jurisdiction,” disjunctively rather than cumulatively. The Human Rights Committee explained in a recent General Comment:

> States Parties are required by article 2, paragraph 1, to respect and to ensure the Covenant rights to all persons who may be within their territory and to all persons subject to their jurisdiction. This means that a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party . . . . This principle also applies to those within the power or effective control of the forces of a State Party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained, such as forces constituting a national contingent of a State Party assigned to an international peace-keeping or peace-enforcement operation.

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88. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, 2004 I.C.J. Rep. 136 (July 9); Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. Rep. 226 (July 8).
91. Legal Consequences of the Construction of a Wall, 2004 I.C.J. Rep. at 178-80, para. 108-11. The ICJ reached a more limited conclusion with regard to the International Covenant on Economic, Social and Cultural Rights, which it described as guaranteeing “rights which are essentially territorial,” but which are protected in areas where the state “exercises territorial jurisdiction”—including areas under military occupation—as well as in the state’s own sovereign territory. The ICJ found the extraterritorial application of the Convention on the Rights of the Child straightforward, because under that treaty states undertook obligations “to each child within their jurisdiction.”
Under this view, neither the nationality of the individual nor the location of the action could suffice to make a state’s human rights obligations inapplicable. Rather, the exercise of jurisdiction, explained in terms of power or effective control over the individual, expands the scope of the state’s obligations beyond its territory (subject to the possibility of necessary derogation for those rights that are derogable).

This international interpretation of the Covenant thus resembles the European Court’s interpretation of its own human rights convention in Banković (mentioned earlier), based on the clearer language of the European convention. It is uncertain, however, whether the criteria of exercise of jurisdiction intended by the ICJ, the Human Rights Committee, and the European Court are the same. The Banković decision treated the bombardment of Belgrade as not amounting to an exercise of jurisdiction; the view of the ICJ and the Human Rights Committee that nuclear weapons implicate the right to life appears to rest on a different assumption.

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The expansion of the application of human rights treaties in situations of extraterritorial armed conflict, and especially in situations of belligerent occupation, attempts to serve the suprapositive values underlying those treaties, perhaps more broadly than a consensually based interpretation would permit. The positive expression of the norms in the treaty may not coincide with their underlying suprapositive justification, but it may come closer than having no rule at all. Simultaneously modifying the content of the treaty norms in this context by importing relevant rules (if any exist) from the law of armed conflict, by means of lex specialis or similar arguments, could be justified on several grounds. In consensual terms, it may hold states to standards that they have already accepted for the situation within a different regime; in institutional terms, it may provide more determinate content that strikes a balance of interests tailored to the particularities of the situation. From the suprapositive perspective, one would ask whether the balance struck by the existing law of armed conflict better approximates the duties that states should owe to individuals. The answer to that question may vary from rule to rule, and in any case suprapositive considerations may be outweighed in practice by consensual or institutional considerations. One additional institutional consideration is how the operation of the treaty regime itself would be affected by the attempt to extend it into situations of belligerent occupation, or more active armed conflict.

94. See Part IV.
95. See Human Rights Committee, General Comment 14, Right to Life and Nuclear Weapons (1984); Nuclear Weapons, 1996 I.C.J. Rep. at 240 para. 25. The ICJ’s discussion was very brief, primarily emphasizing that any human rights standards would be drawn from the law of armed conflict (which unquestionably does apply extraterritorially).
C. Banković and Extraregional Diversity

A different aspect of the Banković decision should be discussed separately. In the course of distinguishing prior cases, the European Court of Human Rights identified another factor that supported its conclusion that the European Convention did not apply to the bombardment: the “essentially regional vocation of the Convention system.”96 Yugoslavia was not a member of the Council of Europe, the regional organization under whose auspices the Court operates, and not a party to the Convention. It thus did not fall within the “legal space (espace juridique) of the contracting states.” The situation was thus unlike a contracting state’s bombing of its own territory, or the use of force by one contracting state against another (as in cases involving Turkey’s occupation of northern Cyprus). In the latter situation, a broader concept of jurisdiction was necessary to prevent the use of force from ousting the protection of the Convention from a territory that it normally covered. The Court was not saying that a state would never be regarded as exercising jurisdiction by its actions in a non-European state, but rather that the criteria were stricter.97

This element of the Banković decision has received much criticism, but also some defense. The recent decision of the House of Lords in Secretary of Defense v. Al Skeini,98 applied this distinction with regard to actions of UK armed forces in Iraq. Iraqi nationals shot erroneously by British soldiers in the insecure environment of Basra were not “within the jurisdiction” of the United Kingdom under Banković, and no obligation to investigate the killings arose under the European Convention. The government conceded, however, that an Iraqi national detained at a British military base in Basra, who allegedly died as a result of beatings, was “within the jurisdiction.”

In rejecting the other claims, two Law Lords discussed at some length why the application of the European Convention outside Europe should be exceptional.99 The reasons were linked to the European Court’s insistence in Banković that the Convention should not be disassembled and applied only partially in external locations. First, interpretive practice under the European Convention gave human rights more detailed meaning in terms of European values. Lord Rodger wrote:

The essentially regional nature of the Convention is relevant to the way that the court operates. It has judges elected from all the contracting states, not from anywhere else. The judges purport to interpret and

96. Banković, para. 78.
97. The Court has, for example, regarded the arrest of a Kurdish rebel leader in Kenya, followed by his return to Turkey for trial, as an extraterritorial exercise of jurisdiction. See Öcalan v. Turkey, 2005-IV Eur. Ct. H.R., App. No. 46221/99 (Grand Chamber), para. 91.
99. [2007] UKHL 26 para. 34 (Lord Rodger); id. at para. 100 (Lord Brown).
apply the various rights in the Convention in accordance with what they conceive to be developments in prevailing attitudes in the contracting states. This is obvious from the court’s jurisprudence on such matters as the death penalty, sex discrimination, homosexuality and transsexuals. The result is a body of law which may reflect the values of the contracting states, but which most certainly does not reflect those in many other parts of the world. So 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. Hence, as noted in Bankovic, 11 BHRC 435, 453-454, para 80, the court had “so far” recognised jurisdiction based on effective control only in the case of territory which would normally be covered by the Convention. If it went further, the court would run the risk not only of colliding with the jurisdiction of other human rights bodies but of being accused of human rights imperialism.100

Second, the European Convention obliges states to secure rights, and not merely to refrain from violating rights; the litigation itself involved a positive duty of the state to investigate killings in order to determine who was responsible and whether they involved excessive use of force. As a result, Convention obligations “arise only where the contracting state has such effective control of the territory of another state that it could secure to everyone in the territory all the rights and freedoms” that the Convention protects.101

This second argument (about positive obligations) appears to be overstated. The European Court does recognize exceptional situations where the Convention applies extraterritorially, in territory not under the state’s effective control. Moreover, the Lords may not have taken sufficient account of the Ilasçu case, which modified the reasoning of Banković by reducing the positive obligations of a state that was not in effective control of a portion of its territory.102 But it is still significant that outside Europe action would be taking place in territory where the local sovereign did not have the same positive obligations, and where the European state’s authority was restricted.

It should be observed that the first argument (about extraregional diversity) depends substantially upon the distinction between a regional human rights system and a “universal” global one. The interpretations of the ICJ and the Human Rights Committee discussed in the previous section concerned human rights treaties that were global in scope and very widely (though not

100.  Id. at para. 78 (Lord Rodger); see also id. at para. 129 (Lord Brown) (“a state . . . is unlikely in any event to find certain of the Convention rights it is bound to secure reconcilable with the customs of the resident population”).

101.  Id. at para. 79 (Lord Rodger); see also id. at para. 129 (Lord Brown) (“except where a state really does have effective control of territory, it cannot hope to secure Convention rights within that territory”).

102. See supra note 46. Lord Brown did cite Ilasçu, but quickly distinguished it on the ground that Moldova’s (in)action was not extraterritorial. [2007] UKHL at para. 114.
The arguments for the regional vocation of the European convention rest partly on the claimed indivisibility of the treaty, which does not permit the judges to distinguish between obligations of universal character and obligations that should be limited (absent exceptional circumstances) to the territory of the Council of Europe. The claim of indivisibility could be viewed as a fallacy, or could be justified in consensual or institutional terms: the parties to the convention did not authorize the Court to enforce the obligations unequally, or the Court has difficulty finding a methodology for

103. In the *Congo* case, both Uganda and the Democratic Republic of the Congo were parties to the relevant treaties; in the advisory opinion on the wall, both Israel and Jordan were parties, although Palestine as such was not. However, the United States is not a party to the Convention on the Rights of the Child or the International Covenant on Economic, Social and Cultural Rights, and China is not a party to the International Covenant on Civil and Political Rights.

104. I do not mean to be taking a position here on whether global human rights treaties or their interpretations are actually universal, nor to deny that they are sometimes accused of expressing Western, socialist, or other biases. The point is that the system views itself as universal.

105. The second concern expressed in *Al Skeini*, about imposing extraterritorial positive obligations where the state lacks the capacity to fulfill them, could remain relevant at the global level, if it were not neutralized by taking the state’s capacity to act into account in gauging its positive obligations.

The ICJ appears to have addressed this concern in its advisory opinion on the wall, when it maintained that the dual reference to jurisdiction and territory in the Covenant and Civil and Political Rights was “only intended to prevent persons residing abroad from asserting, vis-à-vis their State of origin, rights that do not fall within the competence of that State, but of that of the State of residence.” Legal Consequences of the Construction of a Wall, 2004 I.C.J. Rep. at 179, para. 109.

106. Moreover, if the set of *jus cogens* human rights norms includes only negative obligations (that is uncertain), the concern about imposing extraterritorial positive obligations would not arise.
doing so.\textsuperscript{107}

Another important element is the claim of nonuniversality of European human rights norms, which could be understood in suprapositive, consensual, or institutional terms. Lord Rodger may have been expressing moral relativism in \textit{Al Skeini}, arguing that European human rights values are normative for Europe but not for other parts of the world; or he could be interpreted as arguing consensually, that Europeans have arrived at a specific understanding of their human rights that differs from the perceptions prevailing in other regions. In some cases one could also argue institutionally, that the particular form of a human rights provision could operate successfully in one region but not another.

The concern about extraterritorial imposition of positive duties has both suprapositive and institutional character. From both perspectives, what a state owes should depend upon what it can deliver.

\textbf{VII. Further specifying global due process}

As the foregoing may demonstrate, the argument that the Bill of Rights should not fully apply to extraterritorial government action disadvantaging U.S. citizens or foreign nationals does not necessarily imply indifference to U.S. constitutional values or disrespect for human rights. There are resources both within U.S. constitutional tradition and within foreign constitutional and human rights regimes that aid in justifying the global due process approach. The Insular Cases doctrine stands at the intersection of those two lines of argument: the original Insular methodology at the beginning of the twentieth century relied on international law and European practice to support partial compliance with the Bill of Rights in overseas territories, and now that the Insular approach is itself embedded in constitutional tradition, courts continue to refer to international practice as part of their inquiry into which strands of rights should be enforced as fundamental in particular overseas territories.

The difficult task is to specify the global due process methodology further. In this section, after a brief examination of Justice Harlan’s terminology, I will discuss some alternatives, which should not necessarily be understood as mutually exclusive.

1. According to Justices Harlan and Kennedy, one goal of the global due process approach is to avoid the extraterritorial application of constitutional provisions in circumstances that would make compliance “impracticable and

\textsuperscript{107} Both of these propositions might be doubted, and seem to be in some tension with other aspects of the Court’s jurisprudence. For example, the Court’s case law prohibits extradition or deportation to a foreign country (including one outside Europe) where the individual faces the likely violation of certain rights, but not others. \textit{See e.g.}, Mamatkulov and Askarov v. Turkey, 2005-I Eur. Ct. H.R., App. No. 46827/99; Al-Moayad v. Germany, App. No. 35865/03 (Eur. Ct. H.R. 2007) (admissibility decision).
anomalous.” (Harlan also wrote “impractical.”) Although this phrase has been repeated in the lower courts, its meaning is unclear. Harlan’s opinion in *Reid v. Covert* gives some indication of how he meant this phrase, not as a two-pronged test with independent elements, but as considerations in a contextual examination.

Enforcing a constitutional right without modification abroad might be “impracticable” because compliance is literally impossible, or because it imposes tolerable costs domestically but vastly greater costs in foreign territory. Harlan concluded in *Reid v. Covert* that citizens’ right to jury trial should be modified, not wholly suppressed, in extraterritorial contexts, and should be limited to capital cases where the consequences to the individual could be extreme enough to justify the costs.

Enforcing a constitutional right without modification abroad might be “anomalous” in different ways. To some extent, Harlan appeared to suggest that impracticability could make compliance with a right anomalous. But he also indicated that a right could be culturally anomalous because of its incongruity with local customs, a traditional claim of the Insular Cases doctrine (and therefore applicable to citizens as well as others). Moreover, Harlan’s sense of the anomalous might also be seen in some of the negative consequences he anticipated if the government were deprived of the option of nonjury trials abroad, such as trials in foreign courts that were “no more palatable,” and the “undesirability of foreign police carrying out investigations in our military installations abroad.”

Finally, it should be emphasized that Kennedy’s concurrence in *Verdugo* lends no support to the idea that the extraterritorial application of a constitutional right to a nonresident foreign national would be anomalous per se. Kennedy rejected the solipsistic social contract reasoning that would limit constitutional rights to citizens on the theory that they created the Constitution for themselves alone. Instead, he invoked Harlan’s concurrence in

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108. By “costs,” I mean negative consequences, not limited to monetary costs. Harlan discussed the difficulty of organizing a jury trial in foreign territory, even if the local sovereign permitted it, the difficulty of transporting defendants and evidence back to the United States for trial, and the difficulty of persuading foreign witnesses to travel to the United States to testify, among other disadvantages. 354 U.S. at 76 n.12.

The characterization of alternatives as “practicable” or “impracticable” in Supreme Court opinions on constitutional law is extremely common, but it may deserve mention that Justice Field had stated that applying the Bill of Rights to consular courts would make law enforcement abroad “impracticable from the impossibility of obtaining a competent grand or petit jury.” In re Ross, 140 U.S. 453, 464 (1891).

109. 354 U.S. at 75-76 (alluding to Balzac v. Porto Rico, 258 U.S. 298 (1922)). For present purposes the relevant question is not whether jury trial actually was culturally incongruous in Puerto Rico at the time Balzac’s trial, but whether Harlan accepted that understanding of the decision.

I note as a curiosity that the one previous Supreme Court decision uniting the adjectives “impracticable” and “anomalous” in a single sentence was Holcombe v. McKusick, 61 U.S. (20 How.) 552, 555 (1858), objecting that the procedure employed by the Minnesota Territory’s courts was “anomalous, and involve[d] the absurd and impracticable experiment of attempting to administer common-law remedies under civil-law modes of proceedings.”

110. 354 U.S. at 76 n.12.
support of a differentiated inquiry into “what constitutional standards apply when the Government acts, in reference to an alien, within its sphere of foreign operations.”

2. One possible component of the global due process inquiry would be a kind of ad hoc empirical pragmatism. Harlan’s own analysis in *Reid v. Covert* involved a highly case-specific investigation of consequences, detailing the costs of recognizing the extraterritorial right and then placing the individual defendants within the narrowly defined class of capital cases against civilian dependants of soldiers, whose number “would appear to be so negligible that the practical problems of affording the defendant a civilian trial would not present insuperable problems.”

Impracticability could arise from the absence of supporting institutions abroad that are necessary to the implementation of the right. The right might have been phrased, or interpreted, as an absolute standard that leaves no room for taking into account higher burdens of compliance in foreign territory. Even a flexible domestic standard might be impracticable to apply abroad (as Kennedy suggested in *Verdugo*), if the evaluation would be too unpredictable or dependent on information that was too difficult to obtain.

The conclusion of impracticability does not necessarily dismiss the relevance of the underlying suprapositive norm to the extraterritorial context. Rather, the institutional design of the constitutional provision or its interpretation may have presupposed conditions that are satisfied domestically but not in some or all foreign locations. The solution may be to apply the right differently abroad, if the problem of impracticability can be avoided, or to limit the right to U.S. territory.

3. Another component would focus on the problem of cultural variation and the possible anomaly of extending a U.S. constitutional right to foreign territory where a different version of the right (or none at all) prevails.

Recalling the discussion of *Banković, Al Skeini*, and the ICJ cases in Part VI(3) above, we saw the concern expressed in Europe that extraregional enforcement of the regional version of the right would be inappropriate, possibly because it would impose undesired rights conceptions on foreign populations, or because it would place excessive burdens on the state for

111. 494 U.S. at 277.
112. 354 U.S. at 78.
113. The variants of the Solange approach discussed in Part VI(1) above, suggest that a national constitutional system may choose to restrain its application of its own particular understandings of rights in order to further cooperation with other states that employ different understandings, even within its own territory. That approach, however, required the guaranteed application of a common standard of rights in the place of the national rights, and the German version of Solange required substantial similarity between the package of transnational rights and the rights guaranteed by the national constitution. The United States does not participate in a strongly enforced transnational system comparable to the European Union, so the analogy could operate only a fairly high level of abstraction. If the analogy were pursued more fully, it would require a quite extensive set of extraterritorial rights.
positive protection of the right. The latter concern has considerably less force
in the context of U.S. constitutionalism, which recognizes far fewer rights to
affirmative government services even for citizens within the national territ-
ory.\textsuperscript{114} The former concern is the salient one, that the United States may
protect rights that other countries do not believe in, or that it may have chosen
for consensual or institutional reasons to protect them more strongly.

By rejecting the mutuality approach, which proposes the nonselective
extension of the Bill of Rights abroad, the global due process approach also
rejects the indivisibility assumption of \textit{Banković}. It is therefore able to
respond to the concern about cultural variation by choosing which rights, or
even which strands of rights,\textsuperscript{115} can be applied abroad without risk of
anomaly. In theory this inquiry could be conducted country by country, as the
\textit{Insular Cases} doctrine now adapts to particular territories, but more likely
the Court would treat all generic countries uniformly, as it did in \textit{Verdugo}.\textsuperscript{116}

The primary question would then be whether a right already protected by the
U.S. Constitution domestically was also globally protected. An approximate
answer could be found, for example, in the Covenant on Civil and Political
Rights (which is the principal international human rights instrument that
addresses the same types of rights as the U.S. Constitution). If the answer is
affirmative, and if no serious issues of impracticability arise (such as the
dependence of the right on supporting institutions that cannot be maintained
abroad), then the right should be afforded extraterritorially to foreign
nationals as well as citizens.\textsuperscript{117} If a right with the same suprapositive basis is
globally protected, but is more narrowly defined or subject to more extensive
limitation than its U.S. counterpart, to such a degree as to make enforcement
of the usual domestic content of the right abroad appear excessive, then the
Court might choose to afford a lesser measure of U.S. constitutional protec-

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\textsuperscript{114}. See DeShaney \textit{v. Winnebago County Dept. of Social Services}, 489 U.S. 189 (1989).
\textit{DeShaney} did, however, recognize affirmative rights to services for persons deprived of liberty,
which may be quite relevant in some extraterritorial contexts.

\textsuperscript{115}. Compare the discussion of the unbundling of the equal protection clause in the overseas
territories, in Part V(1) above.

\textsuperscript{116}. Again, by “generic countries” I mean the typical case of independent foreign countries,
leaving aside for possible special treatment countries in atypical power relations with the United
States, whether pacific or hostile.

\textsuperscript{117}. Given the text of the CCPR, shared rights that would be candidates to be considered for
possible extraterritorial extension from this perspective would include versions of First Amendment
rights to free exercise of religion (but not the Establishment Clause) (CCPR art. 18), free expression
and association (arts. 19, 22), and perhaps freedom of peaceful assembly (art. 21); of Fifth
Amendment-based limits on double jeopardy (art. 14(7)), self-incrimination (art. 14(3)(g)), rights to
fair hearing (arts. 13, 14), equal protection (art. 26), and substantive due process rights to bodily
integrity and to protection of the family (but not the right to abortion) (arts. 7, 10, 23); of Sixth
Amendment rights such as speedy and public trial (not necessarily by jury), notice of charges,
confrontation of witnesses, compulsory process and assistance of counsel (art. 14(3)); of Eighth
Amendment rights to bail and against cruel and unusual punishment (arts. 9(3), 7, 10); of Thirteenth
Amendment rights against involuntary servitude (art. 8); and of Article I rights to habeas corpus and
against ex post facto laws (arts. 9(4), 15).

Extension of rights to privacy derived from the Third and Fourth Amendments (see CCPR art. 17)
has presumably already been rejected as impracticable under \textit{Verdugo}. 
tion in foreign cases.

I believe it is unlikely at the present stage of U.S. constitutional history that the Supreme Court would announce a methodology in which comparison with a particular international instrument such as the CCPR would operate as sufficient justification for the application of a constitutional right. Rather, the function served by an external benchmark would be as part of the response to the concern that the Court was requiring the United States to comply unilaterally with extraterritorial rights to which the rest of the world does not adhere.

The use of comparisons with an international standard like the Covenant on Civil and Political Rights to reduce the level of U.S. constitutional protection abroad might be criticized by some authors for permitting external sources to influence U.S. constitutional interpretation. But as we have seen, the Insular Cases doctrine and other decisions concerning extraterritorial government action—including both the Rehnquist and Kennedy opinions in Verdugo—already take international practice into account in defining U.S. constitutional obligations. The voluntary consideration of external benchmarks in determining the best manner of implementing constitutional commands has a lengthy history in the United States. Indeed, since the 1950s, it has been the liberal wing of the Supreme Court that has sought to apply U.S. constitutional values without modification in extraterritorial situations, and the conservative wing of the Court that has departed from U.S. exceptionalism to accommodate the government’s need “to ‘function[ ] effectively in the company of sovereign nations.’”118

A different criticism of the inquiry outlined above might assert that the Covenant on Civil and Political Rights provides the wrong external benchmark. As previously mentioned, ratification of the CCPR is not universal, and compliance is even less so. If the anomaly that we seek to avoid is treating citizens of the least free nations more favorably than their own governments do, then a standard corresponding to the lesser of the U.S. Constitution and the CCPR is still too high. But it is not clear why the worst governments should inspire U.S. emulation under the global due process approach. Its predecessor, the Insular Cases doctrine, promised respect for rights that “are the basis of all free government.”119

Alternatively, the reference point could be provided by the minimal but not abysmal standard of jus cogens violations of human rights. All states are bound to that level of human rights de jure, even if some violate it de facto. Again, the result of examining jus cogens would be to apply those U.S. constitutional rights that also amount to jus cogens norms—such as prohibi-

tions on slavery, torture, extrajudicial execution, genocide, and perhaps prolong ed arbitrary detention\textsuperscript{120}—in extraterritorial situations, possibly after adjusting the U.S. standard of protection downward for the extraterritorial context.

The purpose of these comparisons would not be to constitutionalize U.S. compliance with international law, but rather to derive information from international law about the circumstances under which the United States can respect its own constitutional principles extraterritorially without creating the hypothesized anomaly.

Another possible objection to the use of the CCPR as benchmark might be that the CCPR presupposes peace, and does not supply the set of international standards for protecting human beings in international armed conflict, when many of its provisions are subject to derogation and to displacement by \textit{lex specialis}.\textsuperscript{121} The response of the global due process approach would be that war is a special case, and that global due process is sufficiently flexible to provide different standards for normal extraterritorial action in generic countries and exceptional extraterritorial actions in hostile ones. Neither Harlan nor Kennedy sought to define rights in extraterritorial law enforcement at the level that would be appropriate for war.\textsuperscript{122}

How the global due process approach would deal with war itself is uncertain. Conceivably one could reason in parallel with the generic case, and apply U.S. constitutional rights extraterritorially to the extent that they are also afforded by the law of armed conflict. What this would actually mean requires further inquiry. Even within U.S. territory, it is doubtful that the Fourth and Fifth Amendments apply to battlefield operations against an invading foreign army.\textsuperscript{123} If they do not, then in that context there is nothing to consider applying abroad. Once enemy soldiers have been captured and reduced to effective control, the situation may change, but the extent of their constitutional rights within U.S. territory has rarely been adjudicated.\textsuperscript{124}

The concern about unilateral enforcement of rules that another country does not comply with, whether or not it is formally bound by them, becomes particularly intense in the context of war. Justice Kennedy argued in \textit{Rasul v.


\textsuperscript{121} The international law concept of derogation should not be misunderstood. Making a right derogable does not license a state to infringe it at will. Rather, derogations are performed under a different set of rules. The situation must be exceptional and the limitations on the right must be strictly required and must comply with other constraints. See CCPR art. 4(1).

\textsuperscript{122} Rehnquist, however, did seek to reduce them to that level.


\textsuperscript{124} Dissenting opinions from \textit{In re Yamashita}, 327 U.S. 1 (1946), did find procedural due process violations in the conduct of a military trial in the Philippines shortly after the Japanese surrender.
Bush that a core of *Johnson v. Eisentrager*\(^\text{125}\) remained valid, and that it indicated a realm of extraterritorial presidential authority over military affairs “where the judicial power may not enter.”\(^\text{126}\) He also observed that the military necessity for detention without proceedings would fade as the detention became prolonged in a location outside the zone of hostilities, and that judicial oversight would become appropriate.\(^\text{127}\) Kennedy was not directly addressing the limits of constitutional protection, but it may be possible that a similar distinction between a purely belligerent phase (to which no constitutional rights apply) and a succeeding rights-constrained phase would inform the methodology of global due process. The dividing line may be drawn at the acquisition of effective control, as the international materials suggest, or it may be drawn at a later point when a more orderly framework of governance is feasible.

Thus, the global due process approach could employ several methods to avoid the unjustified unilateral extension of domestic constitutional norms to foreign nationals abroad. The domestic norms might be applied extraterritorially only to the degree that they do not exceed international human rights standards and are not otherwise impracticable; extraterritorial constitutional rights of foreign nationals might be further limited to the minimally humane set of *jus cogens* norms; and in either case a sphere of armed conflict might be defined in which the rights do not operate as constitutional rules (which to some measure may already be true within U.S. territory).

4. The global due process approach might also seek to avoid a different kind of anomaly. Hugo Black echoed Harlan’s language in *Reid v. Covert*, arguing in response that “in view of our heritage and the history of the adoption of the Constitution and the Bill of Rights, it seems peculiarly anomalous to say that trial before a civilian judge and by an independent jury picked from the common citizenry is not a fundamental right.”\(^\text{128}\) That passage offers a different challenge than the claim of total incorporation. The expressive function of constitutional law may be manifested not only with regard to fundamental values that we now share with other countries, but also with respect to some deeply held commitments that distinguish our own constitutional culture. Global due process may protect those rights as well, at least where it is not too impracticable to do so, even if the local sovereign would not.

\(^{125}\) 339 U.S. 763 (1950). In that decision the majority held that German prisoners convicted of war crimes by military commission in China and held in occupied Germany had no right to habeas corpus; Justice Jackson also asserted that they had no Fifth Amendment rights, at a time when the Court had never held that citizens had extraterritorial constitutional rights, either.


\(^{127}\) Id. at 488. Of course, he was also discussing detention at Guantanamo, which was “in every practical respect a United States territory.” Id. at 487. But I am exploring relevant distinctions here, not making a claim of *stare decisis*.

\(^{128}\) 354 U.S. at 9 (footnote omitted).
Jury trial may not be the best example of such a right.129 Perhaps our high tolerance for disrespectful speech provides a better example. Or our reverence for private property, a right neglected in the global human rights regime.130 Applying those rights extraterritorially would accord with the expectations that our citizens hold toward their own government, and that we may want foreign nationals to hold as well.

This concern for distinctive rights might recall the French version of Solange, discussed in Part VI(1) above. Including this concern in the global due process analysis would operate differently than the French doctrine does, but would similarly serve to preserve the national constitutional identity in the face of the compromises necessitated by transnational cooperation.

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Thus, impracticability, anomalous unilateral extension of rights, and anomalous disrespect for our constitutional identity are all considerations that may inform the methodology of global due process. International standards from the CCPR, *jus cogens*, and the law of armed conflict may help to allay concerns about unilateral restraint. These elements are available to the global due process analysis, but the Court will have to make more choices before we know how it operates.

VIII. EPILOGUE AS CONCLUSION

While this Article was awaiting publication, Justice Kennedy united a majority of the Supreme Court behind his global due process approach, which he referred to as a “functional approach” to the extraterritorial application of constitutional rights, in *Boumediene v. Bush*.131 The Court held that Congress had violated the Habeas Corpus Suspension Clause of Article I, section 9, by denying foreign detainees at the Guantanamo Bay Naval Base access to the writ of habeas corpus without providing an adequate and effective substitute form of judicial review. Although the Court could have written a narrow decision relying on factors unique to Guantanamo as a U.S.

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129. At the time Black wrote, jury trial was neither guaranteed to overseas territories under the Insular Cases doctrine nor guaranteed to the states under the Fourteenth Amendment. Subsequently, in *Duncan v. Louisiana*, 391 U.S. 145 (1968), the Court incorporated the Sixth Amendment (but not the Seventh) into the Fourteenth Amendment, describing jury trial as fundamental to an Anglo-American system of criminal justice, and explaining that juries were part of an interrelated set of features that operated together to produce a fair trial, which other systems did in other ways. 130. For historical reasons arising from decolonization, underdevelopment, and the Cold War, protection of property rights was deemphasized in the drafting of the Covenants. The European and Inter-American regional conventions provide more protection for property than the global instruments do. *See, e.g.*, Catarina Krause & Gudmundur Alfredsson, *Article 17*, in *THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: A COMMON STANDARD OF ACHIEVEMENT* 359 (Gudmundur Alfredsson & Asbjørn Eide eds. 1999). 131. 128 S. Ct. 2229, 2258 (2008).
quasi-territory, Kennedy chose to frame the issue within the wider perspective of extraterritoriality as discussed in *Reid v. Covert* and his *Verdugo* concurrence, tracing the roots of the approach back to the Insular Cases. Four dissenters condemned the “‘functional’ test” as indeterminate and insufficiently protective of national security, but it appears to provide the prevailing methodology for the present era.

This Epilogue is not the place to explore fully the clarities and ambiguities of the *Boumediene* opinion. Briefly put, Kennedy presented his functional approach as an extrapolation of key Twentieth Century precedents, which he interpreted and rationalized into a consistent pattern. Having found the Eighteenth Century materials proffered by the parties and the *amici* inconclusive, he did not rely on an originalist explanation of the scope of the Suspension Clause—the consensual bases of the decision lay rather in the text and in a fairly general understanding of the intended purpose of habeas corpus within a scheme of separated powers, and in the ongoing consent that a century of precedent reflects. Text and precedent also demonstrated that basic constitutional guarantees of liberty were not limited to citizens, but protected persons (at least within U.S. territory); Kennedy did not pause to articulate the suprapositive reasons why that should be so. Whether and when rights should apply extraterritorially depends upon “objective factors and practical concerns, not formalism.” As in *Reid v. Covert* and *Verdugo*, rights should not be considered applicable in circumstances where doing so would be impracticable and/or anomalous.

Turning to Guantanamo, Kennedy accepted the government’s characterization of the Naval Base as extraterritorial, while treating that description as one factor among many affecting the practicality of applying the Suspension Clause there. He distinguished Guantanamo from the situation in occupied Germany that underlay the precedent of *Johnson v. Eisentrager* as resting on “[p]ractical considerations”; among these were the shared and temporary character of U.S. authority in the Allied occupation, and the vulnerable position of U.S. forces seeking to administer the heavily populated territory of a defeated enemy. The authority of the United States at Guantanamo is plenary, exclusive, secure, and temporally indefinite. Moreover, the enemy status of the *Eisentrager* petitioners had been reliably determined in a prior trial, whereas the *Boumediene* petitioners maintained their innocence and had been afforded only a rudimentary procedure for challenging their detention. On the present facts, there were “few practical barriers to the running

132. See supra note 60.
133. 128 S. Ct. at 2307 (Scalia, J., joined by Roberts, C.J., and Thomas and Alito, JJ., dissenting).
134. 128 S. Ct. at 2258 (opinion of the Court).
135. Id. at 2261-62.
136. Id. at 2257.
137. Id. at 2259-60.
138. Id. at 2259-60.
of the writ,” and modest procedural modifications could address any that arose.139 Thus, the petitioners were protected extraterritorially by the Suspension Clause, and the majority went on to find that the constitutional guarantee had been violated.140

In addition to demonstrating majority support for the global due process/functional approach, the Boumediene opinion sheds light on a few of the questions discussed earlier in this Article concerning how the approach operates. (1) The decision confirms that foreign nationality as such, and lack of prior connection to the United States, do not preclude possession of extraterritorial constitutional rights. But it does not explore the outer bounds of the class of persons eligible for constitutional protection, or articulate the normative basis for drawing that line. (2) The opinion’s discussion of Reid v. Covert suggests that the majority viewed the functional approach as also limiting the extraterritorial rights of citizens.141 (3) The decision primarily emphasizes the pragmatic content of the “impracticable and anomalous” inquiry, without trying to provide an exhaustive enumeration of the relevant factors. (4) International human rights law plays no explicit role in the Court’s determination that the Suspension Clause applies extraterritorially, although it is possible that the Court was silently reassured by the briefing it received on the universal character of the right to habeas corpus.142 International law may eventually assist in identifying globally practicable limits that have fundamental importance both here and abroad. (5) The Court’s highly specific focus on the conditions prevailing in occupied Germany and at Guantanamo suggests that the functional approach may be more open to variation in the applicability of particular constitutional rights in particular foreign locations than might have appeared from Kennedy’s Verdugo concur-

139. Id. at 2262.
140. Id. at 2275-76. The four dissenters also disagreed with the latter conclusion. See 128 S. Ct. at 2279 (Roberts, C.J., dissenting).
141. See also the Second Circuit’s subsequent decision in the embassy bombing cases, mentioned supra note 55, holding that the Warrant Clause of the Fourth Amendment does not apply to U.S. citizens abroad. That decision did not cite Boumediene, although the companion decision the same day on Fifth Amendment issues did.

A decision of the Supreme Court of Canada in another Guantanamo case in May 2008 illustrates an explicit use of international human rights law in construing the extraterritorial scope of constitutional rights. Under recent case law, the Canadian court considers that requirements of international comity ordinarily permit Canadian officials participating in extraterritorial law enforcement activities to proceed in accordance with the law of the local sovereign rather than in accordance with the Canadian Charter of Rights, so long as the local practice is consistent with Canada’s international human rights obligations (even with regard to Canadian citizens). See R. v. Hape, [2007] 2 S.C.R. 292 (S. Ct. of Canada); Pierre-Hugues Verdier, International Decisions: R. v. Hape, 102 Am. J. Int’l L. 143 (2008) (criticizing the comity rationale). But when the extraterritorial actions clearly violate Canada’s international human rights obligations, comity is not owing and the Charter rights apply. See Hape, para. 52; Khadr v. Canada (Minister of Justice), [2008] 2 S.C.R. 125 (S. Ct. of Canada) (applying this exception to interrogation during unlawful detention at Guantanamo); Benjamin L. Berger, The Reach of Rights in the Security State: Reflections on Khadr v. Canada (Minister of Justice), 56 Crim. Rep. (6th) 268 (2008) (expressing concern that clear violations will be difficult to demonstrate).
rence.

By applying the Suspension Clause to military detainees, ostensibly held pursuant to the laws of war as alleged members of hostile forces, the *Boumediene* decision may indicate that the global due process/functional approach does not make the distinction between a law enforcement mode of government action and a military mode of government action determinative. In this regard the global due process approach may apply more broadly than the “mutuality” approach would have.\(^{143}\) The decision leaves open what other military actions besides detention may be limited by extraterritorial constitutional rights of U.S. citizens or foreign nationals.

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Although the most dramatic extraterritorial issues today concern the penumbra of armed conflict, core problems continue to arise in the field of “ordinary” extraterritorial law enforcement. As the United States augments its capacity to engage in extraterritorial interrogation, trial, and punishment, the temptation to shake off constitutional constraints on the rights of “the accused”\(^ {144}\) increases.

The global due process approach to extraterritorial application of constitutional rights is designed to provide practicable but substantial limits on the treatment of human beings subjected to U.S. power. Like the Fourteenth Amendment incorporation doctrine and the doctrine of substantive due process, it results in uncertainty while its parameters are being specified and its entailments worked out. That uncertainty is preferable to the brutal clarity of denying any rights to foreign nationals abroad.

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143. Even the “mutuality” approach, however, might have extended constitutional rights to the *Boumediene* petitioners, either on the theory that long-term detainees are in a “governance” situation regardless of the basis of their detention, or on the theory that Guantanamo is a quasi-territory fully governed by the United States.

144. *U.S. Const.* amend. VI.