

ARTICLE

BEYOND PROTECTION

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Do foreign terrorists have rights under American law? And can they be prosecuted under such law? These questions may seem novel and singularly difficult. In fact, the central legal questions raised by foreign terrorism have long been familiar and have long had answers in the principle of protection.

This Article explains the principle of protection and its implications for terrorism. Under the principle of protection, as understood in early American law, allegiance and protection were reciprocal. As a result, a person without allegiance was without protection, including the protection of the law. Not owing allegiance, such a person had no obligation to obey American law; moreover, not having protection, he had no rights under such law. This was the principle on which early American law dealt with enemy aliens and other persons who did not owe allegiance, including those who today would be called “terrorists.”

The principle of protection still provides a valuable model for understanding a wide range of otherwise intractable problems. At a doctrinal level, it resolves important questions about habeas, prisoners of war, the power of the executive over enemy aliens, the jurisdiction of courts over foreigners and foreign lands, and the rights of unauthorized aliens. The principle also provides a framework for understanding more general difficulties, including the legal strategies available to the government, the domain of national law in a multinational world, and the means of reconciling safety and civil liberty. In these ways, as illustrated by terrorism, the principle of protection is an essential foundation for a society that seeks to preserve itself from danger without undermining its liberty.

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INTRODUCTION

Imagine that Middle Easterners of dubious intent turned up in Virginia in 1785: What would the Founders have done? Would they have detained them without trial? Would they have interrogated them without allowing them access to lawyers? Would they have denied them habeas corpus? Would they have denied them habeas even if they were held within the United States? Would they have taken these measures against them even if they were acting on behalf of a nonsovereign power? And on what principle could the Founders have done all of this without violating the law? Astonishingly, the answers need not be hypothetical, for “Algerians” were in Virginia in 1785.

This Article explains the principle on which American governments once dealt with foreigners potentially engaged in terrorism. The principle was that of protection, including the protection of the law. According to eighteenth-century theory, allegiance and protection were reciprocal, and thus only persons who owed allegiance enjoyed the protection of the law. Because of their allegiance, such persons were subject to the obligation of the law, and because they had protection, they had rights under the law. Foreigners who did not acquire local allegiance and protection, however, were another matter. Of course, American governments remained bound by their laws when dealing with these foreigners. But because such foreigners lacked allegiance and protection, they had neither the obligation of the law nor any rights under it.

To illustrate the implications of the principle of protection, this Article will eventually show how early American governments preemptively dealt with a range of different persons, including the Algerians in Virginia. It should be kept in mind, however, that the goal here is not merely historical, but also conceptual—not simply to trace historical antecedents, but more substantially to understand a forgotten paradigm. The reciprocal relation of allegiance and protection once offered a broad vi-

sion of who had legal obligation and rights and who did not. Although much has changed in the past two centuries, this older perspective remains revealing.

Most basically, it is necessary to recover not merely the older paradigm, but the sort of question that underlies it. Today, it is widely assumed that the government cannot deny legal rights to terrorists, and that if it does so, they can seek redress in court. Yet this begs the question of whether some individuals are beyond the protection of the law. To many observers, the very question will seem illicit, as if it were an invitation to lawlessness. From the traditional perspective of Anglo-American law, however, a preliminary inquiry about who is within the protection of the law is essential—not to justify lawless government action, but precisely to hold off claims of lawless power and to preserve legal rights.¹

A. *The Significance of the Principle*

The principle of protection is worth remembering for many reasons, both historical and contemporary. At the very least, it reveals the traditional approach to some contemporary problems. The principle, however, is more than merely historical, for it explains otherwise puzzling difficulties and, indeed, offers a valuable model that the law should still

1. A few thoughts about terminology. This Article tends to avoid much of the contemporary vocabulary regarding terrorism, which often fails to reflect the underlying legal principles and therefore leaves room for confusion. For example, terrorism is a real threat, but terrorism is not ordinarily a legally significant category for purposes of discerning how a government can legally respond to it. Similarly, torture is a real problem, but the common law, for good reason, dealt with it in other, more concrete terms. Although the Supreme Court in *Hamdi* alludes to “citizen enemy combatants,” see *Hamdi v. Rumsfeld*, 542 U.S. 507, 515–19 (2004), this phrase is not employed here because it combines categories that cannot be considered compatible without undermining the civil liberties of citizens. See *infra* text accompanying note 460–462.

Even the word “extraterritorial” is largely avoided here. It will be seen that the law’s domain extended out in multiple dimensions, and although the coercive effect of law ran along a geographic dimension, the obligation of the law cut in a different direction, along lines of personal allegiance. Accordingly, there are risks in using a merely geographic label for the expansive use of a nation’s law. Put another way, territory and allegiance are very different planes of national and individual existence, and neither nations nor individuals can afford to have these reduced to a flat question of geography.

For purposes of understanding allegiance and protection, this Article uses the phrase “prisoners of war” inclusively, as was traditional, to refer to enemy aliens outside protection who are captured, regardless of whether they are civilians or combatants, let alone formal or informal combatants. Obviously, this is not to say that all such persons equally enjoyed rights under the traditional laws of war. Nor is it to say that they would all be prisoners of war for purposes of the Third Geneva Convention, Article IV. See Geneva Convention Relative to the Treatment of Prisoners of War art. 4, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 (defining “prisoner of war”).

In another respect, though, this Article follows contemporary terminology. Whereas in the seventeenth century there could be a distinction between detention and imprisonment, this distinction is not drawn here.

follow. Accordingly, although this Article begins with historical evidence, it ends with contemporary analysis.

What, in particular, are the problems addressed by the principle of protection? At the doctrinal level, these include many of the controversial legal issues arising from terrorism, such as detention, removal, expulsion, interrogation, and other modes of dealing with enemy aliens. They also encompass the rights of prisoners of war, whether in getting legal advice, access to courts, or writs of habeas corpus. The problems examined here even embrace the rights of immigrants, authorized and unauthorized; the rights of foreigners (for example, under the Alien Tort Claims Act); the extent of jurisdiction; and conflicts of laws.²

At a more fundamental level, the principle of protection deals with the problem of legal authority or strategy. The government of the United States has often had difficulty framing its responses to terrorism, for it faces much uncertainty as to when it must act through the legal system and when it need not. For example, it has not had clarity as to whether, before an attack, it can preventively detain individuals without judicial process. Nor as to whether, after individuals participate in an attack, it must give them a criminal trial. The principle of protection overcomes such uncertainty by showing when the use of law is mandatory, optional, or barred.

A deeper sort of difficulty addressed by the principle of protection is an aspect of the problem of domain—in particular, the domain of national law in a multinational world.³ If the laws of different nations are not to become sources of conflict and imperialistic oppression, nations need an intellectual framework that reveals the domain of each nation's law and its limits. An element of such a framework is the principle of sovereign territory, which does much to define the outer geographic boundaries of a nation's law.⁴ Another element, which is the focus of this Article, is the principle of protection—this being what delineates the per-

2. Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 77 (codified as amended at 28 U.S.C. § 1350 (2006)) (establishing jurisdiction for “all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States”).

3. Another element of domain, concerning the depth of regulation within a nation, need not be pursued here. For a discussion of this aspect of domain, see generally Philip Hamburger, *Law and Judicial Duty* 59–64, 132 (2008) [hereinafter *Hamburger, Law and Judicial Duty*] (“[T]he common law typically aimed for limited ends . . . [and] often did little more than allocate authority among men, thus leaving them to enjoy the sort of justice they could make for themselves.”). For the concept of domain in another context, that of recognizing the domain of statutes, see generally Frank H. Easterbrook, *Statutes’ Domains*, 50 *U. Chi. L. Rev.* 533 (1983).

4. Although territorial limits are familiar, they tend to get stated in sweeping ways that collapse questions about the obligation and protection of the law for persons into the rather different question about the geographic reach of the law's coercive force. See, e.g., Kal Raustiala, *The Geography of Justice*, 73 *Fordham L. Rev.* 2501, 2506 (2005) (observing that, in American law, “[t]he physical location of an individual determines the legal rules applicable and the legal rights that individual possesses” (emphasis omitted)). For a summary of relatively recent extraterritorial developments, see Austen L. Parrish,

sonal boundaries of the law, meaning the persons to whom the law is applicable. Taken together, these principles confine the domain of each nation's law and thereby largely prevent each nation from extending its law beyond its own society.

To be precise, the principles of protection and sovereign territory counteract the problem of domain by delimiting, respectively, the obligation and coercion of national law. The principle of protection confines the set of persons subject to the law's obligation. Allegiance is necessary for an individual to be bound by the law, and protection is necessary for him to have "rights"—that is, to have claims that are legally binding on others. In these ways, the reciprocal relation of allegiance and protection establishes and limits the obligation of individuals to obey the law. In contrast, sovereign territory defines and limits the outer geographic edges of the law's coercive force—typically, as a limit on the reach of writs and other legal process. Put in terms of the literature on conflicts of laws, whereas sovereign territory circumscribes geographic jurisdiction, allegiance and protection together demarcate "legislative" jurisdiction.⁵ The principles discussed here thus illuminate some thorny questions about obligation, coercion, conflicts, and jurisdiction, and the principles thereby confine much of the danger arising from the potentially expansive domain of each nation's law.

Most profoundly, the principle of protection offers a way of minimizing the tension between safety and civil liberty. Some such tension is inevitable, but in responding to terrorism, many Americans have come to assume that safety and civil liberty are incompatible. On the one hand, many Americans believe that loss of life, even the risk of massive losses, is the price Americans must pay for the liberty they enjoy under the law. On the other hand, many think that the erosion of civil liberty is the inevitable cost of safety. The principle of protection, however, does much to avoid such dangers, for it draws a line that, in most circumstances, allows safety and civil liberty to coexist.

B. *The Current Approach*

The current approach to these problems relies almost exclusively on geography to understand when aliens have rights. Indeed, it relies on a very broad sweep of geography. As the Supreme Court hinted in *Rasul v. Bush* and elaborated in *Boumediene v. Bush*, habeas and potentially other civil rights are now available, at least theoretically, to anyone in a location under the "control" of the United States.⁶

Reclaiming International Law from Extraterritoriality, 93 Minn. L. Rev. 815, 841–69 (2009) (arguing extraterritorial jurisdiction has risks for United States and for international law).

5. "Legislative" jurisdiction is a rather limited description, as the same reasoning applies to common law.

6. *Boumediene v. Bush*, 128 S. Ct. 2229, 2260–62 (2008); *Rasul v. Bush*, 542 U.S. 466, 481–82 (2004).

An initial step toward this expansive understanding of American law was the notion that habeas must be available to aliens and even prisoners of war within the sovereign territory of the United States. In 1950, in *Johnson v. Eisentrager*, the Supreme Court held that Germans held abroad as prisoners of war had no right to habeas.⁷ Justice Jackson's majority opinion, however, left open the possibility that prisoners of war, if held domestically, might in some instances have a right to habeas.⁸ Hence, half a century later, the executive's reliance on Guantanamo. On the assumption that habeas would complicate the domestic detention of prisoners of war, the executive has concluded that it has to hold al Qaeda prisoners outside the sovereign territory of the United States. It may be thought rather odd that a nation's own laws apparently incapacitate it from effectively holding prisoners of war within its own territory, but this was only the beginning.

In *Boumediene*, the Supreme Court took this line of thought a step further, holding that anyone, even a prisoner of war, has the potential to get habeas if he is held in a location under American "control."⁹ The Court has thereby adopted an extraordinarily broad vision of access to American rights. Although it is to be expected that American citizens and at least some aliens have civil rights within the United States, the Supreme Court offers such rights to all aliens within the United States; to all aliens within sovereign territory; to all aliens in places within the "con-

7. 339 U.S. 763, 781 (1950).

8. See *id.* at 778 (stating habeas should not be extended to prisoners who were never "within any territory over which the United States is sovereign").

9. *Boumediene*, 128 S. Ct. at 2260–62; see also *Rasul*, 542 U.S. at 481–82 (dicta to same effect).

Some academic commentators go even further. David Cole argues against unequal treatment of citizens and enemy aliens. Yet rather than insist that "citizens and foreign nationals must be treated identically in every respect," he makes the broader point that there are profound dangers in adopting dehumanizing conceptions of enemy aliens. David Cole, *Enemy Aliens: Double Standards and Constitutional Freedoms in the War on Terrorism* 207–08, 233 (2003).

From a similar perspective, Neal Katyal also argues for equality, especially equal process. Neal Katyal, *Equality in the War on Terror*, 59 *Stan. L. Rev.* 1365, 1382 (2007). As might be expected, he thereby ends up accepting the possibility of denying due process and other rights to citizens: "There is simply no reason why the government must subject aliens who are alleged to have participated in acts of terrorism to military commissions, but need not do so for citizens suspected of the same crimes." *Id.* at 1389. In complaining about "[t]he breakdown in parity between citizen and alien post-9/11," he observes that this "is a new, and disturbing, trend," explaining that "[e]ven the horrendous internment of Japanese Americans in World War II applied symmetrically to citizens and aliens." *Id.* Yet the equal internment of citizens of Japanese descent is precisely one of the reasons why the internment was unconstitutional, see *infra* Part VIII.E.2, and it is therefore rather odd to hold up this internment as an illustration of the equality to which the nation should return. In fact, the central question is not parity between citizens and aliens, but rather the distinction between persons who owe allegiance and those who do not. As will be seen, moreover, the rejection of equality between these groups is not new, but very traditional and the foundation for preserving constitutional rights.

trol” of the United States; even to those who are enemy aliens being held as prisoners of war.

This expansive approach carries risks. Most obviously, there are dangers in suggesting that the executive can successfully exercise discretionary control over prisoners of war only in locations where it lacks “control.” Such dangers include not only pressures to release information and prisoners but also perverse incentives to turn prisoners over to other nations, with obvious costs for both the prisoners and the United States. Recognizing that its “control” standard is apt to become untenable, the Court in *Boumediene* qualified it by hinting at multi-factor “[p]ractical considerations” in a “functional” test.¹⁰ Yet this assumes that the government will be able to act vigorously in defending the nation without a clear measure of what is lawful and what is not. The indeterminate and unrealistic breadth of the Court’s analysis thus comes with substantial perils.

Indeed, the Supreme Court’s expansive vision of access to rights has costs not only for safety but also for civil liberty, as evident in *Hamdi v. Rumsfeld*.¹¹ The Court in this case assumed that a wide array of prisoners of war might have rights to judicial process, and it therefore felt obliged to take a very narrow view of such process. Hamdi was a citizen, with a constitutional right to a regular criminal trial. The Court, however, had a broad view of who might have a right to trial, and recognizing that a regular criminal trial for most enemy combatants would be impracticable, it relegated all of them, including Hamdi, to military proceedings.¹² The very breadth of access to the right thus seemed to require that its definition be diminished. As will be seen later, this loss of liberty was an almost predictable result of the expanded access to the liberty.¹³ Hamdi’s fate in the Supreme Court is therefore a grim reminder that the Court’s broad understanding of access to civil rights has sobering implications for liberty as well as safety.

C. Reviving an Understanding of Protection

The principle of protection offers a more balanced approach. To understand the coercive domain of American law over places, an exclusively geographic measure makes sense, even if not one as broad as that adopted by the Supreme Court. To understand another aspect of domain, however, the obligation of the law for persons, another principle is necessary—one that focuses on the individuals themselves. This is what the principle of protection contributes. It sorts out who is within the domain of the law by distinguishing between persons with and without allegiance. It is an elegant solution to a wide range of important problems.

10. *Boumediene*, 128 S. Ct. at 2255, 2257–58, 2275.

11. 542 U.S. 507 (2004).

12. *Id.* at 533–35, 538.

13. See *infra* text accompanying notes 458–462.

It is therefore regrettable that the principle of protection has been mostly forgotten. At the time of the Revolution, it was a fundamental ideal of both American law and the law of nations. Today, although the principle gets some slight attention in the literature on equal protection, it is scarcely discernable in the work on terrorism or informal warfare.¹⁴ Even when it gets mentioned in such scholarship, it is usually portrayed as if it placed no clear limits on foreign access to American legal rights.¹⁵ In fact, it sharply limited access to such rights.

Although it may seem worrisome that the principle of protection excludes some individuals from legal protection, this is precisely how the principle preserves both safety and civil liberty. The principle is a relatively open gatekeeping mechanism, which allows many visiting foreign-

14. An exception is J. Andrew Kent, who briefly notes this principle. See J. Andrew Kent, *A Textual and Historical Case Against a Global Constitution*, 95 *Geo. L.J.* 463, 505 (2007). For the literature on equal protection, see Philip A. Hamburger, *Equality and Diversity: The Eighteenth-Century Debate About Equal Protection and Equal Civil Rights*, 1992 *Sup. Ct. Rev.* 295, 300 n.12 [hereinafter *Hamburger, Equality and Diversity*] (citing relevant works).

In scholarship on terrorism, Paul Halliday and G. Edward White acknowledge part of the intellectual framework discussed here, but without recognizing its significance for habeas: “Early modern justices distinguished between aliens and ‘natural subjects,’ though . . . this distinction was irrelevant to their purview of prisoners using habeas corpus.” Paul D. Halliday & G. Edward White, *The Suspension Clause: English Text, Imperial Contexts, and American Implications*, 94 *Va. L. Rev.* 575, 587 (2008). It would have been more accurate to say that early modern justices distinguished between *enemy* aliens and *the wide range of individuals, both subjects and aliens, who owed allegiance*, and that this distinction was *critical* to their purview of prisoners using habeas corpus.

The principle’s implications for immigration are elegantly examined in the work of Gerald Neuman, but even his scholarship does not directly delineate the principle. See generally Gerald L. Neuman, *Strangers to the Constitution: Immigrants, Borders, and Fundamental Law* (1996). Indeed, because his work omits the eighteenth-century evidence, it leaves the impression that the basic theoretical and legal questions were left unresolved until later centuries. For example, Neuman writes that “[t]he ambiguities of the social contract tradition regarding aliens’ rights were not resolved in the drafting of the United States Constitution” and that the 1798 debate over the Alien and Sedition Acts “was the first of the major confrontations over the scope of American constitutionalism.” *Id.* at 52. He then concludes that these debates “produced no obvious immediate winner.” *Id.* at 60. Similarly, he writes about the different approaches resulting from the “ambiguities of the social contract tradition.” *Id.* at 72. There were serious ambiguities, but not of the sort or depth he suggests.

15. Halliday and White recognize the danger that their work will be viewed as making rights indefinitely available to foreigners abroad, but they make no attempt to discern a limit, other than to propose an unspecified “connection” between sovereign and jailer:

[W]hat about enemy alien residents not within the territorial jurisdiction of the king’s courts, or of the courts of the United States? Did the writ run to them? The history that we have set forth cannot be fairly read as demonstrating that the writ ran to every person in the world who happens to be outside the jurisdiction of British or American courts. But we do not believe that any sensible person would make that claim. Rather, the writ of habeas corpus presupposes a connection between the jailer and the sovereign with which that jailer is associated.

Halliday & White, *supra* note 14, at 707–08.

ers to claim legal rights. At the same time, it allows the nation vigorously to deny such protection to persons who have not submitted to allegiance. The principle thereby permits the nation to defend itself without having to compromise civil liberties.

If this were the end of the matter, it would be an incomplete solution, but the principle of protection is only the first step. To be sure, the principle itself does not guarantee that the government will use its power prudently, reasonably, or justly against persons who are outside protection. The principle, however, is merely an initial, threshold measure of government authority, and it does not relieve the government of other, more restraining mechanisms.¹⁶ For example, although the principle denies legal rights to persons outside protection, it does not excuse the government from its obligation to act in accord with the law. On the contrary, the government and its officers remain subject to the law, whether constitutions, statutes, or treaties, including those that incorporate international law. The principle thus gives the government the freedom it needs, without undermining its obligation to act lawfully. It is yet another way in which the principle allows a society founded on law to prevent informal warfare without undermining its own values.

The reality is that a line has to be drawn between persons who enjoy the protection of the law and those who do not. No such line will be perfect. But the line drawn by the principle of protection has many advantages—most substantially that it preserves both safety and the liberty enjoyed under law.

D. *Overview of the Argument*

This Article begins by outlining the theory of protection and its general implications. Drawing on eighteenth-century evidence, Part I shows how the principle of protection served as a gatekeeper for national legal systems. Protection and allegiance were understood to be reciprocal, and therefore, in general, persons who were outside a nation's allegiance were outside the obligation and protection of its laws. Everything else here is merely a variation on this theme. Part II observes that the protection could be generous, but that such generosity was not without limits. Part III then shows how the principle of protection shaped the government's legal authority or strategies—determining when the use of law as to various persons was mandatory, when it was optional, and when, in particular, it was barred. To be precise, persons outside allegiance were beyond the protection and obligation of the law. In practical terms, this meant they could neither claim rights nor be prosecuted. More theoretic-

16. It may be thought that the principle of protection is too general to be informative, and certainly very general principles are often too indefinite to sort out questions of substantive law. Yet this has not for the most part been a difficulty for the principle of protection, for it is largely a means of regulating who is within the legal system and who is not. In other words, rather than draw refined substantive distinctions, it mostly allocates authority, and this usually can be done in relatively general terms.

cally, it meant that, in a multinational world, each nation could apply its law only to persons within the domain of its law, as determined by the principle of protection.

The Article then concentrates on the implications of the principle of protection for executive power. These days, in legal analysis of executive action, there is rarely a clear distinction between persons within protection and persons outside it. In the 1770s and 1780s, however, the principle of protection laid out different executive approaches to such persons. Part IV shows that, as to persons within protection, an executive could take limited emergency measures to detain and remove them without judicial process, but that it could only do so temporarily, and only if it obtained authorization and a suspension of habeas from the legislature. In contrast, Part V shows that, when dealing with persons outside protection, an executive had a regular power, without any need for a suspension of habeas, to take a wide array of indefinitely long or permanent measures—as illustrated by Virginia's treatment of the Algerians who visited in 1785. The executive remained entirely subject to law when dealing with persons who were outside protection, but it could not be held legally accountable by them, for they did not have legally enforceable rights. To complete this understanding of executive power, Part VI suggests how the principle of protection facilitated the structural enforcement of the law of nations and, more generally, international relations. It will be seen that through structural mechanisms, executives did far more than judges to enforce international law.

Finally, it is necessary to consider the contemporary value of the principle of protection. Part VII shows that, even after two centuries, the principle still offers an advantageous approach to a series of important problems. In particular, it offers a valuable model for delineating the government's legal strategies, for understanding the domain of national law, and for avoiding the tension between safety and civil liberty. Part VIII makes the implications of the principle more concrete by summarizing how the principle applies to some contemporary issues, including detention, questioning, expulsion, and habeas. By offering responses to informal warfare that are both effective and lawful, the principle of protection reveals how a society can preserve itself without sacrificing its liberty.

I. PROTECTION AND ALLEGIANCE RECIPROCAL

This Part introduces the principle that runs through the whole Article: that protection and allegiance were reciprocal. It was widely assumed in the late eighteenth century that allegiance was given on the condition of protection, and similarly that protection was given on the condition of allegiance.¹⁷ Of course, other considerations fed into this

17. Although much was widely assumed about the principle of protection, some applications of the principle obviously were contested, and at various points this Article

equation. In particular, citizenship and territory were relevant for determining who owed allegiance. Ultimately, however, allegiance (or as some put it, submission) was necessary for protection, and protection was necessary for allegiance. As a result individuals who owed no submission or allegiance were outside protection.

For simplicity's sake, the relationship between protection and allegiance is here called "the principle of protection." It could just as well, however, be described as "the principle of allegiance." Each side of this equation made sense only in relation to the other.

A. *Protection*

It is necessary to begin by understanding what was meant by "protection." There were various sorts of protection, but for practical legal purposes protection was the protection of the law, which meant having rights under the law.

When eighteenth-century lawyers said that protection was reciprocal with allegiance, they tended to assume an amalgamation of three more specific types of protection. Each type had its place in different debates, and all were part of the protection that was reciprocal with allegiance, but one will be seen to have particular significance here.

The protection of the laws for natural liberty was the first and most basic concept of protection. Although ideas about nature are these days apt to seem old-fashioned, they addressed problems that remain important, and this was particularly true of the notion of the state of nature. Today, the state of nature is often thought to have been a simplistic vision of early human development, but it was, in fact, primarily a conceptual model (that from which Rawls drew his "original position").¹⁸ To be precise, the state of nature was a model of the state or condition in which individuals had no common sovereign—in which, that is, there was no

draws attention to these disputes. For controversies over expatriation, see *infra* text accompanying notes 47–52; for challenges to the doctrine on tacit and express licenses, see *infra* note 191; for the question of territories, see Neuman, *supra* note 14, at 73–108. There were also different views about the status of a subject's children born abroad, especially if the subject was female. Although it was fairly clear that consuls were not public ministers, the opposite view was still litigated in the early nineteenth century, but rather desperately, in an attempt to avoid bankruptcy. See Lord Ellenborough's dismissive opinion in *Viveash v. Becker*, (1814) 3 M. & S. 284, 105 Eng. Rep. 619, 620 (K.B.) (noting functions of consul are "purely of a commercial nature"). As for slaves, while doubt increasingly prevailed among Northerners as to whether slaves were within the protection of the law, it became a conventional Southern position that slaves enjoyed a degree of protection, even if only a limited degree. See Hamburger, *Equality and Diversity*, *supra* note 14, at 371–72.

These matters of dispute, however, are not central here, and what is remarkable about the principle of protection is how little the principle itself was contested. Far from being distinctively uncertain and contentious, the principle and its central implications were widely accepted in Anglo-American law and more generally in the law of nations.

18. John Rawls, *A Theory of Justice* 12 (1971).

civil government.¹⁹ In such circumstances, individuals enjoyed an equal liberty from subjection to others and were thus merely subject to natural law—a moral law that seemed to enjoin self-preservation and respect for the equal liberty of others. The liberty that individuals enjoyed under this natural law was their natural liberty or, when particularized, their natural rights.²⁰ According to eighteenth-century theory, if individuals in the state of nature were to preserve this liberty, they had to form themselves into a people, establish civil government, and thereby acquire civil laws, which would give clear definition to their natural rights and protect these moral claims with civil sanctions.²¹ Government and its laws were thus understood to be established for the protection of natural liberty. This limited but basic sort of protection for natural liberty came to seem the essential protection, to which every citizen or free natural subject had a right.²²

A second sort of protection, which will ultimately be more important here, was the protection of the law, most saliently in the courts, for all rights enjoyed under civil law. Whereas the first sort of protection was merely for natural rights, this second sort was also for what could be considered privileges received from government.²³ Even a government privilege, once it was guaranteed by law, became a sort of property, and thus every legal right, whether originally natural or merely received from government, was understood to belong to those who held it. On this assumption, all legal rights had the protection of the law in the sense that they could not be taken away contrary to law or without judicial process.²⁴ As

19. See John Locke, *Two Treatises of Government*, bk. II, ch. II, § 6, at 271 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690) (describing “Law of Nature” governing in absence of established civil government). Rawls explains that his “original position” should be “understood as a purely hypothetical situation characterized so as to lead to a certain conception of justice.” Rawls, *supra* note 18, at 12.

20. See Philip A. Hamburger, *Natural Rights, Natural Law, and American Constitutions*, 102 *Yale L.J.* 907, 918–19 (1993) [hereinafter *Hamburger, Natural Rights*] (“[Eighteenth-century Americans] understood natural liberty to be the freedom an individual could enjoy as a human in the absence of government.”); see also *Hamburger, Equality and Diversity*, *supra* note 14, at 301–03 (discussing early Americans’ conceptions of natural liberty).

21. See *Hamburger, Equality and Diversity*, *supra* note 14 at 303–05 (explaining view of early Americans that individuals form governments in order to protect their natural liberty); *Hamburger, Natural Rights*, *supra* note 20, at 930–32 (elaborating on “American analysis of how individuals, acting in accordance with natural law, preserved their liberty by forming government”).

22. Accordingly, it was the sort of protection that differentiated free persons from slaves and that underlay the idea of the equal protection of the laws. *Hamburger, Equality and Diversity*, *supra* note 14, at 317.

23. *Hamburger, Natural Rights*, *supra* note 20, at 920–22; see also *Hamburger, Equality and Diversity*, *supra* note 14, at 317 (contrasting equal protection of laws for natural rights to “equal privileges”).

24. Property in this way served a function not unlike that of “privacy” in contemporary constitutional law. Rather than refer to a sphere protected from the eyes and ears of others, “privacy” in contemporary law is a powerful label for a decisionmaking authority

summarized by a popular law dictionary, protection “is generally taken for that Benefit and Safety which every Subject hath by the King’s Laws.”²⁵

Of course, the government often had to offer protection not merely through its laws but also by having its executive officers take action to prevent or punish injury, and this was a third, more active sort of protection. There was not always a need to distinguish this active type of protection, but when a line did have to be drawn, Americans did so by differentiating between the protection of the laws and the protection of government.²⁶

Only the second of these types of protection corresponded to what was legally enforceable. The first type, the protection of the law for natural liberty, was an end of government, but the particular degree of protection was understood to vary according to the will of the legislature and ultimately of the people. Thus, although the Fourteenth Amendment could guarantee equal protection of the laws, meaning equal protection of the natural liberty enjoyed under law, the general protection of natural liberty was not legally enforceable.²⁷ Similarly, the third type, the protection of government, was a moral or political commitment of the executive to enforce the laws, rather than a legally binding duty.²⁸ Accordingly, if the government failed to meet the first or third ideals of protection, the remedy lay in politics or revolution, not law. The law of the land, however, carried a legal obligation and was judicially enforceable. As a result, the second kind of protection, the general protection of the law for legal rights, amounted ultimately to the liberty enforceable at law. This was the sort of protection that had the greatest practical significance in the

that inheres in an individual. Similarly, “property” has long been used as a potent label for any right or sphere of authority that belongs to an individual or other person and cannot be taken, except by law. It is ironic therefore that many commentators who are sympathetic to such privacy claims are skeptical of the property claims.

The notion of liberty as a sort of property, and of property as a sort of liberty, was already evident in medieval law, and it was most elegantly elevated to theory by John Locke in his *Two Treatises of Government*. Locke, *supra* note 19, bk. II, ch. VIII, §§ 119–21, at 347–49.

25. Giles Jacob, *A New Law-Dictionary* liii2 (London, E. & R. Nutt 1732) (defining “Protection”).

26. Hamburger, *Equality and Diversity*, *supra* note 14, at 300 n.12, 368–71. This usage can be illustrated by Chief Justice Marshall, who observed in *Murray v. Schooner Charming Betsy*:

The American citizen who goes into a foreign country, although he owes local and temporary allegiance to that country, is yet, if he performs no other act changing his condition, entitled to the protection of our own government; and if, without the violation of any municipal law, he should be oppressed unjustly, he would have a right to claim that protection, and the interposition of the American government in his favour, would be considered a justifiable interposition.

6 U.S. 64, 120 (1804).

27. Hamburger, *Equality and Diversity*, *supra* note 14, at 300 n.12.

28. *Id.* at 300 n.12, 368–71.

disputes at stake here. Nonetheless, the other two types of protection—the protection of the law for natural liberty, and the active protection provided by government—were also aspects of the protection that was reciprocal with allegiance.

Taken together, the three different types of protection could all be understood simply as protection. To be sure, for some purposes, they could be distinguished. They could also, however, be considered aspects of a single idea. As John Witherspoon explained, “[t]he rights of subjects in a social state . . . may be all summed up in *protection*.”²⁹

B. *Protection and Allegiance Reciprocal*

Protection and allegiance were thought to be reciprocal.³⁰ As a result, an individual had a right to the protection of government and its laws only by virtue of his allegiance.³¹

Legal commentators frequently explained that protection and allegiance were reciprocal. The point was familiar from European theorists, and it soon became a truism of the common law.³² Chief Justice Edward

29. John Witherspoon, *Lectures on Moral Philosophy*, in 3 *The Works of the Rev. John Witherspoon* 367, 431 (Philadelphia, William W. Woodward 1800). He continued: “[T]hat is to say, those who have surrendered part of their natural rights, expect the strength of the public arm to defend and improve what remains.” *Id.* at 333. The phrase in the text includes the first and second types of protection. The rest of the passage most clearly includes the first and the third types of protection, although the word “improves” may also refer to the second type. Earlier, Cowell noted that the word “protection” had both a general and a special meaning and that, in the former sense, “it is used for that benefite and safetie, that every subject or Denizen, or alien specially secured, hath by the Kings laws.” John Cowell, *The Interpreter*, [Fff4v] (Cambridge, John Legate 1607) (defining “protection”).

It was often said that a people sacrificed some of their natural liberty to government to preserve the remainder—the sacrifice of liberty being their creation of government power, and the protected liberty being what remained unconstrained by law. Hamburger, *Equality and Diversity*, supra note 14, at 304–13. Some Americans, such as Jefferson, denied that there had been any sacrifice of liberty, but this point played upon and thus acknowledged the conventionality of the more familiar view. It did not amount to a substantively different conclusion. Hamburger, *Natural Rights*, supra note 20, at 958 n.135.

30. See Hamburger, *Equality and Diversity*, supra note 14, at 304–10.

31. The analysis examined here applied not only to individuals but also to artificial persons, notably corporations. At least by the early nineteenth century, courts went behind the corporate name to determine the citizenship of the real parties in interest. See, e.g., *Bank of the U.S. v. Deveaux*, 9 U.S. (5 Cranch) 61, 67 (1809). This Article, however, focuses on the treatment of individuals and therefore, for the sake of simplicity, usually uses the words “individuals” and “persons” interchangeably.

32. For some of the many theorists, see generally Thomas Hobbes, *Leviathan* 153, 491 (Richard Tuck ed., Cambridge Univ. Press 1991) (1651); Thomas Rutherforth, *Institutes of Natural Law*, bk. II, ch. II, § VII, at 269 (2d American ed., Baltimore, William Neal & Joseph Neal 1832) (1754); 4 M. de Voltaire, *Ancient and Modern History*, in *The Works of M. de Voltaire* 18–19 n.* (Tobias Smollet et al. eds., London, J. Newbery et al. 1761) (n.d.) (“[A]cts of tyranny and injustice . . . cancel the obligation of allegiance, for the duties of allegiance and protection are reciprocal.”). In the British House of Commons, Sir Thomas

Coke explained in 1608, in *Calvin's Case*, that "as the subject oweth to the King his true and faithful ligeance and obedience, so the Sovereign is to govern and protect his subjects."³³ To this Coke added that the relation "between the Sovereign and subject" was therefore a "*duplex et reciprocum ligamen*," a dual and reciprocal bond.³⁴ By the beginning of the next century, the idea was so conventional that Jonathan Swift could use it as a foil for his mordant humor, saying, "I have heard that allegiance and protection are reciprocal; but never that allegiance and preferment were so."³⁵ The idea turned up repeatedly in pamphlets, newspapers, magazines, and even novels. Of course, it also regularly appeared in legal treatises. For example, Blackstone echoed Coke that "Allegiance is the tie, or *ligamen*, which binds the subject to the king, in return for that protection which the king affords the subject."³⁶ His contemporary, Justice Michael Foster, similarly recited that "Protection and Allegiance are reciprocal Obligations," and he emphasized that "no Lawyer hath ever yet denied" these principles, for "[t]hey are founded in Reason, Equity and good Policy."³⁷

Underlying the reciprocal nature of protection and allegiance was the logic of consent. It has been seen that individuals in the state of nature were said to be equally free, in the sense that they were equally without subordination to each other and thus without a common sovereign.³⁸ On this initial assumption, no human being or institution could have sovereignty or civil authority over them without their consent. Civil government therefore seemed to have its origins in the consent that occurred

Coventry observed: "The Civilians say, 'Protection follows subjection, and subjection and protection are reciprocal.'" Sir Thomas Coventry, Speech Before Parliament (May 6, 1679), in 7 Anchtell Grey, *Debates of the House of Commons 1763*, at 193 (1763).

33. *Calvin's Case*, (1608) 7 Co. Rep. 1, 5a-5b, 77 Eng. Rep. 377, 382 (Exch. Ch.).

34. *Id.* at 382.

35. A Modest Inquiry into the Reasons of the Joy Expressed by a Certain Set of People, upon the Spreading of a Report of Her Majesty's Death, in *The Works of Jonathan Swift* 455 (Walter Scott ed., Edinburgh, Archibald Constable & Co. 1814) (1714).

36. 1 William Blackstone, *Commentaries* *366.

37. Sir Michael Foster, Discourse on High Treason, in *A Report of Some Proceedings on the Commission of Oyer and Terminer 183, 188* (Dublin, 1767) (1762).

There are countless eighteenth-century elaborations of the idea. For a mundane English example, note a 1706 essay on the union between England and Scotland:

Allegiance and Protection are reciprocal Duties. To declare a People Aliens, as born out of the Allegiance of a Prince, is to declare them Aliens, as born out of the Protection of that Prince, which is in plain terms to tell them, that they are thenceforward Strangers to him and his People, whom he hath retained as his Native Subjects, and may, without breach of the Law of Nations, be treated as Enemies, by him and his Native Subjects, when they shall see cause to do so.

James Hodges, *Essay upon the Union* 18 (London, 1706). American expressions of such sentiments were also commonplace. A newspaper commentator wrote, "It is the opinion of politicians, that protection and allegiance are reciprocal; and it appears to be an opinion which we all readily give into as our passions cool." *Candidus's Address to the Citizens of New-Jersey*, S.C. Gazette & Gen. Advertiser, June 29, 1784.

38. See *supra* text accompanying notes 19-22.

when individuals, by means of their constitution, formed a government for themselves. Individuals, from this perspective, sought the protection of government and its laws for their natural liberty by consenting to the formation of civil society, the people, who then exercised will to enact their constitution.³⁹ They thereby consensually created government and acknowledged submission or allegiance to it.⁴⁰

The exchange of allegiance for protection, however, was based not merely in consent, but more fundamentally in an understanding of nature. The substantive terms of the exchange obviously varied from one society to another, and from one time to another, as people chose to overthrow their governments and establish new ones under new constitutions. The basic model of allegiance in exchange for protection, however, was understood to be inherent in nature, for it was derived from an underlying assumption about the essential purpose of government, protection, which in turn was derived from ideas about the equal freedom of human beings in the state of nature.⁴¹ As put by Blackstone, allegiance, together with its reciprocal relation to protection, "is founded in reason and the nature of government."⁴² Thus, whereas the particular provisions of different constitutions were variable and dependent on the choices of different peoples, the relationship between allegiance and protection was understood to be inherent in nature.⁴³

39. For the underlying theory of consent, as developed by Nicholas of Cusa, see Hamburger, *Law and Judicial Duty*, supra note 3, at 76. For the constitutional theory, as enunciated by John Locke, see *id.* at 293–94 & n.21.

40. Although Continental commentators distinguished three stages of consent, English and especially American theorists tended to collapse the potentially different stages of consent into a single act of consent, the constitution, by which a people simultaneously formed their civil society and established their government. See *id.* at 98–99, 294.

41. For example, an American newspaper writer explained:

Mankind upon entering into society, yield, it is true, some of their natural rights to the community for the common good of the whole [B]ut it would be absurd to say, that for this end any man ever resigned, or could be supposed to resign his personal liberty, or his right to the full protection of the law (neither of which is a slave entitled to,) or gave his rulers authority to deprive him of either; as the preservation of these must be the main design of his entering into society.

Letter to the Printer, *Freeman's J.* (Phila.), June 13, 1781, at 1.

42. 1 Blackstone, supra note 36, at *366.

43. Once again, it must be emphasized that this eighteenth-century reasoning from nature was based on ideas about the state of nature, which was not typically a historical account of pre-modern savages, but rather a conceptual model in which theorists speculated about morals and politics by imagining a pre-governmental condition (a version of what Rawls calls "the original position"). See supra text accompanying notes 19–22.

C. *Personal and National Exit*

Although the principle of protection was the basis of obligation for both government and its subjects, it left room for exit.⁴⁴ The principle of protection was founded on the liberal assumption that government was a matter of consent rather than tyranny, and the principle thereby allowed individuals and even entire nations to escape the obligation that the principle ordinarily imposed.

Traditionally, it had been thought that an individual could not abandon his allegiance, but this position was increasingly viewed with skepticism.⁴⁵ Blackstone still argued that natural allegiance was “perpetual” and that it “cannot be forfeited, canceled, or altered, by any change of time, place, or circumstance, nor by anything but the united concurrence of the legislature.”⁴⁶ As early as the seventeenth century, however, John Locke and many others had argued that government and the obligation of its law were founded on consent. Therefore, far from being born into any “*perpetual tie of Subjection and Allegiance*,” individuals could choose to withdraw their allegiance and set up a “*new Government*.”⁴⁷ Americans eventually adopted this analysis to justify their independence from the Crown. Moses Mather, for example, acknowledged in 1775 that “it is a doctrine of antiquity, patronized by many, that natural allegiance is universal and perpetual” and that it “cannot be lost or forfeited, but by the commission of crimes, &c.”⁴⁸ Mather lived in an era, however, when not only philosophers but many of the people thought that sovereignty could come only from the consent of the governed, and Mather and his fellow Americans believed that allegiance was voluntary—that “mankind by joining to society do not mean, nor doth allegiance intend to confine them perpetually to dwell in one country.”⁴⁹ In other words, allegiance, together with the associated protection, was a matter “of choice.”⁵⁰

There had to be a right of exit not only to preserve a choice about departure but also to create a presumption of some initial consent. In theory, there had to be assent at the time of entry into civil society. On the assumption that all individuals in the state of nature had equal liberty, no one could claim any civil power except by consent, and this would seem to mean actual agreement. The reality, however, was more complex. Rather than inhabit an idealized hypothetical moment of consent,

44. For this term, see Albert O. Hirschman, *Exit, Voice, and Loyalty: Responses to Decline in Firms, Organizations, and States* 4–5 (1970) (positing choice in firms between voice and exit).

45. For the indissoluble character of allegiance, see William S. Holdsworth, 9 *A History of English Law* 78–79, 84, 86 (1926) (explaining how medieval English lawyers assumed “that the tie of allegiance is indissoluble”).

46. 1 Blackstone, *supra* note 36, at *369–*370 (footnote omitted).

47. Locke, *supra* note 19, bk. II, ch. VIII, §§ 114–15, at 344–45.

48. Moses Mather, *America’s Appeal to the Impartial World* 17 (Hartford, Ebenezer Watson 1775).

49. *Id.* at 16.

50. *Id.* at 17.

human beings lived in a historical, developing world, and this meant it was improbable that they could all have actually given their assent to their society and constitution. Even if, moreover, they had assented in the past, they surely did not all feel a continuing, fully conscious consent over time. Actual consent was therefore illusory. The most that could be expected as a practical matter was a presumed consent, based on an individual's choice to enter or at least to remain in his society. Early Americans therefore tended to assume a right to emigrate.⁵¹ They sometimes even guaranteed the right in their constitutions.⁵²

Put in the terms that matter here, the ties of allegiance and protection were voluntary. Of course, a subject could not simply depart during a war to join an enemy.⁵³ In more placid times, however, if civil society and its laws rested on consent, a subject had to be able to abandon his allegiance.⁵⁴ Indeed, by the same token, a ruler presumably could abdicate his throne, thus putting an end to his obligation of protection.⁵⁵ Both subjects and rulers could walk away from their respective duties.

With or without this relaxed attitude toward personal departures, the principle of protection allowed a people as a body to renounce their allegiance. In particular, if a sovereign denied protection to his people, they could eventually abandon their allegiance to him: "[W]hen instead of protection and security, they meet with tyranny and oppression, they are

51. For the imperfect character of consent and the right of emigration, see Witherspoon, *supra* note 29, at 107–08; see also Emerich de Vattel, *The Law of Nations, or, Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns*, bk. I, ch. XIX, § 212, at 101 (London, G.G. & J. Robinson 1797).

52. See, e.g., Ky. Const. of 1792, art. XII, § 27; Pa. Const. of 1776, pt. I, art. XV.

53. Vattel, among others, espoused the view that "every man is born free" and has therefore a right to leave his country, with the caveat, of course, that "it be not in such a conjuncture when he cannot abandon it without doing it a visible injury." Vattel, *supra* note 51, bk. I, ch. XIX, § 220, at 104. Similarly, Jefferson's law reform committee recognized the "natural right" to change allegiance, but not to a hostile state, and only after a formal renunciation of allegiance. A Bill Declaring Who Shall Be Deemed Citizens of This Commonwealth, *in* Report of the Committee of Revisors Appointed by the General Assembly of Virginia, ch. LV, at 41–42 (Richmond, Dixon & Holt 1784). The question of expatriation became especially prominent during the War of 1812 and again in the Expatriation Act, ch. 249, 15 Stat. 223, 224 (1868). The continued importance of the limitations on the right of expatriation can be observed in case of William Joyce. See *infra* notes 133 and 175.

54. In a rather overstated manner, which did not clearly distinguish between travelers and persons abandoning allegiance, Mather preached:

[W]hen a person, under a natural, acquired, or local allegiance removes out of the realm to some distant climate, goes out of the protection of the King, and loses all benefit of the laws and government of the kingdom; his allegiance, which is mutual or not at all, ceaseth, for cessante causa cesset effectus, the cause or reason ceasing, which in this case is protection and the benefits of government, the effect, viz. the obligation of obedience also ceaseth.

Mather, *supra* note 48, at 16.

55. *Id.* at 17. Along these lines, Mather speculated about the implications "[s]hould the King of Great-Britain voluntarily resign his crown, or abdicate the government, remove and reside in Italy." *Id.*

free'd from their promises . . . and return to that state of liberty, which preceded the institution of government.”⁵⁶

The reciprocal relation of allegiance and protection thus became a central tenet of the American Revolution and the establishment of the new nation. In December 1775, Parliament passed the Prohibitory Act, which candidly treated Americans as enemies. It declared that, whereas “many Persons in the Colonies . . . have set themselves in open Rebellion,” therefore:

[A]ll Ships and Vessels of or belonging to the Inhabitants of the said Colonies, together with their Cargoes . . . and all other Ships and Vessels whatsoever, together with their Cargoes . . . which shall be found trading in any Port or Place of the said Colonies . . . shall become forfeited to his Majesty, as if the same were the Ships and Effects of open Enemies.⁵⁷

William Drayton, the Chief Justice of South Carolina, observed that “this Act of Parliament . . . finally released America from Great-Britain.”⁵⁸ The hostilities of the King had already “absolved America” from her allegiance, but the act of Parliament released Americans “from Subjection, by yet a better Title than the mere Oppressions of a Man in the Kingly Office.”⁵⁹ Drayton explained: “It is the voluntary and joint Act of the whole British Legislature . . . releasing the Faith, Allegiance and Subjection of America to the British Crown, by solemnly declaring the former out of the Protection of the latter; and thereby . . . actually dissolving the Original Contract between King and People.”⁶⁰

From this perspective, the Declaration of Independence was not merely an assertion of independence, but a genuinely declaratory recognition of the already existing reality that the combination of British protection and American allegiance had come to an end.⁶¹ In June 1776, John Adams, Richard Henry Lee, George Wythe, and others in the Continental Congress urged that “the question was not whether, by a Declaration of Independence, we should make ourselves what we are not;

56. 3 David Hume, *A Treatise of Human Nature*, Pt. II, § IX, at 159 (London, Thomas Loncman 1740).

57. An Act to Prohibit All Trade and Intercourse with the Colonies of New Hampshire, Massachusetts's Bay, 1776, 16 Geo. 3, c. 5, § 1 (Eng.).

58. William-Henry Drayton, *A Charge, on the Rise of the American Empire* 5 (Charlestown, David Bruce 1776).

59. *Id.*

60. *Id.* Drayton argued, incidentally, that as a result, “an American cannot, legally, at the Suit of the King . . . be indicted of High Treason.” *Id.* Drayton observed that protection was “the great End for which Mankind formed societies,” and on this basis he recited the familiar point that “a Failure of Protection being once established, it necessarily includes, and implies a Charge of a Breach of Original Contract—a Violation of Fundamental Laws”—meaning a justification for revolution. *Id.* at 10.

61. Hence, the otherwise puzzling assumption of most American states that allegiance to Britain ended prior to July 4, 1776. Accordingly, if individuals were to be considered British subjects rather than traitors, they sometimes found that they had to have left their state well before Independence Day.

but whether we should declare a fact which already exists.”⁶² They explained:

[A]s to the King, we had been bound to him by allegiance, but . . . this bond was now dissolved by his assent to the last act of Parliament, by which he declares us out of his protection, and by his levying war on us, a fact which had long ago proved us out of his protection; it being a certain position in law that allegiance and protection are reciprocal, the one ceasing when the other is withdrawn.⁶³

On these arguments, they declared on July Fourth, “He has abdicated Government here, by declaring us out of his Protection and waging War against us.”⁶⁴ Protection had ended, and therefore so had allegiance.

The exchange of allegiance for protection thus shifted for Americans, from Britain to their own states. Everyone, it was assumed, needed the protection of civil government, and similarly every sovereign state needed the allegiance of its subjects. Therefore, as soon as Americans declared independence from Britain, they established their own governments, which in turn self-consciously offered protection and demanded allegiance. The Revolution redirected allegiance, but did not alter the fundamental relation between allegiance and protection.

The reciprocal relationship between allegiance and protection thus became a foundation for the new nation. Under a government formed by consent, the principle of protection explained what a people owed their government and what their government owed them. Therefore, particularly in a new nation established by the people themselves, the principle was understood to be an essential basis of constitutional law.

D. *A Principle Underlying American Constitutions*

It was a measure of the fundamental character of the principle of protection that it was not usually a freestanding constitutional requirement. Instead, it tended to be understood as an underlying principle.

Americans understood that protection was a principle of the English constitution. William Bollan—the London agent for Massachusetts—reminded Parliament that:

According to the fundamental principles of the English constitution, protection and allegiance form the connection or com-

62. 1 Thomas Jefferson, *The Writings of Thomas Jefferson* 21 (Paul Leicester Ford ed., New York, G.P. Putnam & Sons 1892).

63. *Id.* at 22.

64. The Declaration of Independence para. 25 (U.S. 1776). For the application of the principle of protection and allegiance from the English point of view, especially to ascertain the status of Americans who claimed after 1783 to remain British subjects, see Opinion of Mr. Chalmers (Feb. 1, 1814), in William Forsyth, *Cases and Opinions on Constitutional Law* 257–86 (London, Stevens & Haynes 1869); Joint Opinion of Copley and Wetherell (Nov. 13, 1824), in *Cases and Opinions on Constitutional Law*, supra, at 324–25; Discussions by Mr. Reeves (1808), in *Cases and Opinions on Constitutional Law*, supra, at 286–324.

pact of the prince and the subject, whereby they are mutually bound to perform their respective duties, which are in their nature coextensive, the sovereign and all his subjects being thus joined together quasi uno ligamine.⁶⁵

In drawing protection from “the fundamental principles” of the English constitution, Bollan may have meant that the reciprocal relation of allegiance and protection was a specific requirement of this constitution, but he seems to have viewed the relation between allegiance and protection as a natural principle of government, which had become a basic assumption of the English constitution.

Certainly, this was the sort of premise on which American constitutions made prefatory declarations about protection and allegiance. For example, with echoes of the Declaration of Independence, the constitutions of New Jersey and New York began by explaining, “Allegiance and Protection are, in the Nature of Things, reciprocal Ties, each equally depending upon the other, and liable to be dissolved by the other’s being refused or withdrawn.”⁶⁶ The North Carolina Constitution similarly recited that “allegiance and protection are, in their nature, reciprocal, and the one should of right be refused when the other is withdrawn.”⁶⁷ These express assertions of the principle appeared in the constitutions of about

65. William Bollan, *The Petitions of Mr. Bollan, Agent for the Council of the Province of Massachusetts Bay, Lately Presented to the Two Houses of Parliament* 23 (London, J. Almon 1774).

66. N.J. Const. of 1776, pmb.; N.Y. Const. of 1777, pmb.

67. N.C. Const. of 1776, pmb. Although the South Carolina Constitution did not clearly mention the principle, Chief Justice Drayton was so self-conscious about the explicit assertions of the ideal in some other states that he went out of his way to emphasize, perhaps on the basis of a state statute, that “the Law of our Land expressly declares” that “Allegiance, and Subjection . . . are due only in Return for his Protection.” Drayton, *supra* note 58, at 5. It is not exactly clear what law Drayton meant. A slightly later South Carolina statute stated that “Protection and Allegiance are or ought to be reciprocal, and those who will not bear the latter are not entitled to the benefits of the former,” but this was adopted only in early 1777. An Act Establishing an Oath of Abjuration and Allegiance (1777), in *1 The Statutes at Large of South Carolina* 135 (Thomas Cooper ed., Columbia, S.C., A.S. Johnston 1836).

In Massachusetts, Theophilus Parsons laid the foundation for his state’s constitution by observing that “nothing is more true, than that allegiance and protection are reciprocal.” *Essex Result* (1778), in *Theophilus Parsons, Memoir of Theophilus Parsons* app. at 367 (Cambridge, Univ. Press 1859). In fact, when the Massachusetts Constitution was adopted, it introduced its provisions by explaining:

The end of the institution, maintenance, and administration of government is to secure the existence of the body politic, to protect it, and to furnish the individuals who compose it with the power of enjoying in safety and tranquillity [sic] their natural rights, and the blessings of life: and whenever these great objects are not obtained, the people have a right to alter the government, and to take measures necessary for their safety, prosperity and happiness.

Mass. Const., pmb. (enacted 1780). For more specific uses of the notion of protection, see *id.* pt. I, arts. VII, X–XII (guaranteeing rights); *id.* pt. II, ch. I, § 1, art. IV (authorizing legislature). For a particularly long-winded discussion of the relation between protection and allegiance, see Pa. Const. of 1776, pmb.

half the states and almost entirely in their preambles.⁶⁸ At first it may seem odd that only some of the constitutions recognized so basic a principle. The relation of allegiance and protection, however, was understood to be a natural foundation of government that applied to all free constitutions and governments—such that “in all states, existing by compact, protection and allegiance are reciprocal.”⁶⁹ Therefore, while it was sometimes stated as an initial assumption, it could also just be taken for granted.⁷⁰

One way or another, protection was usually an underlying principle rather than an independent legal requirement. Americans assumed the reciprocal character of allegiance and protection when they adopted their constitutions, and they thereby made the principle of protection a

68. The states with express accounts of the relation between allegiance and protection were Massachusetts, New Jersey, New York, North Carolina, Pennsylvania, Virginia, and probably Vermont. Those without were Connecticut, Delaware, Georgia, Maryland, New Hampshire, and Rhode Island. Of course, Connecticut and Rhode Island did not adopt new constitutions after breaking from Britain.

69. Resolution (May 1776), in *The Remembrancer, or Impartial Repository of Public Events* 185 (London, J. Almon 1776). It continued, “the latter being only due in consequence of the former.” *Id.* The sentiment was commonplace. For example, the preface of a South Carolina statute requiring inhabitants to take an oath recited that “in all States, Protection and Allegiance are or ought to be reciprocal, and those who will not bear the latter are not entitled to the benefits of the former.” An Ordinance for Establishing an Oath of Abjuration and Allegiance (1777), in *1 The Statutes at Large of South Carolina*, supra note 67, at 135; see also An Act to Oblige Every Free Male Inhabitant of this State, Above a Certain Age, to Give Assurance of Fidelity and Allegiance to the Same, and for Other Purposes Therein Mentioned Preamble (1778), in *1 The Statutes at Large of South Carolina*, supra note 67, at 147.

70. Common lawyers, incidentally, had long emphasized that express acknowledgments of allegiance merely confirmed what could be taken for granted. English lawyers repeatedly stated that subjects owed allegiance regardless of whether they took an oath of allegiance, for “oaths and professions of homage and fealty are the external signs or confirmations of the bond of allegiance that preceded them.” Matthew Hale, *Prerogatives of the King* 60 (D.E.C. Yale ed., Selden Soc’y 1976) [hereinafter *Hale, Prerogatives*]. Thus, notwithstanding that “the oath of allegiance” was “a farther confirmation or assertion” of such homage, “yet there is a radical and fundamental allegiance due before any oath at all made to observe and keep the same.” *Id.* at 59; see also *1 Blackstone*, supra note 36, at *366–*373; Edward Coke, *The Second Part of the Institutes of the Lawes of England* 121 (London, M. Flesher & R. Young 1642). Similarly, in America, Moses Mather explained that the reciprocal relation of “protection” and “subjection” did not have to be made explicit. He acknowledged that these commitments could be made a matter of a formal oath. This was “what is called a legal allegiance, ex provisione legis, that is by positive institution,” such as “the oath of allegiance taken by the subjects, wherein they swear to bear all true and faithful allegiance to the King; which is a counter part to the King’s coronation oath, whereby he swears to protect his subjects in all their just rights.” Mather, supra note 48, at 16–17. But these “are only confirmations of the mutual obligations resulting from the relation, that subsists between them as King and subjects, and do attend upon and follow it, in its extent and duration.” *Id.* at 17. As Mather noted about allegiance, “the obligation to obedience . . . arises from the reason and fitness of things, and is comprehensively expressed in this short law maxim, *protectio trahit subjectionem, & subjectio protectionem*, protection mutually entitles to subjection, and subjection to protection.” *Id.* at 16.

pervasive foundation of their law. As a result there was always a preliminary question about who was within allegiance and protection and who was not.

II. THE GENEROSITY OF PROTECTION AND ITS LIMITS

The reciprocal character of allegiance and protection was the basis for both much generosity to outsiders and yet also sharp rejections of those who refused to submit. The generosity was very broad. Not only did all citizens have a right to protection, but also, if foreigners came to the country in a manner that created a presumption of allegiance to the government and its law, they too had a right to protection. Other foreigners, however, even if visiting, had no right to protection. Although some of them might receive a partial grant of protection from the government, this was only a matter of legislative and executive policy. The principle of protection was generous, but only up to a point.

A. *The Generous Protection Enjoyed by Aliens in Amity: The Longchamps Affair*

The protection of a state's law could be claimed of right not only by its citizens but also by lawfully present aliens in amity. This generous implication of the principle of protection had long been evident, but in 1784, in Philadelphia, the Longchamps affair brought it home to much of the new nation.

An alien in amity who lawfully came to a country was ordinarily presumed to submit to a local allegiance and to enjoy protection. As a result, while he remained, he was bound by the law and had rights under it. Of course, an outsider did not necessarily have a right to all of the advantages conferred by local law—this being the privileges-and-immunities problem in international law and American constitutional law.⁷¹ More seriously, even when submitting to a local government and its laws, he retained a prior and more binding allegiance to his own sovereign, and for this reason, he did not have to serve in the military of the local government or do other things distinctively associated with *natural* allegiance.⁷² In other respects, however, it was implicit that he had given

71. The U.S. Constitution solved this problem by stipulating that “[t]he citizens of each state shall be entitled to all privileges and immunities of citizens in the several states.” U.S. Const. art. IV, § 2. In other words, a visitor could claim such rights as a state offered to its citizens—that is, not particular classes of citizens, but all of them, as citizens. Even when the Fourteenth Amendment guaranteed equal protection, unequal benefits were not considered an equal protection problem because, as already noted, the equal protection of the laws was understood to be the equal protection of the laws for natural liberty.

72. Vattel merely suggested that a foreigner ought to help defend a host nation out of gratitude:

From a sense of gratitude for the protection granted to him, and the other advantages he enjoys, the foreigner ought not to content himself with barely respecting the laws of the country; he ought to assist it upon occasion, and contribute to its defence, as far as is consistent with his duty as citizen of another

allegiance to the local government and that he had a right to protection in the same manner as its natural subjects.⁷³ It was a point of great importance—not least for Charles Julian de Longchamps.

Longchamps was a pugilistic Frenchman who came to Philadelphia and soon provoked a street brawl with the French consul.⁷⁴ Pennsylvania tried him for striking the consul “in violation of the laws of nations, against the peace and dignity of the *United States* and of the Commonwealth of *Pennsylvania*.”⁷⁵ Far from being satisfied, however, the French government demanded that Longchamps be returned to France for trial under the law of nations, arguing that “the offence . . . had been committed against the law of nations, and according to that law alone, and not by the laws of Pennsylvania, ought he to be proceeded against.”⁷⁶ Many Americans reacted with outrage. If the French government were to prosecute Longchamps, it would, in effect, deny him the protection of the law of Pennsylvania. The executive of Pennsylvania attempted to end the diplomatic controversy by pressuring the state’s supreme court to turn Longchamps over to the French—or at least to imprison him until the king of France was satisfied. The judges, however, politely refused to

state. . . . But there is nothing to hinder him from defending it against pirates or robbers, against the ravages of an inundation, or the devastations of fire. Can he pretend to live under the protection of a state, to participate in a variety of advantages that it affords, and yet make no exertion for its defence, but remain an unconcerned spectator of the dangers to which the citizens are exposed?

Vattel, *supra* note 51, bk. II, ch. VIII, § 105, at 173–74.

Note that natural allegiance was ordinarily understood to include the allegiance of both natural-born and naturalized subjects or citizens. Incidentally, the use of the word “natural” in this context has an interesting history. In the sixteenth century, “natural” could mean simply native, and thus an Englishman’s “natural right” was sometimes merely his native right, and a natural born person was merely native born. At the same time, though, the word was often used to mean what was natural. In this sense, natural rights were those enjoyed under the law of nature, and by the same token, natural or natural-born allegiance was that which a person owed to his or her sovereign under natural law.

73. For example, Chief Justice Coke wrote about “*ligeantia localis*,” which was “wrought by the law”:

[T]hat is when an alien that is in amity commeth into England, because as long as he is within England, he is within the King’s protection; therefore so long as he is here, he oweth unto the King a local obedience or ligeance, for that the one (as it hath bin said) draweth the other.

Calvin’s Case, (1608) 7 Co. Rep. 1, 5b, 77 Eng. Rep. 377, 383 (Exch. Ch.). Hale wrote:

As to local allegiance or subjection, every person that comes within the king’s dominions owes a local subjection and allegiance to the king, for he hath here the privilege of protection He may maintain actions if he be an alien friend, and in this respect he owes a local allegiance to the king so long as he is within the king’s dominions and protection.

Hale, *Prerogatives*, *supra* note 70, at 56; see also Foster, *supra* note 37, at 188 (“Protection and Allegiance are reciprocal Obligations . . .”).

74. See G. S. Rowe & Alexander W. Knott, *Power, Justice, and Foreign Relations in the Confederation Period: The Marbois-Longchamps Affair, 1784–1786*, 104 Pa. Mag. Hist. & Biography 275, 278–79 (1980) (describing Longchamps’s quarrel).

75. *Respublica v. De Longchamps*, 1 U.S. (1 Dall.) 111 (Pa. O. & T. 1784).

76. Article, Freeman’s J. (Phila.), Aug. 11, 1784.

comply and proceeded to sentence him for violating the law of nations as adopted within the law of the state.⁷⁷

In response to the actions against Longchamps, Americans across the continent emphasized the principle that visiting strangers were simultaneously subject to local law and protected by it: A Massachusetts newspaper essayist explained that “[f]oreigners are entitled to the protection of the law as well as amenable to it, equally with any citizens of the United States, while they continue within the jurisdiction of this Commonwealth.”⁷⁸ Going into more detail, another writer quoted Vattel on “strangers who are permitted to settle and stay in the country”—the point being that “[i]f they commit a fault, they ought to be punished according to the laws of the country.”⁷⁹ Vattel, this American noted, had explained that “[t]he sovereign . . . allows a stranger access upon this ‘tacit condition, that he be SUBJECT to the laws as soon as *he enters* the country.’”⁸⁰ The underlying principle was that “[t]he duties of protection and submission are reciprocal,” and thus it was evident that when a stranger entered the country, he acquired protection: “Every stranger, then, the moment he enters and breathes the free air of our land, becomes subject to the penalties and punishment of our laws; and, of course, is entitled to the full benefit and protection of them.”⁸¹

Of course, these were arguments on behalf of Longchamps, and they left the other side of the equation unmentioned: They left the reader to discern for himself the rights of a stranger who was not “permitted to settle and stay in the country” or whose own country engaged in conduct inconsistent with any tacit condition of submission.

At least, however, the lawfully visiting subject of a foreign sovereign at peace with the United States could be assumed to have submitted to the local government and its laws. On this assumption, such an alien could expect the generous implication of the principle of protection that “when a stranger takes footing among us, he is protected by our laws.”⁸²

B. A Vocabulary Problem

The protection enjoyed by strangers created a vocabulary problem. Although a question of vocabulary is rarely central, it can be revealing, and in this instance, it suggests how self-consciously Anglo-American law-

77. *De Longchamps*, 1 U.S. (1 Dall.) at 114–16.

78. Letter to Captain Stanhope, Essex J. (Phila.), Sept. 21, 1785, at 3.

79. A Citizen (Written for the Chronicle of Freedom), *Indep. Gazetteer* (Phila.), Feb. 5, 1785 [hereinafter Citizen, *Chronicle of Freedom*]. For the underlying passages in Vattel, see Vattel, *supra* note 51, bk. II, ch. VIII, §§ 101–02, at 172, 174.

80. Citizen, *Chronicle of Freedom*, *supra* note 79 (citation omitted).

It may be wondered how, under the principle of protection, a foreign merchant who remained abroad could enforce his contracts in England or America. As it happens, the solutions were simple. For example, the foreign merchant could work through a local partner, agent, or broker, or he could assign his paper to a local businessman.

81. *Id.*

82. *Id.*

yers preserved the generous implications of the principle of protection—even at a time when they were increasingly focusing on their own national attachments and citizenship.

The reciprocal duty of subjects to their government was usually described in terms of either “subjection” or “allegiance,” and these words seemed well suited to describing the strong duty owed by natural subjects or by citizens. The very strength of these terms, however, could be a source of awkwardness when they were used to describe the duty of foreign visitors, who could be understood to owe only a much qualified subjection or allegiance. Although it was easy enough to speak of domestic subjects who owed allegiance, it could seem rather forced, especially in an era of increasingly strong national attitudes, to speak of foreigners who owed *subjection*, let alone foreigners with *allegiance*.

The solution among common lawyers was to distinguish among different types of allegiance or protection. Like other common lawyers, Chief Justice Matthew Hale distinguished between natural and local allegiance, explaining that allegiance “is either natural from all that are subjects born within the king’s allegiance; or local, which obligeth all, that are resident within the king’s dominions, and partake of the benefit of the king’s protection, altho strangers born.”⁸³ Struggling to find adequate words to describe the distinction, Hale also spoke of the difference between *primitive* and *virtual* allegiance.⁸⁴ Others would speak of *natural* and *temporary* allegiance.⁸⁵

The question of terminology was probably especially awkward for Americans. On account of their attachment to republican ideals, they increasingly preferred to think of themselves as citizens who created their government rather than as subjects of their ruler—indeed, as citizens who owed allegiance, not subjects who owed submission. This emphasis on citizenship and allegiance, however, had a cost. It drew a sharp line

83. 1 Matthew Hale, *Historia Placitorum Coronae* 62 (London, E. & R. Nutt 1736) [hereinafter Hale, *Historia Placitorum*].

84. He wrote: “The breach of this primitive or virtual allegiance is that, which is called high treason” *Id.* at 62. A slightly different distinction was that between an “express or explicit allegiance” by oath and an “implied and virtual allegiance.” *Id.* at 62, 64.

Some seventeenth-century lawyers differentiated natural and loving subjects, natural subjects being those who were natural born and naturalized subjects, and loving subjects being both natural subjects and lawfully visiting foreigners. For example, Hale summarized a case: “Alien only living here comes, not under the name of naturall subjects, but comes under the name of loving subjects.” 1 Matthew Hale, *Black Book of the Common Law*, fol. 38[r], (written prior to Dec. 1676) unpublished commonplace book, Yale Law School Manuscripts Dep’t, ms. G +C73, no. 1 (citing “7: Jac: Hubb: 357: Curtiinis case”) (This is a secretarial copy of the original in Lincoln’s Inn. The pagination cited here is that on the bottom of the page.).

85. Among those who combined the terms was the mid-eighteenth-century English judge Joseph Yates. See *infra* notes 172–177 and accompanying text.

between citizens and others—a line that made it slightly jarring to talk about the subjection or allegiance of noncitizens.⁸⁶

Nonetheless, Americans followed Hale and other English lawyers in assuming that visiting aliens in amity owed allegiance and enjoyed protection. In 1775, at the beginning of America's independence, Mather wrote that "every alien friend that comes into the realm to reside for a time, oweth a local temporary allegiance, during his residence there."⁸⁷ In the years ahead, Americans would regularly recognize that even foreigners could participate in the reciprocal relationship of allegiance and protection enjoyed by citizens.

C. *Traitors, Even if Aliens, Enjoyed Protection*

All persons, including aliens, who owed allegiance to a government could be found guilty of treason; but at the same time, all such persons, even the aliens, had a right to the protection of the government and its laws. The Supreme Court has recently held that an American citizen who takes up arms against the United States can be detained without judicial process—in particular, that he can be detained without the regular due process of law owed to criminal defendants.⁸⁸ Once, however, not only citizens, but also lawfully visiting aliens who joined an enemy would have had the protection of the law, and they would therefore have gone free, unless tried before a judge and jury and convicted of treason or another offense. This application of the criminal law could be harsh, but it was

86. When the Massachusetts Constitution of 1780 alluded to the principle of protection, it avoided any difficulties by speaking not about citizens, but about members of the society and subjects of the commonwealth. It stated that "[e]ach individual of the society has a right to be protected by it in the enjoyment of his life, liberty and property, according to standing laws," and that "[e]very subject of the commonwealth ought to find a certain remedy, by having recourse to the laws, for all injuries or wrongs which he may receive in his person, property, or character . . . without any denial; promptly, and without delay; conformably to the laws." Mass. Const. pt. I, arts. X, XI. Although the Constitution in these clauses could be understood in a republican spirit to have confined protection and legal remedies to members of the society in the sense of its citizens, the phrases "[e]ach individual of the society" and "[e]very subject of the commonwealth" were probably understood to have included foreign visitors. As explained in a different context by a newspaper essayist in Philadelphia, "inhabitants and subjects, as distinguished from citizens, are strangers who are permitted to settle and stay in the country." Citizen, *Chronicle of Freedom*, supra note 79. For a similar question about the meaning of the word "subject," see *infra* text accompanying notes 274–275.

87. Mather, supra note 48, at 16. For a similar passage, see Hale, *Historia Placitorum*, supra note 83, at 62 ("[T]his allegiance is either natural from all that are subjects born within the king's allegiance; or local, which obligeth all, that are resident within the king's dominions . . . altho strangers born."). For another illustration of such ideas, see 1 Zephaniah Swift, *A System of the Laws of the State of Connecticut* 164 (Windham, John Byrne 1795–1796) [hereinafter Swift, *A System*] ("Local allegiance is that subjection which every stranger, or foreigner owes the state, while within its limits.").

88. See *Hamdi v. Rumsfeld*, 542 U.S. 507, 533 (2004) (consigning a citizen, Hamdi, to a military trial). This traditionally could make sense in some civil wars, but not otherwise. See *infra* notes 331, 508, 516, and accompanying text.

also generous, for it assumed that even visiting foreigners who presumptively submitted to the government and its laws were entitled to the protection of the law, including judicial process.

It will be recalled that aliens in amity who came to England lawfully were presumed to have accepted a local or temporary allegiance and that they therefore, like natural English subjects, had the protection of the law.⁸⁹ By the same token, having taken advantage of the protection of the law, such aliens had presumably accepted allegiance and were vulnerable to criminal prosecution for any crimes they committed, including treason.

Treason prosecutions were especially apt to elicit discussions of allegiance because a breach of the allegiance owed to the king was a substantive allegation in indictments for treason. Thus, although the absence of allegiance and protection usually arose merely as a jurisdictional obstacle, it came to be debated in treason prosecutions as a substantive question. Even with this difference, however, prosecutions for treason are revealing about allegiance and protection.⁹⁰ Of particular interest here, such prosecutions show that even aliens, if they owed a local allegiance, could be charged with treason.

Hale explained that a breach of allegiance was the same, regardless of whether it was the primitive allegiance owed by natural subjects or the local allegiance owed by foreign visitors.⁹¹ Put bluntly, “[t]he breach of this primitive or virtual alligance is that, which is called high treason.”⁹² Accordingly, “if an alien, the subject of a foreign prince in amity with the king, live here, and enjoy the benefit of the king’s protection, and commit a treason, he shall be judged and executed, as a traitor; for he owes a local allegiance.”⁹³ Although visiting foreigners could thus be tried for treason, they at least had the same protection as English offenders. In particular, they had a right to the same judicial process and they could go free if not convicted.⁹⁴

89. See *supra* Part II.A.

90. Whatever the earlier history, certainly by the seventeenth century the general assumption about allegiance and protection was understood to underlie the allegation of breach of allegiance in treason indictments. Hale explained:

Because as the subject hath his protection from the king and his laws, so on the other side the subject is bound by his alligance to be true and faithful to the king; and hence all indictments of high treason run proditorie, as a breach of the trust, that is owing to the king; *contra ligeantiae suae debitum*, against that faith and alligance he owes to the king, and *contra pacem domini regis, coronam, & dignitatem ejus*.

Hale, *Historia Placitorum*, *supra* note 83, at 59.

91. See *id.* at 62 (defining high treason as breach of either “natural” or “virtual” allegiance).

92. *Id.*

93. *Id.* at 59.

94. For example, John Sherleys was a French subject residing in England, who joined a rebellion there. As it was a time of peace between the two nations, Sherleys was an alien in amity, and he was therefore tried and found guilty of treason. *Sherleys’ Case*, (1557) 2

The reciprocal relation of allegiance and protection, including its implications for treason, became a foundation of American government. In June 1776, the Continental Congress asked the states to adopt treason statutes based on the principle of protection. Americans who promptly fled to go behind British lines evidently did not accept any American allegiance or protection. Those, however, who remained within American lines in their state presumably accepted its protection and therefore owed it allegiance. Similarly, lawfully visiting aliens in amity presumably accepted protection and allegiance. All such persons were owed the protection of the law, including the due process of law, but were also subject to the law of treason:

That all persons abiding within any of the United Colonies, and deriving protection from the laws of the same, owe allegiance to the said laws, and are members of such colony; and that all persons passing through, visiting, or mak[ing] a temporary stay in any of the said colonies, being entitled to the protection of the laws during the time of such passage, visitation or temporary stay, owe, during the same time, allegiance thereto:

That all persons, members of, or owing allegiance to any of the United Colonies, as before described, who shall levy war against any of the said colonies within the same, or be adherent to the king of Great Britain, or others the enemies of the said colonies, or any of them, within the same, giving to him or them aid and comfort, are guilty of treason against such colony:

That it be recommended to the legislatures of the several United Colonies, to pass laws for punishing, in such manner as to them shall seem fit, such persons before described, as shall be proveably attainted of open deed, by people of their condition, of any of the treasons before described.⁹⁵

With protection came allegiance, and with allegiance came the possibility of prosecutions—not least, for treason.

The theoretical foundation of this Congressional policy was echoed in the prefaces of some of the resulting state statutes. For example, the 1776 New Jersey treason statute began by asserting that all residents who derived protection from the laws were members of the society and owed allegiance to the government: “[A]ll Persons abiding within this State, and deriving Protection from the Laws thereof, do owe Allegiance to the Government of this State, established under the Authority of the People,

Dy. 144a, 145a, 73 Eng. Rep. 315, 316 (K.B.). Commenting on the case, the reporter observed that “the indictment was against the duty of his allegiance, when he was not a subject of the realm; but this is of no signification; in this time of peace between England and France, to levy war with other English rebels was sufficient treason; and if it were in time of war, he should not be arraigned, but ransomed.” *Id.* (emphasis omitted).

95. Resolution of June 24, 1776, in 5 *Journals of the Continental Congress, 1774–1789*, at 475 (Worthington Chauncey Ford ed., 1905). These resolutions, although not their significance for protection, are noted in Brian F. Carso, Jr., *Whom Can We Trust Now? The Meaning of Treason in the United States, from the Revolution Through the Civil War* 58–59 (2006).

and are to be deemed as Members thereof.”⁹⁶ Turning to transitory visitors, the statute attributed both protection and allegiance to them: “And all Persons passing through, visiting or making a temporary stay in this State, being entitled to the Protection of the Law during such Passage, Visitation, or temporary Stay, do owe, during the same Time, Allegiance to this Government.”⁹⁷ The statute then proceeded to punish “every person who is a member of [this state], or owes allegiance to this government,” if he committed treason, if he maintained the authority of the British government, or if he reviled the government of the state or otherwise encouraged disaffection.⁹⁸ Roughly similar statutes, also based on the reciprocal character of allegiance and protection, were passed in the other states.⁹⁹

Of course, the link between protection and allegiance was a mixed blessing for the states. On the one hand, the states used their treason and loyalty statutes for their own ends—to pressure disloyal citizens and visiting aliens towards greater loyalty and sometimes even to establish grounds for the forfeiture of the property of those who joined the enemy.¹⁰⁰ On the other hand, the states could have difficulty proving trea-

96. An Act to Punish Traitors and Disaffected Persons (1776), in *Acts of the Council and General Assembly of the State of New-Jersey* 4 (Trenton, Isaac Collins 1784). The preamble began by noting that “the Safety of the People . . . requires, that all Persons who are so wicked as to devise the Destruction of good Government, or to aid or assist the Enemies of the State, shall suffer condign Punishment.” *Id.*

97. *Id.*

98. *Id.* For the enforcement of the act, see Proclamation of Governor William Livingston (Aug. 14, 1779), in 1 *Minutes of the Governor’s Privy Council* 32–35 (1974). Language similar to the preface of the New Jersey statute appeared in, for example, An Act Against Treason and Misprision of Treason, for Regulating Trials in Such Cases, and for Directing the Mode of Executing the Judgments Against Persons Attained of Felony (1777), in *The Perpetual Laws of the Commonwealth of Massachusetts* 357 (Worcester, Isaiah Thomas 1788). Such phrasing could also be used in compressed form, as when the New Hampshire treason act recited that “all Persons passing through, visiting, or making a temporary Stay in this State, and enjoying the Protection of its Laws, during their Residence therein, as well as the Inhabitants of this State, Owe Allegiance to the Same.” An Act Against Treason and Misprision of Treason, and for Regulating Trials in Such Cases, and for Directing the Mode of Executing Judgments Against Persons Convicted of Those Crimes (1777), in *Acts and Laws of the State of New-Hampshire, in America* 65 (Exeter, Zechariah Fowle 1780).

99. For the state treason statutes, see Carso, *supra* note 95, at 62–63.

100. Indeed, many states adopted attainder statutes, which attainted loyalists for treason, thus justifying forfeiture of their property. Such statutes, however, were often a last resort against men who had fled to join the British and who therefore could not be tried in a regular manner. The statutes accordingly sometimes permitted a regular trial for defendants who returned. For example, a Georgia statute attainted a number of named inhabitants for treason on the ground that they had joined the British in violation of the “allegiance” they owed the state, but it added that if they returned they were to be tried for their treason in a court of record. The statute then recited that they “have forfeited the personal protection of, and been guilty of high treason against the State, contrary to their duty and allegiance to the same,” and on this basis, it imposed a forfeiture of their property. An Act for Attainting Such Persons as Are Therein Named of High Treason, and for Confiscating Estates, Both Real and Personal, to the Use of the State, for Establishing

son and other criminal offenses, because the defendants had a right to judicial process. It was therefore not always advantageous for the states to accord the protection of their laws to persons who were not actually loyal. Yet state legislatures usually felt they had no choice but to give such protection to persons within allegiance, regardless of whether they were citizens or aliens in amity. From this perspective, the difficulty of acting through the law was an inevitable cost of the reciprocal relation between allegiance and protection.

The treason statutes were thus both severe and rather generous. They were harsh measures for harsh times. But they were instances of how the American states felt obliged to use law rather than military means against persons within protection, including aliens in amity.

D. *Disaffected Citizens, Including Domestic Terrorists, Enjoyed Protection*

Among those who enjoyed protection, including the protection of the law, were those who today would loosely be called “domestic terrorists.” The most widespread problem for the states was not outright warfare or treason, but rather “disaffection”—the old loyalties felt by the citizens of the new governments. Many such persons did nothing more than express discontent with the Revolution. Others, however, shared intelligence, harbored clandestine intruders, and joined in acts of sabotage, looting, and violence of a sort that today might be called “terrorism.” Nonetheless, if such persons were citizens, or if they were even lawfully visiting aliens in amity, they were within the protection of the law, and they therefore could not be punished except by law.

Even when the states could not be confident of the loyalty of individuals, their legislatures usually adhered to the principle of protection. As a matter of law, colonists who remained within American lines during the War of Independence became citizens, who owed allegiance to their state and enjoyed its protection, but as a matter of sentiment, many such citizens retained attachments to Britain. The standard solution to this problem was to impose oaths of allegiance, thus forcing individuals to declare where they stood. In some circumstances, a state might feel it could not even begin with a presumption that the disaffected persons were within allegiance and thus deserving of protection, and in these instances its legislature might feel free to employ nonjudicial officers, such as commissioners or committees of safety, to impose oaths of allegiance and expel

Boards of Commissioners for the Sale of Such Estates, and for Other Purposes Therein Mentioned, Preface, §§ I–III (1778), in *A Digest of the Laws of the State of Georgia* 208–10 (Philadelphia, R. Aitken 1800). In other words, the persons who joined the British were given the protection of the law, but after they were attainted for treason, they lost their protection. Although the forfeiture was harsh, it notably followed the section on attainder, and it appeared in a statute that allowed the men an opportunity to return for a regular trial.

noncomplying individuals.¹⁰¹ More typically, however, states presumed that persons who remained within their lines were within allegiance and protection, and their legislatures therefore relied on justices of the peace or other judicial officers to impose the oath and merely punish those who refused it. In New Jersey, for example, the same statute that imposed penalties for treason also, at a lesser level, authorized justices of the peace to require an oath of abjuration and allegiance from those “whom they shall suspect to be dangerous or disaffected to the present Government.”¹⁰² Anyone who did not comply was to be bound over to the general quarter sessions, where, “if such Offender refuse to take the said Oaths, he shall continue bound to his good Behaviour, or be fined or imprisoned, as the said Court shall deem necessary.”¹⁰³ As with the other provisions of the act, this was severe, but was done entirely through judicial process. Indeed, there has been a study of all of the wartime state statutes that required assurances of allegiance, and this study reveals that the statutes usually authorized judges or justices of the peace to execute these laws.¹⁰⁴ These enactments tended to assume that all inhabitants,

101. A 1778 New York statute illustrates how the uncertainty of allegiance could seem to permit reliance on nonjudicial officers. Significant portions of New York remained under British control through most of the war. Worried that parts of the population “affected to maintain a Neutrality,” the Assembly authorized commissioners “to cause all such Persons, of neutral and equivocal Characters in this state, whom they shall think have influence sufficient to do Mischief in it” to take an oath or affirmation of allegiance, and if such persons refused, the commissioners were to “remove the said Person or Persons so refusing, to any Place within the Enemy’s Lines.” An Act More Effectually to Prevent the Mischiefs, Arising from the Influence and Example of Persons of Equivocal and Suspected Characters, in This State §§ I–III (1778), in *Laws of the State of New-York* 43 (Poughkeepsie, John Holt 1782). Such persons, in the view of the Assembly, did not start with a presumption of allegiance, and the commissioners could therefore deny them protection and expel them unless they declared sides by taking an oath. Even in this statute, however, the presumption could shift. If the suspected persons did not comply with the statute or the requests of the commissioners that they leave, these individuals were to be charged, under the law, with misprision of treason. *Id.* § IV, in *Laws of the State of New-York*, *supra*, at 258. In other words, if they lingered in New York without taking the oath, they were presumed to be within allegiance and protection and thus subject to the law and within its protection. Incidentally, the legislature quickly enacted another statute providing that those who refused to take the oath could change their minds and take it later. An Act to Amend an Act, Entitled, an Act More Effectually to Prevent the Mischiefs Arising from the Influence and Example of Persons of Equivocal and Suspected Characters in this State, and for Continuing the Powers of the Commissioners for Detecting and Defeating Conspiracies § I (1779), in *Laws of the State of New-York*, *supra*, at 49.

102. An Act to Punish Traitors and Disaffected Persons § 4 (1776), in *Acts of the Council and General Assembly of the State of New-Jersey*, *supra* note 96, at 5.

103. *Id.* For another example, see An Act, Obliging the Male White Inhabitants of this State to Give Assurances of Allegiance to the Same, and for Other Purposes Therein Mentioned (1777), in *The Acts of the General Assembly of the Commonwealth of Pennsylvania* 61–65 (Philadelphia, Francis Bailey 1782).

104. Claude Halstead Van Tyne, *The Loyalists in the American Revolution* 318–26 (1902).

Of course, state legislatures sometimes egregiously denied protection to individuals who were within protection. A particularly sweeping example was the New Jersey statute

even the disaffected and treasonous inhabitants who refused to take oaths of allegiance, were within the protection of the law.

That state legislatures almost always accorded protection to persons who presumptively owed allegiance is revealing—especially when it is recognized that many Americans bitterly insisted they had a right to retaliate outside the law against their fellow citizens who happened to be Tories.

authorizing the state's council of safety to hold disaffected citizens as hostages for citizens abducted and taken behind British lines. An Act for Constituting a Council of Safety § 17 (1777), *in* Acts of the General Assembly of the State of New-Jersey, At a Session Begun at Princeton on the 27th Day of August 1776, and Continued by Adjournments til the 11th of October 1777, at 89 (Burlington, Isaac Collins 1777) [hereinafter, Acts of New-Jersey of 1777].

A more typical and interesting sort of denial of protection was when statutes authorized the expulsion of the wives and children of men who had traitorously left to join the enemy. For example, the same New Jersey statute authorized the Council of Safety, headed by the Governor, "to send into the Enemy's Lines such of the Wives and Children of Persons lately residing within this State, who have gone over to the Enemy, as they shall think necessary." An Act for Constituting a Council of Safety § 12 (1777), *in* Acts of New-Jersey of 1777, *supra*, at 87. Similarly, a South Carolina statute authorized the expulsion of the families of persons who had left to join the enemy and had been outlawed. An Ordinance to Prevent Persons Withdrawing from the Defense of this State to Join the Enemies Thereof § III (1779), *in* 4 Statutes at Large of South Carolina, *supra* note 67, at 479.

A 1782 New York version of such an enactment was more self-conscious about the question of protection. It recited that "many and great Mischiefs do arise, by permitting the Families of Persons who have joined the Enemy, to remain at their respective Habitations, inasmuch as such Persons frequently come out in a private Manner, to gain Intelligence and commit Robberies, Thefts and Murders, upon the good People of this State, and are concealed and comforted by their respective Families." On this account, it required that justices of the peace "shall notify the Wives of all such Persons . . . that they depart this State within twenty Days after such Notice, or repair to such Parts of it as are within the Power of the Enemy; and at their Discretion to take with them all or any of their Children, not above the Age of twelve Years." An Act for the Removal of the Families of Persons who have joined the Enemy § I (1780), *in* Laws of the State of New-York, *supra* note 101, at 143–44. The statute thus seems to have treated persons who were within the protection of the law as if they were outside it. This Act, however, at least purported to meet the ideal of protection, for it further provided that "in Case any of the Persons aforesaid, shall, after the Space of twenty Days after such Notice, be found in any Part of this State; they shall and are hereby declared to be out of the Protection of the Laws of this State; and shall be liable to be proceeded against as Enemies of this and the United States." Recognizing that the state could allow such persons to stay, it added that "this Law shall not extend to affect such of the said Persons as shall procure Permits to remain at their respective Habitations." *Id.* § II, *in* Laws of the State of New-York, *supra* note 101, at 144. The statute was probably designed to persuade families that harbored the enemy to give up such misconduct in exchange for a permit to remain.

The status of spouses and children has always raised complicated questions of loyalty. At common law, for example, a conviction for treason was punished not merely with death but with corruption of blood—thus providing a precaution against the continued power of a traitor's family. The increasing individualism of common law societies has deprived this sort of solution of its legitimacy, but has not fully diminished the underlying problem of treason in the context of family loyalty. Accordingly, the conflict between national and intimate allegiances remains a difficult problem.

In the minds of these Americans, British pillage had to be met with American pillage.

The demands to treat citizens of dubious loyalty as if they were outside the protection of the law can be observed in Monmouth County, New Jersey, where the war between nations often devolved into a war among neighbors. The trouble seemed to come from the “Refugees and disaffected.”¹⁰⁵ Refugees were former inhabitants of the American states, many of whom had fled at the beginning of the war, and who were therefore British subjects. In contrast, the disaffected were usually citizens (in this instance, of New Jersey) who remained but sympathized with the British. Both such groups engaged in “Murder, Depredations and Kidnapings” on behalf of Britain.¹⁰⁶ By 1780, therefore, various self-proclaimed “Retaliators” organized to take extralegal measures against local Tories—the goal being both revenge and enrichment.¹⁰⁷ The Retaliators acted without legal authority because they typically attacked disaffected citizens of the state who had not clearly violated any law. Usually, the sole offense of such persons was merely that they retained pro-British sentiments, but in the aftermath of raids by refugees, this was enough to make them seem suitable targets for retaliation. A leading spokesman for the Retaliators explained:

We have from the mere Necessity of our Case on the sole ground of Self-Preservation been compelled to enter into a general Association for the Purpose of Retaliation on the Persons and Property of the notoriously disaffected yet residing among us, for all Damages, Depredations, Burnings, Kidnapings &c: done or committed by any of the Refugees &c.¹⁰⁸

This was “[a]n Eye for an Eye & a Tooth for a Tooth,” and although the writer acknowledged that this retaliation was lawless, he justified it with the old excuse of necessity:

We are well aware of the objections this distressing Mode is liable to, as being not agreeable to Law, but liable to abuse and likely sometimes to injure the innocent—But Alas! my dear Friend, *Necessity has No Law*. We could no longer consent to be murdered and plundered by Rule, while from the Laxness Timidity & Indecision of our Magistracy the Laws were rather a Screen for Tories, while they afforded little Security to the well-affected Citizen.¹⁰⁹

What the Retaliators considered timidity and indecisiveness, however, the New Jersey Assembly thought a matter of law and good policy. The Assembly could not afford to give way to measures that would deprive

105. Letter from Congressman Nathaniel Scudder to Henry Laurens (June 17, 1780), in 8:2 Members of Old Congress, Dreer Collection 111 (Philadelphia, Pa. Historical Soc’y n.d.), quoted in Hamburger, *Law and Judicial Duty*, supra note 3, at 421 n.60.

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

Tory residents of the protection of the law and push them further toward Britain. The Assembly therefore rejected a request from the Retaliators for a statute “authoriz[ing] the well-affected inhabitants to retaliate upon the property of the disaffected” of Monmouth County.¹¹⁰ The legislature acknowledged that the county needed the government to provide a more “spirited” defense, but it declared that the Retaliators were “an illegal and dangerous combination, utterly subversive to law” and “tending to the dissolution of the constitution and government.”¹¹¹

New Jersey was not alone in responding to domestic terrorism by recognizing the right of the culprits to judicial process and punishment. In Virginia, one such case was that of Josiah Philips—a notorious bandit or irregular combatant. He claimed to be a British subject, but the state viewed him as a wayward citizen and therefore tried and convicted him for a felony. Thomas Jefferson recalled: “Philips was a mere robber, who availing himself of the troubles of the times, collected a banditti, retired to the Dismal swamp, and from thence sallied forth, plundering and maltreating the neighboring inhabitants, and covering himself, without authority, under the name of a British subject.”¹¹²

Although the legislature adopted a bill of attainder, “the first object” of this Act was to “bring him to a fair trial,”¹¹³ and therefore, when he was captured, Attorney General Edmund Randolph prosecuted him.¹¹⁴ Philips apparently pled that “he was a British subject, taken in arms, in support of his lawful sovereign, and as a prisoner of war entitled to the protection of the law of nations.”¹¹⁵ The court, however, overruled this defense, and at the end of his trial, the jury found him guilty.¹¹⁶ Another case from Virginia was that of James Lamb—a wheelwright who got carried away by justifiable resentments. After some errant Americans “committed . . . unwarrantable outrages on the persons & property of the Citizens of this state within the Enemies lines,” Lamb joined a counterattack against persons within American lines.¹¹⁷ His story suggests how

110. Memorial to New Jersey Assembly (Sept. 23, 1780), quoted in Hamburger, *Law and Judicial Duty*, supra note 3, at 421; N.J. Assembly, Committee Report (Sept. 29, 1780), quoted in Hamburger, *Law and Judicial Duty*, supra note 3, at 421.

111. N. J. Assembly, Committee Report (Sept. 29, 1780), supra note 110, at 421.

112. Letter from Thomas Jefferson to William Wirt (Aug. 14, 1814), in 2 Papers of Thomas Jefferson 191, 191 (Julian P. Boyd ed., 1950). In this letter, Jefferson suggested that Randolph refused to rely on the bill of attainder lest Philips plead that he was a British subject, but this explanation was more self-serving than plausible. *Id.*

113. Letter from Thomas Jefferson to L. H. Girardin (Mar. 12, 1815), in 2 Papers of Thomas Jefferson, supra note 112, at 191.

114. Letter from Thomas Jefferson to William Wirt, supra note 112, at 191.

115. Letter from Thomas Jefferson to L. H. Girardin, supra note 113.

116. *Id.* According to one version of the trial, the court also ruled that “a Commission from an enemy could not protect a citizen in deeds of murder and robbery.” 4 John Burk et al., *History of Virginia* 306 (Petersburg, Va., M. W. Dunnavant 1816).

117. Extract of a Letter from the Hon. Judges of the Gen. Court (unpublished letter, Library of Virginia, House of Delegates, Office of Speaker, Executive Communications, Box 2, Folder 80), quoted in Hamburger, *Law and Judicial Duty*, supra note 3, at 487. In

men could be drawn into the back and forth of informal warfare and plunder; and like many others who violated their allegiance to their states, he was convicted of treason. As it happens, Lamb was pardoned, and his pardon gave rise to an important constitutional controversy in the Virginia Court of Appeals.¹¹⁸ What matters here, however, is the illustration of how states applied the law, including judicial process, to citizens and others within protection who committed what would today be called “terrorism.”

The evidence reveals that state legislatures tended to recognize not only the force of allegiance but also the protection of the law. The Revolution abounded in lawlessness, and state legislatures sometimes participated in such misconduct, but they appear to have acknowledged the ideal of reciprocal protection and allegiance. In this ideal, persons who had submitted to the laws, whether they were citizens or foreigners, deserved both the punishment and the protection of the laws.

E. *No Right of Protection for Enemy Aliens: The Common Law*

Notwithstanding the generous treatment observed thus far for citizens and aliens in amity, enemy aliens had no right of protection. It will later be seen that a state could optionally extend a degree of protection to a limited range of enemy aliens, but this sort of protection was held only by license. Any right of protection was cut short by war.¹¹⁹

War delineated an emphatic distinction between enemy aliens and natural subjects, not to mention aliens in amity. The prototypical contrast was with natural subjects. On the one hand, although a natural subject of England could adhere to the enemy, such a subject still owed allegiance to England, and he therefore remained within the protection of its law and was really a traitor rather than an enemy. On the other hand, an alien who owed allegiance to a foreign sovereign or other power at war with England was an enemy alien, and unless he had been offered English protection and the associated allegiance, and unless he had accepted them, he could not ordinarily be considered to have any obligation under English law or to have any protection under it. Accordingly,

his defense, it was said that he was “actuated in this Conduct rather from Resentment” than “a desire to assist the Enemy,” and the judges therefore recommended a pardon.” *Id.* For further details of Lamb’s case, including the subsequent constitutional issues, see Hamburger, *Law and Judicial Duty*, *supra* note 3, at 487–96.

118. Hamburger, *Law and Judicial Duty*, *supra* note 3, at 487–96.

119. For the optional grant of protection, see *infra* Part III.A. An illustration of the use of the word “license” in these circumstances can be observed in an argument of a late seventeenth-century Attorney General, Sir Robert Sawyer. Speaking of the king, Sawyer pointed out that “[h]e may licence *alien enemies* who were prohibited by the common law, as by his letters of safe conduct.” *East India Co. v. Sand[y]s*, (1684) 2 Shower K. B. 370, 370, 89 Eng. Rep. 988, 990 (K.B.). Recognizing that Jews had been prohibited aliens, Sawyer noted that they “are here by an implied licence” and when they suffered from “a proclamation of banishment,” this was “like a determination of letters of safe conduct to an alien enemy, who was here by virtue of such letters.” *Id.* at 991.

when Chief Justice Matthew Hale observed that both “subjects” and “foreigners” could “raise war against the king,” he distinguished them. The subjects “are not properly enemies but rebels or traitors,” and only the foreigners “come properly under the name of enemies.”¹²⁰

Enemy aliens were thus generally outside both the obligation and protection of the nation’s laws. On the one hand, they were not accountable at law; on the other hand, as Blackstone summarized, they had “no rights, no privileges, unless by the king’s special favor, during the time of war.”¹²¹ This meant that, whether in civil or criminal proceedings, they could be neither defendants nor plaintiffs. At the most mundane level, enemy aliens could not typically sue or be sued. Indeed, “[a]lien enemies shall not have so much as a personal action, which other aliens may.”¹²² At a more dramatic level, they could not be tried for treason and other offenses, and concomitantly had none of the rights of a person accused.

As Justice Foster explained about prisoners of war and spies who came during wartime, “they are to be considered at the worst but as Enemies subject to the Law of Nations; never as Traitors subject to our municipal Laws, and owing Allegiance to the Crown of *Great Britain*.”¹²³ Echoing this point in South Carolina, Chief Justice Drayton recited: “So, an alien Enemy, even invading the Kingdom of England, and taken in Arms, cannot be dealt with as a Traitor, because *he violates no Trust or Allegiance*.”¹²⁴ This was the “[d]octrine laid down in the best Law Authorities,” and it was “a Criterion whereby we may safely judge, whether or not a particular People are subject to a particular Government.”¹²⁵

Although it was clear enough that enemy aliens had no right to protection, it may be wondered how enemy aliens were to be identified. The initial answer came in the form of a presumption that was developed within the law of treason. The 1352 English treason statute prohibited men from levying war against the king and from being adherents to his enemies.¹²⁶ Writing about this statute, Hale explained that the subjects of an enemy foreign prince under his protection were understood to adhere to him but were to be treated as enemies rather than traitors:

120. Hale, *Historia Placitorum*, supra note 83, at 159. Note that the word “alien” tended to be used, even if not systematically, to refer to visiting foreigners. M. Anderson Berry, *Whether Foreigner or Alien: A New Look at the Original Language of the Alien Tort Statute*, 27 *Berkeley J. Int’l L.* 316 (2009).

121. 1 Blackstone, supra note 36, at *372.

122. Henry Finch, *Law, or, a Discourse Thereof* 28 (Danby Pickering ed., London, Henry Linot 1759).

123. Foster, supra note 37, at 187. He initially wrote this about ambassadors, and then added, “therefore I shall not take their Case into Consideration in this Place. And for the same Reason I say nothing of the Case of Spies taken here in time of War, *actual Hostilities being on foot in the Kingdom at that Time*, nor of Prisoners of War.” *Id.* at 187–88.

124. Drayton, supra note 58, at 5.

125. *Id.*

126. Treason Act, 1352, 25 Edw. 3, stat. 5, c. 2 (Eng.).

If a foreign prince be in actual war against the king of England, any subject of that prince under his protection is presumed to be adhering to him, but he is not a person within this act, for if he be taken, he shall be dealt with as an enemy, viz. he shall be ransomed, and his goods within this realm seised to the use of the king.¹²⁷

Such a subject was presumed to adhere to his sovereign, and therefore, if that sovereign were actually at war with England, the subject was an enemy, who could not ordinarily get protection or be punished under English law.

Yet there were limits on what could be presumed. It was reasonable to presume enemy status from an alien's being a subject of an enemy sovereign and under his protection. And by the same logic, it might be possible to presume enemy status from an alien's being a member of, or attached to, an enemy nonsovereign power. But what about an alien who was a subject of a friendly sovereign, who engaged in war privately, as an individual, without any commission from a superior? The enemy status of such an alien could not simply be presumed, and it was therefore necessary to inquire whether he was actually "in hostility"—that is, in a state of war against England. Matthew Hale noted this in passing, when recounting how Lord Herries, "a subject of the king of Scots in amity with queen Elizabeth . . . made an actual invasion upon *England* without the king's commission."¹²⁸ Hale concluded that "an enemy extends farther than a king or state in enmity, namely an alien coming into *England* in hostility."¹²⁹ In other words, an enemy could include even an alien who was the subject of a friendly sovereign. Although such an alien could not be presumed to be an enemy on account of his allegiance, he could still in fact be an enemy.

Like any other enemy alien, this sort of un-commissioned enemy alien had to be treated differently than a subject:

127. Hale, *Historia Placitorum*, supra note 83, at 164–65. It should be kept in mind that Hale made no suggestion that this was the only possible assumption about who was an enemy. He merely discussed this presumption because adherence to an enemy was an element of treason.

128. *Id.* at 164. The difference between actual and presumed hostility can be observed elsewhere in Hale's treatise. Again alluding to the *Herries* case, Hale wrote that "if an alien enemy come into this kingdom hostilely to invade it, if he be taken, he shall be dealt with as an enemy, but not as a traitor, because he violates no trust nor allegiance: resolved in the lord Herise's case." *Id.* at 59. At the same time, "[i]f a merchant, subject of a foreign prince in hostility with our king, come hither, after the war begun, without the king's license, or safe-conduct, such a person may be dealt with as an enemy, viz. taken, and ransomed." *Id.* *Herries* was an enemy because he was actually in hostility; the unlicensed foreign merchant was an enemy merely because he was a subject of a foreign prince in hostility.

For the contrast between this "in hostility" test and the "in open hostility" test, see *infra* note 183.

129. Hale, *Historia Placitorum*, supra note 83, at 164.

[I]f a subject born of the king of France makes war upon the king of England, a subject of the king of England adhering to him is a traitor within th[e] law, and yet the Frenchman, that made the war, is not a traitor but an enemy, and shall be dealt with as an enemy by martial law, if taken¹³⁰

The subject and the foreigner were engaged in the same violent enterprise, with different consequences. The subject was within allegiance and protection, but the enemy alien, whether presumptively or actually in hostility, was not. Thus, whereas the subject was a criminal, who had legal rights and was at risk of indictment, the enemy alien was a prisoner of war, who was subject to the laws of war and, at best, a military tribunal.¹³¹

Rather than seek protection, some prisoners, hoping to avoid criminal penalties, denied they owed allegiance. Such was the situation of a former Pennsylvanian, Samuel Chapman, who joined the British in December 1776 and then was attainted of treason in his former place of residence. His counsel argued that in the last month of 1776, “there was no government established in Pennsylvania, from which he could receive protection; and consequently, there was none to which he could owe allegiance—protection and allegiance being political obligations of a reciprocal nature.”¹³² The conceptual premise was indisputable, but the factual claim about the state’s government was dubious. The Attorney General therefore responded that, although the state did not yet have a constitution by the end of 1776, it had a government, to which residents owed allegiance. On this basis, as Chief Justice M’Kean instructed the jury, Chapman could be found guilty of treason.¹³³

130. *Id.* Hale explained this at greater length elsewhere:

If a foreign prince, or the natural subject of a foreign prince, not being a natural or acquise subject of the king, comes in hostility within the realm, he is not so much as a local subject and therefore if taken he shall be dealt with as an enemy, and not as a traitor. As it happened in the Lord Harris’s case, the duke of Norfolk being a subject was condemned as a traitor for adhering to him, but if he [Herries] had been taken, he had been dealt with as a prisoner of war.

Hale, *Prerogatives*, *supra* note 70, at 56 (citation omitted).

131. Although this Article focuses on the implications for persons, it should be noted that there were also implications for property. Attorney General Robert Sawyer explained:

After open war proclaimed, whereby all the subjects have notice whom the king hath declared his enemies, and against whom they are to join in defence of themselves and the kingdom; if the persons or goods of such enemies come into the kingdom, any subject may seize them, and gain a propriety in the goods, as a prize taken in open war.

East India Co. v. Sandys (K.B. 1684), in 10 *Cobbett’s Complete Collection of State Trials* 487 (London, T. C. Hansard 1811) [hereinafter *State Trials*]; see also Hale, *Prerogatives*, *supra* note 70, at 130.

132. *Respublica v. Chapman*, 1 U.S. (1 Dall.) 53, 53 (Pa. 1781) (emphasis omitted).

133. *Id.* at 53–57. The defendant was acquitted by the jury after instructions inviting this result on other grounds. *Id.* at 60. Similarly, in 1945, William Joyce sought to escape treason charges in England by claiming that he was outside allegiance, but without success. See Rebecca West, *The New Meaning of Treason* 12–13 (1964).

Other prisoners, far from being accused of owing allegiance, desperately sought the concomitant protection of the law. Such was the unhappy posture of the prisoners in the *Case of Three Spanish Sailors*, and this English decision is thus a sharp reminder about the degree to which enemy aliens held as prisoners of war were outside protection. As will be noted later, a lawyer moved that Common Pleas grant the three Spaniards a writ of habeas—on the ground that they had been taken prisoner only as a result of a misrepresentation by a British captain.¹³⁴ This was a serious charge, but the court denied the writ, explaining that the Spaniards “are alien enemies and prisoners of war, and therefore are not entitled to any of the privileges of Englishmen; much less to be set at Liberty on a habeas corpus.”¹³⁵ Today, this decision is thought to be specifically about prisoners and habeas. The Court’s language, however, suggests that the decision resulted from the underlying commitments of allegiance and protection, without which the prisoners were “not entitled to any of the privileges of Englishmen.”¹³⁶

Although more will be said below about prisoners and habeas, it should suffice here to observe that although a government could generally extend protection to aliens and even to some enemy aliens, enemy aliens had no right to protection. Whether they were presumptively or actually in hostility, their enemy status left them without any right to protection, including the protection of the laws.

F. *No Right of Protection for Enemy Aliens: Vattel*

The principle of protection has thus far been treated as a common law assumption that underlay English and American constitutions. Yet it was also, more basically, a principle of the law of nations, and its significance for foreign enemies was nowhere made more clear to Americans than in Vattel’s *Law of Nations*.¹³⁷ Emerich de Vattel was a Swiss writer whose treatise on the law of nations was widely read and appreciated by late eighteenth-century Americans. As noted by Benjamin Franklin in 1775, the book “has been continually in the hands of the members of our Congress.”¹³⁸ Of particular importance here, Vattel discussed the treatment of enemy aliens. A state could generously grant some of them a degree of protection, but they had no right to it.

Vattel was very clear on the duty of submission owed by visiting foreigners and the corresponding duty of protection ordinarily owed to them. He noted that “[s]ince the lord of the territory may, whenever he thinks proper, forbid its being entere[d], he has . . . a power to annex

134. See *infra* text accompanying notes 222–225.

135. *Case of Three Spanish Sailors*, (1779) 2 Black. W. 1324, 1324, 96 Eng. Rep. 775, 776 (K.B.).

136. *Id.* at 776.

137. Vattel, *supra* note 51.

138. Letter from Benjamin Franklin to Charles W. F. Dumas (1775), in 7 *The Works of Benjamin Franklin* 87, 88 (John Bigelow ed., 1904).

what conditions he pleases to the permission to enter.” But Vattel added that, in Europe, on the whole “the access is every where free to every person who is not an enemy of the state.”¹³⁹ All of this, however, rested on the assumption of submission to the laws:

[E]ven in those countries which every foreigner may freely enter, the sovereign is supposed [i.e., understood] to allow him access only upon this tacit condition, that he be subject to the laws,—I mean the general laws made to maintain good order, and which have no relation to the title of citizen, or of subject of the state. The public safety, the rights of the nation and of the prince, necessarily require this condition; and the foreigner tacitly submits to it, as soon as he enters the country, as he cannot presume that he has access upon any other footing.¹⁴⁰

Entry into a country was presumptively on the condition of submission to its laws, and with this presumed submission came the sovereign’s protection: “[A]s soon as he admits them, he engages to protect them as his own subjects, and to afford them perfect security, as far as depends on him.”¹⁴¹

But what was to be done by a sovereign with visiting subjects of another sovereign when a war began between the two nations? Vattel did not examine all angles of this problem, but he at least explained what a sovereign could do with the subjects of a sovereign against which he declared war. At the beginning of the war, the sovereign that initiated the war had to give the subjects of an enemy time to leave. Afterward, however, he could treat them as enemies:

The sovereign declaring war can neither detain the persons nor the property of those subjects of the enemy who are within his dominions at the time of the declaration. They came into his country under the public faith. By permitting them to enter and reside in his territories, he tacitly promised them full liberty and security for their return. He is therefore bound to allow them a reasonable time for withdrawing with their effects; and if they stay beyond the term prescribed, he has a right to treat them as enemies,—as unarmed enemies, however.¹⁴²

Many sovereigns, he added, graciously went beyond this duty of allowing enemy aliens to withdraw. Especially as to merchants, there were obvious advantages in allowing them to remain, and Vattel remarked upon the British practices in this regard:

At present, so far from being wanting in this duty [of permitting enemy subjects a reasonable time to withdraw], sovereigns carry their attention to humanity still farther, so that foreigners, who are subjects of the state against which war is declared, are very

139. Vattel, *supra* note 51, bk. II, ch. VIII, § 100, at 172. He added, “except, in some countries, to vagabonds and outcasts.” *Id.*

140. *Id.* bk. II, ch. VIII, § 101, at 172.

141. *Id.* bk. II, ch. VIII, § 104, at 173.

142. *Id.* bk. III, ch. IV, § 63, at 318.

frequently allowed full time for the settlement of their affairs. This is observed in a particular manner with regard to merchants; and the case is moreover carefully provided for, in commercial treaties. The king of England has done more than this. In his last declaration of war against France, he ordained that all French subjects who were in his dominions, should be at liberty to remain, and be perfectly secure in their persons and effects, "provided they demeaned themselves properly."¹⁴³

In short, the Crown could allow enemy aliens to remain with protection. There will be occasion to return to this practice, for Americans were very self-conscious about it; but for now it should suffice to note that this was a courtesy arising from self-interest rather than a duty required by the law of the land or the law of nations.¹⁴⁴ After having allowed the subjects of an enemy a reasonable opportunity to withdraw, a sovereign declaring war no longer owed them any duty and had "a right to treat them as enemies," even if, as already noted, only "unarmed enemies."¹⁴⁵

Of course, Vattel's comments on the grace period, which was due from a sovereign that declared war, were not applicable to a sovereign that was attacked. Such a nation evidently did not owe enemy foreigners a time to withdraw.

The broader point, however, is that although visiting aliens usually had a right to protection, they lost this right during wartime. Prior to the war, the subjects of what would become the enemy sovereign may have been lawful residents, who had presumptively submitted to a local allegiance. Yet after the war began, they had no right to the protection of the law—the only clear exception being the grace period required from attacking nations. As Vattel explained, "[w]hen the sovereign or ruler of the state declares war against another sovereign . . . all the subjects of the one are enemies to all the subjects of the other," and "[t]he place of abode is of no consequence here."¹⁴⁶ Regardless of location, "[w]hilst a man continues a citizen of his own country, he is the enemy of all those with whom his nation is at war."¹⁴⁷

G. *Vattel on War Conducted in Violation of the Law of Nations*

Although Vattel has been examined here to confirm how war ended the right of protection enjoyed by resident aliens, it should be noted that Vattel went even further by distinguishing between lawful and unlawful warfare. It was a distinction that would be significant for the Algerians who visited Virginia in 1785, and in writing about it, Vattel suggested that,

143. *Id.* The English gave this permission to Spanish and French aliens in 1707 and to French merchants in 1756. See Treaty of Amity, Commerce, and Navigation, U.S.-Gr. Brit., Nov. 19, 1794, 8 Stat. 116. For later discussion of the right of merchants to withdraw, see Henry Wheaton, *Elements of International Law* § 334, at 464 (4th ed. 1904).

144. See *infra* Part III.C.3.

145. Vattel, *supra* note 51, bk. III, ch. IV, § 63, at 318.

146. *Id.* bk. III, ch. V, § 70, at 321.

147. *Id.* bk. III, ch. V, § 71, at 321.

just as a sovereign could take distinctively generous approaches toward merchants and other useful enemies, so too a sovereign could take especially severe measures against another class of enemies—those who violated the law of nations, particularly those who engaged in informal warfare.

Vattel explained that persons engaged in informal warfare (including what today would be called “terrorism”) were subject to retaliation under the law of nations. He relied on Grotius to argue that “a lawful war” had to be “a solemn or formal war.”¹⁴⁸ This kind of war was conducted “on both sides” by “the sovereign authority”; it was “accompanied by certain formalities,” including “a declaration of war, at least on the part of him who attacks”; and it was “such a war as nations have a right to wage.”¹⁴⁹ In contrast, “illegitimate and informal wars” included those that were “undertaken, either without lawful authority, or without apparent cause, as likewise without the usual formalities, and solely with a view to plunder.”¹⁵⁰ Speaking of the latter, Vattel explained:

Such were the enterprises of the grandes compagnies which had assembled in France during the wars with the English,—armies of banditti, who ranged about Europe, purely for spoil and plunder: such were the cruises of the buccaneers, without commission, and in time of peace; and such in general are the depredations of pirates. To the same class belong almost all the expeditions of the Barbary corsairs: though authorised by a sovereign, they are undertaken without any apparent cause, and from no other motive than the lust of plunder.¹⁵¹

It was almost needless to add that the distinction between “[t]hese two species of war, . . . the lawful and the illegitimate,” mattered because “the effects and the rights arising from each are very different.”¹⁵²

The absence of a lawful authority, cause, or declaration was not the only indication of unlawful warfare. Vattel further distinguished surreptitious warfare from “open war”—“a private enemy” from “a public enemy”—the former being “one who seeks to hurt us, and takes pleasure in the evil that befalls us,” and the latter being one that “forms claims against us, or rejects ours, and maintains his real or pretended rights by force of arms.”¹⁵³ The former, he emphasized, “is never innocent; he fosters rancour and hatred in his heart”; but “[i]t is possible that the public enemy may be free from such odious sentiments, that he does not wish

148. *Id.* bk. III, ch. IV, § 66, at 319–20.

149. *Id.* For the national character of a solemn war, see Rutherford, *supra* note 32, bk. II, ch. IX, § X, at 504–05. For early evidence of English acceptance of ideas about a “sovereign’s exclusive prerogative in starting a legitimate war,” see Alain Wijffels, Julius Caesar’s Notes on the Status of POWs, 65 *Tijdschrift voor Rechtsgeschiedenis* 349, 352 (1997).

150. Vattel, *supra* note 51, bk. III, ch. IV, § 67, at 320.

151. *Id.*

152. *Id.*

153. *Id.* bk. III, ch. V, § 69, at 321.

us ill, and only seeks to maintain his rights." This point he thought "necessary in order to regulate the dispositions of our heart towards a public enemy."¹⁵⁴

Although Vattel did not use the word "terrorism," he clearly understood surreptitious warfare, as also the warfare conducted by a nonsovereign power, to be outside the mores established by the law of nations. Together with piracy or plunder, such war was informal and therefore particularly dangerous, and its perils remain familiar, whether in terrorism, narcotics conflicts, or guerrilla campaigns.

Vattel assumed that nations could retaliate against those who engaged in informal warfare or otherwise violated the law of nations, this being the standard method of punishment or enforcement in the law of nations. Of course, most such retaliation had to be proportionate, for retaliation was usually little more than an exemplary punishment or a mode of inducing compliance by other sovereign nations. For example,

If the hostile general has, without any just reason, caused some prisoners to be hanged, we hang an equal number of his people, and of the same rank,—notifying to him that we will continue thus to retaliate, for the purpose of obliging him to observe the laws of war.¹⁵⁵

This was "a dreadful extremity," but it was a carefully measured, proportionate mode of enforcement.¹⁵⁶

Some retaliation, however, could go further, especially the retaliation that was a punishment of those who had, in effect, stepped outside the law of nations. Vattel was not entirely clear on these matters, but apparently it was one thing to be outside the protection of the law of the land; another thing to be vulnerable to proportionate retaliation for a particular violation of the law of nations; but even worse to be more seriously at odds with the law of nations and therefore subject to more dramatic retaliation.

There were several levels of retaliation against sovereigns and other powers that engaged in substantial violations of the law of nations. Even as to sovereign nations engaged in formal warfare, the permissible severity for an "enormous breach" of the law of nations was sobering:

There is, however, one case, in which we may refuse to spare the life of an enemy who surrenders, or to allow any capitulation to a town reduced to the last extremity. It is when that enemy has been guilty of some enormous breach of the law of nations, and particularly when he has violated the laws of war. This refusal of quarter is no natural consequence of the war, but a punishment

154. *Id.*

155. *Id.* bk. III, ch. VIII, § 142, at 348.

156. *Id.* For an American example, organized by George Washington, see *infra* note 431 and accompanying text.

for his crime,—a punishment which the injured party has a right to inflict.¹⁵⁷

Still more harsh was war with a “savage” nation, which meant a sovereign nation that generally did not respect the law of nations at all—for example, a nation that systematically engaged in informal warfare. Such a nation deserved total war:

When we are at war with a savage nation, who observe no rules, and never give quarter, we may punish them in the persons of any of their people whom we take (these belong to the number of the guilty), and endeavour, by this rigorous proceeding, to force them to respect the laws of humanity.¹⁵⁸

Of course, “wherever severity is not absolutely necessary, clemency becomes a duty.”¹⁵⁹ To the extent necessary, however, even sovereign nations could be denied the usual protection of the law of nations when they engaged in particularly egregious violations of the law of nations or when, even worse, they generally engaged in warfare outside that law.

The implications for nonsovereign powers were obvious enough. By their nature, they lacked the authority to engage in formal war, and they therefore had no rights under the law of nations. Even during a regular war, if irregular forces engaged in any hostilities, “the enemy shews them no mercy, but hangs them up as he would so many robbers or banditti.”¹⁶⁰ Nor was this an unnecessarily harsh result. As Vattel explained, it was the means of discouraging the horrors of total war.¹⁶¹

The main point here, however, concerns not the protection of the law of nations, but the protection of the law of the land—a principle that was generous but limited. If protection was reciprocal with allegiance, the protection of the law could be available only for persons who came within allegiance. A lawfully visiting alien in amity was presumed to have submitted to allegiance, and he therefore had a right to protection. A war, however, severed this allegiance and the right of protection that came with it. After that point, the government could courteously choose to offer some protection, as Britain did with French merchants, but it did not have to do so.

III. LEGAL STRATEGIES—IN PARTICULAR, WHAT WAS BARRED

The relationship between allegiance and protection defined a government’s legal authority or, in more practical terms, its legal strategies.

157. *Id.* bk. III, ch. VIII, § 141, at 348.

158. *Id.*

159. *Id.* As Vattel explained elsewhere, “[t]he lawfulness of the end does not give us a real right to any thing further than barely the means necessary for the attainment of that end[.]” and “[r]ight goes hand in hand with necessity and the exigency of the case, but never exceeds them.” *Id.* bk. III, ch. VIII, § 137, at 346. I am grateful to John Witt for drawing my attention to the importance of this limitation.

160. *Id.* bk. III, ch. VIII, § 137, at 346. Vattel emphasized that the requirement of a special commission to engage in hostilities was “thoroughly established.” *Id.*

161. *Id.* bk. III, ch. XV, § 226, at 399–400.

Thus far, the focus of this Article has been on when a state *had* to give the protection of its laws and when it could *choose* to give such protection. Put abstractly, the use of law was sometimes inescapable and sometimes optional. It remains to be explored, however, whether the use of law as to foreigners was occasionally limited, such that a government was barred from applying the law to them—either for constraint or for protection.

Throughout Part III, it will be apparent that the limits on allegiance and protection rested on one of the bold foundations of liberal politics—the ideal that the lawful civil government of each nation arose from the consent of its people. In this ideal, the people of a nation voluntarily exchanged allegiance for protection. Consent was thus the foundation for both the obligation and the protection of the law, and without such consent there could be neither the obligation nor the corresponding protection.

A. *Legal Strategies: Mandatory, Optional, and Barred*

The principle of protection defined the use of law that was mandatory, that was optional, and that was barred. Today, there is much confusion as to when the United States must pursue legal strategies, when it may do so, and when it cannot. But the question was once less difficult than is usually assumed, for the principle of protection gave at least an initial answer.

The mandatory protection should by now be familiar. Ideally, a state was obliged to give protection to persons who had a right to its protection—that is, to persons who owed it allegiance. Most centrally, this included citizens, but it also included lawfully present foreign visitors, at least until a war with their sovereign.¹⁶²

What was mandatory, however, was the protection of the law rather than particular rights. In other words, although a state had to recognize the protection of the law for persons who had a right to it, the state could still limit their substantive rights. For example, the American states acknowledged the right of protection that belonged to lawfully visiting aliens in amity, but many states barred such aliens from owning land—this being the traditional English rule, which remained in force in much of America.¹⁶³ It was conventional in some types of treaties, moreover, to stipulate the level of substantive rights a state had to offer visitors—this being the question of privileges and immunities. Not surprisingly, this

162. As put by Chief Justice Edward Coke, this local allegiance of aliens in amity was “wrought by the law.” Calvin’s Case, (1608) 7 Co. Rep. 1a, 1b, 77 Eng. Rep. 377, 383 (Exch. Ch.).

163. For England, see 9 William S. Holdsworth, *A History of English Law* 85, 92–93 (1926) (explaining the “law that an alien cannot hold English land”). The application of this rule in America can be observed in *Bayard v. Singleton*, 1 N.C. (Mart.) 5, 48 (1787). See Hamburger, *Law and Judicial Duty*, *supra* note 3, at 459–60. The plaintiffs secured their constitutional right to a jury but lost at trial after the judges instructed the jurors that land could “not be held by foreigners.” *Id.* at 460.

issue was addressed by the Articles of Confederation, which was framed as a compact or treaty among the American states. The Articles guaranteed with unusual breadth that visitors from the other states should not be denied the privileges and immunities of citizens of a state—meaning apparently the privileges and immunities enjoyed by citizens as such.¹⁶⁴ Thus, both internationally and within the United States, lawful visitors had an unqualified right to the protection of the law, but did not have all possible rights. This may seem a distinction without a difference, but it will eventually be seen to matter—in Part VII for explaining how safety and liberty can be reconciled, and in Part VIII for understanding the equal protection of the laws.

Like the mandatory protection, the optional protection is also familiar. At the outbreak of a war with England, enemy aliens who were present in the country did not have a right to continued protection, but the English monarch could, at his discretion, grant them some protection by license, which he usually did generally, in a declaration or proclamation. Unlike the protection owed to citizens and visiting aliens in amity, this optional protection could be limited. A state did not have to give any protection to enemy aliens, and it therefore not only could limit their substantive rights, but also could decide to give them a very qualified protection—for example, merely to enjoy protection against crimes, torts, and breaches of contract.

A version of this optional protection was that given by means of safe-conducts to specific enemy aliens who came after the commencement of a war. Passports and safe-conducts were in one sense similar to modern passports, for they were usually special licenses of protection, meaning that they were issued to specific persons. More substantively, however, they were almost the opposite of what might be supposed today. Whereas a passport these days is issued by the traveler's own nation, a passport or safe-conduct was traditionally issued by the nation where the traveler sought to pass unmolested.¹⁶⁵ Rather than certify his identity and request protection for him, such a document formerly was itself a grant of protection. In particular, a passport was a grant of protection to persons "who lie under no particular exception as to [their] passing and repassing in safety, and to whom it is only granted for greater security, and in order to prevent all debate, or to exempt them from some general prohi-

164. Thus, if citizens as such enjoyed the right to bring an action for injury, this right could not be denied to a person visiting from another state. On the other hand, because not all citizens had the right to vote (the most obvious excluded categories being children, women, slaves, and sometimes free blacks and the poor), a state did not have to grant such a right to visiting foreigners who were not yet citizens of the state. Similarly, as only poor citizens had a claim to poor relief, a state could deny such benefits to visiting foreigners. Not being the rights of citizens as such, these were not among the privileges and immunities of citizens of the state, and they were therefore not owed to those who were visiting there.

165. For the nature of a modern passport, see 3 John Bassett Moore, *A Digest of International Law* 856 (1906).

bition.”¹⁶⁶ A safe-conduct was even stronger, for it was a grant of protection to persons “who otherwise could not safely pass through the places where he who grants it is master,—as, for instance, to a person charged with some misdemeanor, or to an enemy.”¹⁶⁷ Like a general grant of protection for already resident enemy aliens, a safe-conduct for an entering enemy alien was merely a license and was therefore terminable at will.¹⁶⁸ Like the more general grant, moreover, a safe-conduct was of limited scope. Thus, in the same manner as a general grant of protection, a safe-conduct was a valuable means of optionally licensing enemy aliens to enjoy at least a degree of protection.

All of this, however, raises questions about what was barred by the principle of protection.¹⁶⁹ Most immediately, were there circumstances in which a sovereign could not choose to extend the protection of its laws to foreigners? To be sure, a state could offer a sort of protection to anyone. For example, states frequently offered military protection to vulnerable foreigners abroad and even entire nations. But could, for example, the United States offer the protection of its laws to foreigners who owed no local allegiance? And what if the foreigners were prisoners of war or other enemy aliens whose situation or status seemed to preclude any allegiance to the United States? Today, it is often assumed that the United States can and perhaps must offer legal remedies, such as habeas, to prisoners of war.¹⁷⁰ Traditionally, however, it was understood that such persons owed no allegiance to the United States and that they were therefore

166. Vattel, *supra* note 51, bk. III, ch. XVII, § 265, at 416. For a discussion of safe-conducts in English law, see generally 1 Blackstone, *supra* note 36, at *372 (“[N]o subject of a nation at war with us can . . . come into the realm . . . unless he has letters of safe conduct; which . . . must be granted under the king’s great seal.”). Focusing on the typical use of passes, during conflicts, Henry Wheaton later explained: “Passports, safe-conducts, and licenses, are documents granted in war to protect persons and property from the general operation of hostilities.” Wheaton, *supra* note 143, § 408, at 549–50.

Whereas traditional passports were special passes from the sovereign of another country to pass unmolested through his territory, modern passports are somewhat similar to the old licenses to leave a country issued by the country’s own sovereign. For example, in England, a medieval statute created “a general inhibition of all to pass the sea without the king’s licence except lords, known merchants and the king’s soldiers.” The statute was repealed in the early seventeenth century, so that in mid-century Hale could observe:

[N]ow no other restraint lies upon the transference than what was at common law, which was never at all till restraint by writ or proclamation, and that also in case of common danger. Yet it is commonly used at this day to have a pass from the council unless in case of known merchants and seamen.

Hale, *Prerogatives*, *supra* note 70, at 296–97.

167. Vattel, *supra* note 51, bk. III, ch. XVII, § 265, at 416.

168. Recognizing the terminable character of such licenses, Attorney General Robert Sawyer said that “when the persons or goods of aliens are in or come into England under safe-conduct; and the safe-conduct be not determined by the king, either by proclamation of open war or otherwise, no subject can seize the person or goods of such alien enemies.” *East India Co. v. Sandys* (K.B. 1684) *in* *State Trials*, *supra* note 131, at 487.

169. For the way in which this was a legal limitation, see *infra* Part III.E.

170. See *Boumediene v. Bush*, 128 S. Ct. 2229 (2008).

outside the protection of its law. It was understood, indeed, that prisoners of war were in a position in which their allegiance to their own sovereign precluded their allegiance to the United States. Evidently, therefore, there might be circumstances in which the protection of the law was precluded.

Indeed, the limits on the application of a nation's law went even further. Not only does there appear to have been a limit on how far a nation could extend the protection of its law, but there was also a similar obstacle to the obligation of its laws. These days, it is widely thought that the United States can and should impose not merely military law, but more generally the law of the land and the jurisdiction of its courts, on foreigners captured abroad, whether aliens in amity, such as drug dealers, or enemy aliens, such as Emanuel Noriega and members of al Qaeda.¹⁷¹ Traditionally, however, it was assumed that only persons who presumptively had submitted to a nation, and who thus owed it at least a local allegiance, could be obliged by its laws. As a result, foreigners in foreign lands and captured enemies could not be subject to the nation's laws and courts, even if forcibly brought within the country. For example, although the United States could exert military power and law over such persons, it generally could not treat them as subject to the obligation of its laws or the jurisdiction of its courts. Not having consented, they were not bound.

It should thus be apparent that, in addition to mandatory protection and optional grants of protection, there were instances in which protection could not be given. Concomitantly, these were also instances in which the law of the land could not have obligation. In other words, both for the protection of rights and the obligation of the law, there might be limits, sometimes substantive and at least jurisdictional. The full range of evidence cannot be explored here, but three particularly significant illustrations should suffice—the first concerning enemy aliens, the second concerning habeas corpus for prisoners of war, and the third regarding foreigners in amity who remained outside allegiance.

B. *Limits on Obligation: Enemy Aliens Who Remained or Entered*

For a first example of the limits on the use of law, it is necessary to consider the enemy aliens who remained within England or entered it during a war. To be within allegiance and thus the obligation of the law, enemy aliens had to be licensed to enjoy protection, and they had to accept the protection. Otherwise, they were outside allegiance and were not bound by the law. This illustration hints at the limits on the protection of rights, but it is particularly useful for its suggestion of the limits on legal obligation.

171. See generally *United States v. Noriega*, 808 F. Supp. 791 (S.D. Fla. 1992); Parrish, *supra* note 4, at 841–56 (2009) (discussing growing tendency of U.S. legal system “to export, if not globalize, its brand of justice”).

1. *Enemy Aliens Who Remained During Wartime.* — The limits on the use of law as to foreigners can initially be observed in regard to the enemy aliens who remained during wartime. When licensed to remain with protection, they enjoyed, as already noted, a narrow sort of local protection and allegiance and so could be bound by the laws. By the same token, if they were not offered, or did not accept, this local protection, they did not owe the corresponding local allegiance and were not within the obligation of the law. Such aliens might be within the country, but as they did not owe allegiance, they were therefore outside the reach of the nation's law, other than its military law.

At the beginning of the eighteenth century, when fighting France and Spain, Britain generally licensed residents from these nations to remain and enjoy a degree of protection, including access to the courts. Predictably, the enemy aliens who took advantage of this local protection were understood to have accepted a degree of local allegiance, and as a consequence, they were at risk of being tried for treason. The rule was that “[a]n *Alien* residing & receiving Protection here, if he commits any offence which wou[ld] be Treason in a *Natural-born* Subject, may be punished as a Traitor; and this, whether his own Sovereign be at *Enmity*, or in *Amity* with ours.”¹⁷² In 1707, this became the subject of an advisory opinion, in which all the judges further elaborated:

If such an Alien, shou[ld] after ye Commencem[en]t of a War between the King of Great Britain and the Alien's Sovereign, go over to his native Country, but leave his Family and Effects here, and shou[ld] adhere to ye King's Enemies (ye Alien's Countrymen) in Acts or purposes of Hostility, he may be dealt with as a Traitor.¹⁷³

This much was unremarkable.

More revealing was the explanation. The obligation of English law as to enemy aliens was based on their submission—on their acceptance of local protection and allegiance—the underlying assumption being that the law could not punish enemy aliens who did not participate in this

172. Joseph Yates, Manuscript Annotations 2, in 1 Matthew Hale, *A Methodical Summary of the Law Relating to the Pleas of the Crown* (1759) (Georgetown Law School Library, Special Collections, S-1149). I am grateful to James Oldham for drawing this manuscript to my attention. Yates had read Foster, who had written:

[A]ll Aliens Enemy residing here under the Protection of the Crown . . . in Case they commit Crimes which in a Subject would amount to Treason, may be dealt with as Traitors. For their Persons are under the Protection of the Law; and in Consequence of that Protection, they owe a local temporary Allegiance to the Crown.

Foster, *supra* note 37, at 186.

173. Yates, *supra* note 172, at 2. Yates took his account of the 1707 opinion from the summary printed in Foster. See Foster, *supra* note 37, at 185. Foster, in turn, had drawn his account from four manuscripts, which he identified as “Tracy, Price, Dod, and Denton.” *Id.* This Article, however, quotes the summary of the 1707 opinion in Yates because he was more concise than Foster. Moreover, although Yates also borrowed from Foster in some of his other commentary quoted here, Yates added more than he took.

protection and allegiance. In reciting the judges' 1707 opinion, a later Justice of King's Bench, Joseph Yates, noted that:

[I]n that Resolution, [the judges] laid a Considerable stress on ye Queen's Declaration of War, in which she expressly took under her Protection ye Persons & Estates of ye Subjects of France & Spain (with whom she was at war) Residing here, & demeaning themselves dutifully & not Corresponding with the Enemy. For by that Declaration, those Aliens were put under a kind of Safe Conduct, & Enabled to acquire Chattels & to maintain Actions for ye Recovery & protection of their personal Rights as fully as an alien Amy [i.e., an alien in amity].¹⁷⁴

They had been expressly offered protection and the associated local allegiance, and their acceptance of this dual relationship to the Crown was what made these enemy aliens vulnerable to prosecution.¹⁷⁵

On the other hand, if they had not received or accepted the offer of protection, or if they had given up such protection, they would be without any local protection or allegiance and so would not be bound by the law or subject to its courts. Yates illustrated this limitation on the reach of the law and its courts with the same fact pattern as recited by the judges in 1707: If a visiting alien accepted allegiance at the commencement of a war but then left and adhered to an enemy of England, while leaving his family and effects in England, he was still taking advantage of the local protection, and he could therefore still be punished by law. He could not, however, be punished by law if he took his family and effects with him, for he would then have put himself outside both protection and allegiance. Echoing Hale, Yates began by generally noting that:

Allegiance is Either Natural, or Local. Natural Allegiance, is that which is due from every man who is born a member of ye Society It is due from him at all times & in all places, at Home & abroad. . . . Local Allegiance is that which is due from a Foreigner during his Residence here; and is founded in the Protection he enjoys for his own person[,] his Family & Effects during the Time of that Residence.¹⁷⁶

174. Yates, *supra* note 172, at 2.

175. This point was much discussed again when William Joyce in 1945 sought to avoid treason charges by denying that he owed allegiance. He had American citizenship, but he lived in Britain for many years with a local allegiance, and he obtained a British passport on false pretenses. He took this passport with him when he fled to join the Germans, and when the British tried him for treason at the end of the war, the court, echoing the reasoning underlying the 1707 opinion, held that although he left for Germany and thus might be thought to have abandoned any local allegiance to Britain, he traveled with his passport, and was thus apparently still taking advantage of British protection. He therefore owed allegiance and could be tried for treason. West, *supra* note 133, at 17.

176. Yates, *supra* note 172, at 1. Hale had written: "[T]his allegiance is either natural from all that are subjects born within the king's allegiance; or local, which obligeth all that are resident within the king's dominions, and partake of the benefit of the king's protection, altho strangers born." Hale, *Historia Placitorum*, *supra* note 83, at 62.

Then, turning to the situation described by the judges in 1707, Yates added:

This Allegiance Ceases whenever he withdraws with his Family & Effects[,] For his temporary Protection being then at an End, the Duty arising from it determines with it. But if he only goes abroad himself, & leaves his Family & Effects here, the Duty Continues, because his Family & Effects are still under the same Protection.¹⁷⁷

While he accepted protection, the enemy alien owed allegiance and was subject to legal punishment for any breach of this duty; but when he gave up such protection, he no longer owed allegiance and was therefore no longer accountable under the law.

2. *Enemy Aliens Who Came During Wartime.* — The principles that applied to enemy aliens who stayed during wartime also applied to enemy aliens who came within the country during the war. It has been seen that an enemy alien could acquire local protection and allegiance not only by being generally licensed to remain with protection, but also by being granted a special license, a safe-conduct, to come with protection after the commencement of the war.¹⁷⁸ Here too, the underlying assumption was that an enemy alien who was present without a license of protection, or who did not accept it, was without local protection or allegiance. He therefore had no obligation under the law and could not be prosecuted as a criminal. He could, however, be dealt with as a prisoner of war under the laws of war.

Any grant of local protection came with the reciprocal duty of local allegiance and all that this entailed. Writing about the English treason statute, Hale observed how the reciprocal relationship applied both to enemy aliens who remained by license during a war and to enemy aliens who entered by license after its commencement:

If a subject of a forei[g]n prince hath lived here in England under the protection of the king of England, and so continues after a war proclaimed, and partakes of all the benefits of a subject, and yet secretly practiseth with the king of France, and assists him before he hath left this kingdom, or openly renounced his subjection to the crown of England, this man seems to be an adherent within this act, and commits treason thereby . . . and the like law seems to be of an enemy coming hither and staying here under the king's letters of safe conduct . . .¹⁷⁹

177. Yates, *supra* note 172, at 1.

178. Of course, the license at the beginning of the war could be to specific persons, and the license during the war could be general, but this was not the usual English practice.

179. Hale, *Historia Placitorum*, *supra* note 83, at 165. Justice Foster similarly explained: "An Alien whose Sovereign is at Enmity with us living here under the King's Protection, committing Offences amounting to Treason, may . . . be dealt with as a Traitor. For he oweth a temporary local Allegiance . . ." Foster, *supra* note 37, at 185.

It thus made no difference whether an enemy alien remained or came during a war: If he was licensed to be present with protection, and if he accepted it, he enjoyed not only this local protection but also a local allegiance and the consequent risk of criminal vulnerability.

Summarizing the two modes of acquiring local protection and allegiance, Hale recited that “if an alien enemy reside or come into the kingdom, and not in open hostility, he owes an allegiance to the king *ratione loci*, and if he attempt any treason, he shall be indicted as doing it *contra ligeantiae suae debitum*.”¹⁸⁰ This passage in Hale’s writings has been misunderstood to mean that any enemy aliens who “reside or come into the kingdom, and not in open hostility,” had the protection of the law, at least as to habeas.¹⁸¹ Indeed, it has been interpreted to mean that “[u]ntil a court explored an allegation of violence intended by an enemy alien,” he had such protection.¹⁸² Hale’s point, however, if read in context, was obviously very different. When he wrote about enemy aliens who “reside or come into the kingdom,” he clearly meant the two types of enemy aliens who could be licensed to enjoy protection: those who remained at the beginning of a war and those who entered during the war. Once it is understood that he was speaking in a condensed manner about the two categories of licensed enemy aliens, the rest of his statement, about open hostility, falls into place. If there was an offer of protection, it made sense that when an enemy alien resided or came into the country “not in open hostility,” he could be presumed to have accepted the offer and to have thereby acquired a local allegiance. Hence, the risk of indictment.

By the same token, if an enemy alien was offered local protection, either to stay or to enter, but was “in open hostility,” it made sense that he could not be prosecuted.¹⁸³ Protection and allegiance were reciprocal, and a person who was in open hostility could not be presumed to have accepted the one or have submitted to the other.

Even more fundamentally, if an enemy alien came into the kingdom without a license of protection, it was unnecessary even to ask whether or not he was “in open hostility.” Such an alien was in a state of war with England, and as he had not been offered protection, no good conduct,

180. Hale, *Prerogatives*, supra note 70, at 56; see also John Brydall, *Decus and Tutamen: Or a Prospect of the Laws of England* 30 (London, G. Sawbridge et al. 1679). For the use of the Latin phrase in indictments, see Foster, supra note 37, at 186.

181. See Halliday & White, supra note 14, at 606, 705 n.402, 706, 708.

182. *Id.* at 606–07.

183. The words “in open hostility” are repeated here with care because they echo the technical significance of the words “in hostility,” which referred not to an antagonistic emotional condition, nor to an intent to engage in violence, but to a person’s being in a condition of war. By way of illustration, note that if, in a war with France, a subject of a neutral nation, such as Sweden, were to join, aid, or support France, he would be in hostility—even if he had entirely beneficent views and no violent intentions. See *R v. Schiever*, infra text accompanying notes 217–221.

not even open good conduct, could bring him within allegiance and protection.

Such were the circumstances of most enemy aliens. They had not received an offer of protection, and being therefore outside protection and allegiance, they both had no rights and could not be prosecuted at law—whether for treason or anything else. Instead, the law simply left them at the mercy of the Crown. As Queen’s Bench explained in 1703, “if an *alien enemy* come into England without the Queen’s protection, he shall be seized and imprisoned by the law of England, and he shall have no advantage of the law of England, nor for any wrong done to him here.”¹⁸⁴ Similarly, the leading eighteenth-century law dictionary summarized: “An *Alien Enemy* coming into this Kingdom, and taken in War, shall . . . not be indicted at Common Law, for the Indictment must conclude *contra Ligeantiam suam, &c.* And such was never in the Protection of the King.”¹⁸⁵

Hence, the comparable observations, already quoted in Part II, about the fate of unlicensed enemy aliens. Speaking of wartime, Justice Foster observed that prisoners of war and spies “are to be considered at the worst but as Enemies subject to the Law of Nations; never as Traitors subject to our municipal Laws, and owing Allegiance to the Crown of *Great Britain.*”¹⁸⁶ Chief Justice Drayton said “an alien Enemy, even invading the Kingdom of England, and taken in Arms . . . *violates no Trust or Allegiance*” and that this was “a Criterion whereby we may safely judge, whether or not a particular People are subject to a particular Government.”¹⁸⁷ It did not matter whether or not these enemy aliens remained in the country or entered it; nor did it matter whether they were in open hostility. Being unlicensed, they were without protection and allegiance and so were outside the scope of the legal system.¹⁸⁸ If

184. *Sylvester’s Case*, (1703) 7 Mod. 150, 150 [D4y], 87 Eng. Rep. 1157, 1157 (Q.B.).

185. Jacob, *supra* note 25, at [D4v] (defining “Alien”).

186. Foster, *supra* note 37, at 187.

187. Drayton, *supra* note 58, at 5. The conclusion about the limited reach of the law was most commonly discussed as to treason—to understand when an enemy alien “may be dealt with as a Traitor.” Yates, *supra* note 172, at 2. As revealed by the quotations from Foster and Drayton, however, the underlying logic also reached other offenses, for the question was nothing less than the domain of the nation’s law. In Drayton’s words, allegiance was “a Criterion whereby we may safely judge, whether or not a particular People are subject to a particular Government.” Drayton, *supra* note 58, at 5.

188. Justice Foster briefly questioned this perspective, but only at the margins, and even for this, he was criticized. Blackstone observed that it had once been thought that ambassadors could be prosecuted for crimes that were *mala in se*, such as conspiring to kill the king, but Blackstone did not think this was modern doctrine. 1 Blackstone, *supra* note 36, at *254. Justice Foster, however, at one point echoed this old-fashioned view, speculating that English law and its courts could sometimes, in especially serious cases, be employed against persons who did not owe allegiance. In particular, Foster suggested that ambassadors should be accountable under English law for attempts directly against the life of the king. To this he added that prisoners of war should be accountable under law “for Murder and other Offences of great Enormity, which are against the Light of Nature and the Fundamental Laws of all Society.” Foster, *supra* note 37, at 187–88. He even cited one

captured, they were prisoners of war rather than criminals, and instead of enjoying legal rights and being at risk of indictment, they were subject to the laws of war and, at best, a military tribunal. Prisoners of war will get further attention later. For now, it should suffice to observe that enemy aliens could have legal obligation and rights within a society's legal system only when they had been offered, and had accepted, a license of protection and the concomitant allegiance.

3. *Presumptions.* — These limitations on the imposition of a nation's law rested on a series of presumptions, and it is important to recognize the force of this mode of legal analysis. Some presumptions have already been discussed, such as the presumption that a lawfully visiting alien in amity had been offered local protection and had submitted to local allegiance.¹⁸⁹ In addition, there were presumptions about alien enemies, and they reveal the strength of the reasoning that usually precluded protection for such persons and barred a sovereign from subjecting them to its laws and courts.

One such presumption was that a subject of an enemy sovereign under his protection was presumptively an adherent of that sovereign and thus an enemy. This may seem so obvious as to be not worth mentioning, but it was essential for understanding when and how an enemy alien could acquire local protection and allegiance. It has already been seen that Hale used the presumption of adherence to show that an enemy alien ordinarily did not owe allegiance and could not be tried under English law:

If a foreign prince be in actual war against the king of England, any subject of that prince under his protection is presumed to be adhering to him, but he is not a person within this [treason] act, for if he be taken, he shall be dealt with as an enemy, viz. he shall be ransomed, and his goods within this realm seized to the use of the king.¹⁹⁰

The underlying point, that the subject of an enemy sovereign adhered to him, was merely a presumption, and it therefore left room for an enemy

of his own cases to this effect—a case in which he fined a French prisoner of war for larceny. *Id.*

Foster's views, however, were a departure from modern law, and a quiet rebuke therefore came from Justice Yates. Commenting on the rights of ambassadors, Yates wrote in his manuscripts that “[b]y ye Law of Nations, an Ambassador from a foreign State, tho’ he has a Local Residence & Protection here, is not Subject to our Laws but remains within the Forum & Jurisdiction of his own Country only.” From this perspective, when he read Foster's unusual conclusions about persons not owing allegiance, Yates observed:

Foster seems to think yt for Murder or any gross offence agt ye Law of Nature, an Ambassador may be punished here, and yt he is only Exempted from ye peculiar Municipal Laws of ye Realm. But in this ye learned Judge is mistaken For an Ambassador is totally & in all Cases Unamenable to our Laws.

Yates, *supra* note 172, at 3. Yates conflated the two examples offered by Foster, but his reasoning is clear enough.

189. See *supra* Part II.A.

190. Hale, *Historia Placitorum*, *supra* note 83, at 164–65.

alien to acquire local protection and allegiance by license. At the same time, because an enemy alien was in the very opposite of a relation of allegiance to the Crown, he apparently could not acquire local protection on the basis of a mere presumption—what was sometimes called a “tacit” license. Both conclusions were logical and prudent. The result was that an enemy alien could have obligations and rights under local law, but only when the sovereign’s permission or license was express.¹⁹¹

191. Thus, when discussing offenses against the law of nations, Blackstone distinguished between “*violation of safe-conducts or passports, expressly granted by the king or his ambassadors to the subjects of a foreign power in time of mutual war*” and, in contrast, “*committing acts of hostilities against such as are in amity, league, or truce with us, who are here under a general implied safe-conduct.*” 4 Blackstone, *supra* note 36, at *68.

The point was not that enemy aliens needed a detailed or explicit license, but rather that, because of their status, it could not be simply presumed that they were within any license of allegiance and protection. In other words, a grant of such a license to them had to be a conscious decision of the Crown. From this perspective, Blackstone wrote that “*alien enemies have no rights, no privileges, unless by the king’s special favor, during the time of war.*” 1 Blackstone, *supra* note 36, at *372.

The expectation of express permission or license was sometimes questioned by peaceable enemy aliens who sought to enforce or defend their rights in court. When confronted with the objection that they were outside allegiance and protection, they responded that they should be considered to have a tacit license, if only by acquiescence, to remain and enjoy protection.

The judges in such cases seem to have understood the risk of injustice, and some of the judges evidently favored the notion of a tacit license, but it is not evident that they ever went so far as to hold that a tacit license was sufficient for an enemy alien. For example, in at least one seventeenth-century English case, *Wells v. Williams*, (1697) 1 Lwt. 12, 125 Eng. Rep. 18 (C.P.), the court resolved such a dispute with a suggestion that it would accept a tacit license, saying that a license could be “presumed” for an enemy alien in the plaintiff’s circumstances. This could not have been more than dicta, however, as evident from another report. When Chief Justice Treby explained that “*an alien enemy, who is here in protection, may sue [on] his bond or contract,*” he emphasized the king’s declaration of war against France—a declaration that expressly excepted French Protestants. *Wells v. Williams*, (1697) 1 Ld. Ram. 283, 91 Eng. Rep. 1086 (K.B.). Similarly, much later, in New York, Chancellor Kent praised the view of “modern” Continental commentary that visiting enemy aliens enjoyed a tacit license under the law of nations. From this perspective, a tacit license was sufficient “*when wars are carried on with the moderation that the influence of commerce inspires.*” *Clarke v. Morey*, 10 Johns. 69, 71 (N.Y. Sup. Ct. 1813) (citing *Bynkershoek*). Kent took care to explain, however, that the Alien Enemies Act had adopted this modern understanding of the law of nations, and he thus relied on the statute’s express license. *Id.* at 73. In at least one English case, moreover, when neither the facts nor the law would help, the judges simply left the case unresolved, thus giving the enemy alien plaintiffs a chance to seek a settlement. *Maria v. Hall*, (1807) 1 Taunt. 30, 36, 127 Eng. Rep. 741, 744 (C.P.).

Clearly, since at least the late seventeenth century, some judges sympathized with peaceable enemy aliens who lacked an express license. Strikingly, however, the judges hesitated to go so far as to hold that a tacit license would suffice. The basic reason was the difficulty of presuming that an enemy alien had been brought within allegiance and protection, for such an alien was presumptively in a state of war. In addition, the judges could not substitute their decision for that of the government. Lest this not be sufficient, there was also the problem evident from Kent’s opinion in *Morey*: Even the Continental commentators only went so far as to suggest that a tacit license was possible in relatively

Hale's point about persons "not in open hostility" was simply another presumption concerning enemy aliens. If an enemy alien remained in the country, or if he entered it, after being licensed to do so with protection, he was presumed to accept the protection and acquire allegiance, but only if he was "not in open hostility."¹⁹² If he remained or entered "in open hostility," he evidently did not accept protection and allegiance, and he therefore could not claim rights or be held accountable under the country's laws.

Without an offer of protection, however, there could be no presumption that the enemy alien had accepted it. In these circumstances, as already noted, it was of little relevance whether an enemy alien remained or came in open hostility. Either way, he was outside protection and allegiance, and he neither had rights under the law nor was bound by it.

Of course, the point is not that a person outside protection and allegiance was beyond the physical reach of the law or the coercive jurisdiction of a court, but rather, more fundamentally, that he did not owe allegiance to the state and was therefore not under the obligation, let alone the protection, of its law.¹⁹³ A prisoner of war, for example, could be held within England and thus clearly within the physical reach of the law and the courts, but he was to be held and dealt with merely under military law, not the more general law of the land. This sort of limit on what could be done by law may initially seem surprising, but it rested on a principle that was essential to the lawfulness of any government—the principle that a state could not consider its law obligatory on or for persons who could not be understood to have consented to allegiance.

C. *Limits on Protection: Habeas Corpus*

A second illustration of the limited domain of the law can be observed in the denial of habeas to prisoners of war and other aliens who could not be presumed to owe allegiance. Not owing allegiance, they could not claim the protection of the law. Incidentally, as if this personal limit on the law's domain were not enough, there was also, alongside it, a

mild wars, and whatever the talents of Continental judges, Anglo-American judges were in no position to decide what was or would remain a temperate conflict.

192. Hale, *Prerogatives*, supra note 70, at 56.

193. It may be thought that there is a counterexample in the prosecution of foreigners for piracy on the high seas—or these days in international air space. In fact, there was a difference of opinion as to whether a nation could lawfully prosecute foreign pirates in domestic courts. Even on the assumption that a nation could do this, such prosecutions were not fully an exception to the principle of protection, for they concerned the one part of the globe as to which no nation had an exclusive sovereign power. Although the prosecuting nation imposed its law and courts on foreigners who had not submitted allegiance to any particular nation, there was understood to be at least a hint of consent, for those who committed piracy on the high seas were submitting to the shared power known to be exercised there by sovereigns. Moreover, sovereigns could enforce their laws against foreign pirates on the high seas, without disturbing the relationship of allegiance and protection that other nations enjoyed with their own subjects.

geographic limit on the law's domain. Thus, habeas could reach neither an individual outside protection nor a location outside sovereign territory.

1. *No Habeas to Places Outside Sovereign Territory.* — Although the geographic domain of the law is not a central point here, it will be discussed first. Put simply, writs of habeas and other legal process could not reach beyond the nation's sovereign territory, for this was the outer boundary of the law's geographic domain.¹⁹⁴

Some recent scholarship and briefs, together with the *Boumediene* decision, suggest that a writ of habeas could reach any place, even overseas, within the nation's "control."¹⁹⁵ As it happens, no seventeenth- or eighteenth-century lawyer is known to have said as much. Nonetheless, in support of the claim about control, it is observed that, in English law, habeas could reach foreign sailors impressed on British naval vessels.¹⁹⁶ Yet naval vessels were recognized as sovereign territory, and the seafaring aliens who got writs of habeas from ships belonging to the British navy would

194. The geographic limits on domain are not central in this Article outside this section, and their intellectual foundations are therefore not explored here. For a more substantial treatment of the geographic domain or "jurisdiction" of the law, see Hamburger, *Law and Judicial Duty*, *supra* note 3, at 59–64.

195. See *Boumediene v. Bush*, 128 S. Ct. 2229, 2235–36 (2008); *Rasul v. Bush*, 542 U.S. 466, 476 (2003); Brief for the Petitioners at 13, *Boumediene*, 128 S. Ct. 2229 (Nos. 06-1195, 06-1196) [hereinafter, Petitioners' Brief]; Brief of Legal Historians as Amici Curiae in Support of Petitioners at 3, *Boumediene*, 128 S. Ct. 2229 (Nos. 06-1195, 06-1196) [hereinafter, Historians' Brief]; Halliday & White, *supra* note 14, at 707.

In some of the leading *Boumediene* briefs on behalf of the petitioners, historical allusions to places and persons *subject* to government are presented as if they were allusions to places and persons merely under the *control* of government. For example, as to places, it is suggested that when early lawyers wrote about places "under the subjection of the Crown" or within "the government of the king," they were referring to places under the Crown's control. Petitioners' Brief, *supra*, at 11, 13; see also Historians' Brief, *supra*, at 9–10. In a similar manner, as to persons, it is insisted that "[t]he term 'subject' . . . cannot be equated with modern notions of a nation's 'citizens'"—the implication being that subjects are to be understood as persons under the government's control. Historians' Brief, *supra*, at 5 n.4.

One difficulty with all of this is that it presents the questions in terms of false alternatives. The question about place gets presented as a choice between either the narrow boundaries of the country itself or the indefinitely expansive range of places under the sovereign's control. Similarly, the question about persons gets depicted as a choice between either citizens or else all persons in places under the government's control. Given a choice between extreme options, one too narrow and the other too broad, it is not surprising that judges opt for the more open alternative.

Yet in each question, the very framing of the issue in terms of such sharp alternatives ignores abundant evidence of a third, more moderate choice. The seriousness of the omission becomes evident when one realizes that it collapses the distinction between sovereignty and coercive control, between legal subjection and submission to mere force—essentially, between right and might.

196. See Historians' Brief, *supra* note 195, at 6 n.5; Halliday & White, *supra* note 14, at 644–47.

have been understood to be within allegiance.¹⁹⁷ Similarly, in support of the claim about control, it is observed that habeas could be issued in the American colonies—not only by colonial judges, but also, at least theoretically, by the judges in Westminster.¹⁹⁸ But this likewise misses the point. Although Britain's American colonies were not part of the realm of England, and although they were allowed to maintain their own laws, they were annexed to the English Crown and were thus sovereign territory.¹⁹⁹ In short, the evidence that habeas was available on British naval

197. Thus, for example, when one nation's naval vessel entered the waters of another nation with its permission, the vessel was outside the reach of the latter nation's law. Similarly, a visiting sovereign or ambassador was outside the reach of the law.

198. Petitioners' Brief, *supra* note 195, at 14 n.12. Similarly, Halliday and White interpret the American evidence to mean that habeas was available to residents of any "territory controlled by the king." Halliday & White, *supra* note 14, at 707.

Not only America but also India forms part of the evidence, for it is claimed by the *Boumediene* petitioners and Halliday and White that habeas was available in India from English judges. Petitioners' Brief, *supra* note 195, at 12–13; Halliday & White, *supra* note 14, at 708. This was true, however, only in the trivial sense that English judges sat on East India Company courts. At least in theory, the judges at Westminster—that is, the judges of the courts of England—could issue habeas to the American colonies, because these places were part of the sovereign territory of the English Crown. See text accompanying note 207. But they could not even theoretically issue writs of habeas to India, for that land was not part of England's sovereign territory.

It was English policy in India to leave sovereignty formally in the hands of local rulers, and India came to be clearly British sovereign territory only in 1813. Huw V. Bowen, *A Question of Sovereignty? The Bengal Land Revenue Issue, 1765–67*, 16 *J. Imperial & Commonwealth Hist.* 155, 171 (1988). The only caveat was that noted in the conclusion of a 1757 legal opinion, given by the attorney general and solicitor general, to the effect that some small sections of India, its English settlements, were within the sovereignty of the Crown. *Id.* at 162–63. More generally, however, India was not yet recognized as sovereign territory. It is therefore no surprise that habeas was not even theoretically available from the justices at Westminster.

English judges in India issued habeas because the British Crown in 1774 issued a charter that gave the justices of the Supreme Court of Judicature at Fort William in Bengal the same jurisdiction and authority as the justices of King's Bench in England. Halliday & White, *supra* note 14, at 653. Yet far from showing that the justices of English courts could issue writs of habeas in India, this charter merely used the authority of King's Bench as a measure of the power of the highest East India Company court. Indeed, the justices of the court at Fort William emphasized that the people of India were under the protection of not the English or British Crown, but the East India Company—a point acknowledged by Halliday and White. *Id.* at 658.

The confusion in the literature on this subject has not been alleviated by the tendency of contemporary lawyers and historians to speak of what was done by "English judges" in India, without distinguishing whether they sat on English or Indian courts. Once this distinction is drawn—in other words, once the ethnicity of the judges is distinguished from the nationality of their courts—one can begin to observe that the judges of England's courts could only issue writs of habeas within England's sovereign territory, which did not include India.

199. In the early seventeenth century, it was disputed whether all the American colonies were annexed to the Crown, but by the eighteenth century this was largely taken for granted, and the contrary view was aired only when some Americans at the beginning of the Revolution rather desperately sought to revive the early seventeenth-century doubts.

vessels or in American colonies actually confirms the conclusion here that habeas was available only within sovereign territory.

Put abstractly, there were two spheres of national territory. It may be thought that the king's realm and his sovereign territory were coextensive. In fact, as will be seen, the king's sovereign territory included his realm of England and Wales, but also reached beyond, even if not to all places he controlled. The narrow range of territory—the "realm" or nation itself—mattered for the personal domain of the law as an indication of when a lawfully visiting alien in amity had a local allegiance and a right to protection. The broader, sovereign territory also mattered for the law's personal domain because an alien who came there could enjoy allegiance and protection by license. Sovereign territory, however, was more directly significant for the law's geographic domain. Although the law of England was increasingly expected to have exclusive obligation within the realm, the law additionally had some reach in areas that were not ordinarily governed by English law, but that were within sovereign territory. Yet the coercive force of the law, including its legal process, could not reach beyond sovereign territory. Thus, while the nation was increasingly assumed to be the minimum sphere of the law's coercive reach, sovereign territory established the outer boundary of such coercion.

This assumption that the king's sovereign territory marked the outer extremities of his law's coercive effect had not only domestic but also international importance. In a multinational world, the law of each sovereign might morally bind his natural subjects outside his sovereign territory, but his courts could not have jurisdiction or otherwise enforce the law against them beyond this point. For example, an Englishman traveling in France was still bound by his allegiance to the Crown and was thus still obliged not to commit treason or otherwise violate the English law that remained applicable to him while he was abroad. English law, however, did not have coercive force in France and could not be judicially enforced against him until he returned to a place within the reach of the king's writs and other legal process—that is, within sovereign territory. Thus, just as the principle of protection addressed the problem of domain by limiting the obligation of a nation's law, so the ideal of sovereign territory approached this problem by delimiting the coercive effect of such law.

This limited territorial domain can be observed in the original Habeas Corpus Act, which recognized that the writ ran to sovereign territory and not farther. Various places within the realm of England and Wales had traditionally been privileged from writs of habeas. Yet the potential for habeas to reach throughout the realm was obvious. The people within England and Wales could be understood to have tacitly consented to their custom, the common law, and to have expressly

See John Phillip Reid, *Constitutional History of the American Revolution: The Authority to Legislate* 165 (1991).

consented, through their representatives in Parliament, to the nation's statutes. Although such assumptions were not uncomplicated, they made it easy enough to explain why the law of the land had obligation in England and Wales and why Parliament could require the judges to issue the writ to all places within this sphere.²⁰⁰ As for the broader reach of habeas, the writ was one of the mechanisms employed on behalf of the king to regulate the administration of justice in places that, although not governed by English law, were annexed to the English Crown and were thus part of the Crown's sovereign territory. For example, Berwick on Tweed and the Isles of Jersey and Guernsey were not part of England and were not governed by English law, but because they were attached to the English Crown, the king's judges could use writs of habeas to oversee the justice done in these places. In contrast, the territories belonging to the Scottish Crown were not subject to habeas, for even when the English and Scottish kingdoms or crowns were united in one monarch, his English writs could reach only the possessions he held as sovereign of England.²⁰¹ Necessarily, therefore, when the 1679 Habeas Corpus Act gave habeas its broadest possible reach, the Act stipulated that the writ could be directed to any place in England, Wales, Berwick on Tweed, and the Isles of Jersey and Guernsey, but it did not mention Scotland, let alone more distant places ruled by the king and his government.²⁰² Not being part of the territory attached to the English Crown or sovereignty, they were not within the ambit of English writs.

200. For consent to common law, see Hamburger, *Law and Judicial Duty*, supra note 3, at 51–52. For consent to acts of Parliament, see id. at 73–74, 76–77.

201. A late nineteenth-century article on habeas explained:

The reason . . . why Scotland is exempt from this jurisdiction is, that it extends only over the dominions which prior to the Union were dominions of the crown of England, and Scotland was never part of the dominions of the crown of England. The King of Scotland came also to be King of England, but this did not make Scotland subject to the crown of England.

Note on the Power of the English Courts to Issue the Writ of Habeas to Places Within the Dominions of the Crown, But Out of England, and on the Position of Scotland in Relation to that Power, 8 *Jurid. Rev.* 157, 158 (1896).

202. Hale explained that Guernsey and Jersey were “annexed to the crown of England” as “a relic of the king’s right in Normandy,” and thus, although they remained under the law of Normandy, they were “in some kind of subordination to the English jurisdiction.” Hale, *Prerogatives*, supra note 70, at 41. They thus were “annexed unto the crown of England . . . though not *infra regnum*.” Id. at 42. Similarly, Hale explained that Berwick on Tweed was “appurtenant to the crown of England,” being “annexed unto, and enjoyed by the crown of England, acquired by conquest.” Id. Again, he added that it “is parcel of dominion and crown of England, but not *infra regnum Angliae*.” Id.; see also Matthew Hale, *The History of the Common Law of England* 121 (Charles M. Gray ed., Univ. of Chi. Press 1974) (n.d.) [hereinafter Hale, *Common Law*]. In contrast, Scotland was considered a separate kingdom, which the monarch ruled separately, not as king of England, but as king of Scotland, thus leaving it beyond the reach of the writs that could be issued in his name as king of England. R.J. Sharpe, *The Law of Habeas Corpus* 191 (2d ed. 1989).

Evidently, habeas did not extend to some rather prominent places under English control. If one assumes that the control or coercive force of a government is the measure of its law, then it may seem odd that habeas could run to Berwick on Tweed, but not just across the border to Scotland. The basis for law, however, was not physical control, but the ideals of sovereignty and subjection. Accordingly, the maximum possible extent of an English writ, such as habeas, was to territory annexed under the sovereignty or subjugation of the monarch in his role as king of England.

This geographic domain of the law was so limiting that the Habeas Corpus Act had to rely on a mechanism other than habeas against imprisonments outside sovereign territory. In particular, the Act included a provision (copied from what had previously been a separate bill) declaring it illegal to send inhabitants of England, Wales, or Berwick on Tweed to be imprisoned in other parts of the British Isles or overseas.²⁰³ The Habeas Corpus Act thus took aim at imprisonment outside sovereign territory, but not by means of habeas corpus, for English writs could not reach beyond places within English sovereignty.²⁰⁴

During the following century, when the Crown's sovereign territories expanded, so too did the reach of habeas corpus. This happened, however, not because the Crown exercised control over the affected places, but because the Crown deliberately claimed certain colonies as sovereign territory and thus extended the reach of at least part of its law. By the late eighteenth century, as already observed, the Crown had assumed a sovereign role in its American colonies, and because they were sovereign territory, they were at least theoretically within the range of a writ of habeas from Westminster.²⁰⁵ The evidence from the American colonies thus confirms that habeas reached beyond the realm, but only as far as sovereign territory—that is, places annexed to the Crown.

This conclusion can be observed in *Rex v. Cowle*.²⁰⁶ Chief Justice Mansfield's opinion in this 1759 case reveals that he carefully described the reach of habeas in terms of places "annexed" to the English Crown or under its "subjugation"—meaning places under the sovereignty of the

203. An Act for the Better Securing the Liberty of the Subject, and for Prevention of Imprisonments Beyond the Seas, 1679, 31 Car. 2, c. 2, § 11 (Eng.). This provision barred some imprisonments within sovereign territory, and in this sense it did not exactly track what would be expected of a well-drafted supplement to the Habeas Corpus Act, but this is hardly surprising, for the provision was originally another bill, designed for the "Prevention of Imprisonments beyond the Seas," which was simply added to the Habeas Corpus Act. *Id.*

204. *Id.* As summarized by an early commentator, "[t]his Act extends to *all places within England and Wales*"—the emphasis on all places being necessary to bar claims of exempt jurisdictions, such as royal forts and castles. Henry Care, *English Liberties: Or, The Free-Born Subject's Inheritance* 131 (London, G. Larkin 1680).

205. See *infra* text accompanying note 207.

206. *R v. Cowle*, (1759) 2 Burr. 834, 856, 97 Eng. Rep. 587, 599–600 (K.B.).

Crown. Habeas could not issue beyond these places, and even within them, it might not be proper:

There is no doubt as to the power of this Court; where the place is under the subjection of the Crown of England; the only question is, as to the propriety.

To foreign dominions, which belong to a prince who succeeds to the throne of England, this Court has no power to send any writ of any kind. We cannot send a habeas corpus to Scotland, or to the electorate [of Hanover]: but to Ireland, the Isle of Man, the [American] plantations, and, as . . . they have been considered as annexed to the Crown, in some respects to Guernsey and Jersey, we may

But notwithstanding the power which the Court have, yet where they cannot judge of the cause, or give relief upon it, they would not think proper to interpose. Therefore upon imprisonments in Guernsey and Jersey, in Minorca, and in the plantations, I have known complaints to the King in Council, and orders to bail or discharge: but I do not remember an application for a writ of habeas corpus. Yet cases have formerly happened of persons illegally sent from hence and detained there, where a writ of habeas corpus out of this Court would be the properest and most effectual remedy.²⁰⁷

Here, again, Scotland offers a telling contrast: The American plantations, three thousand miles away, were “annexed to the Crown” and so within the reach of habeas, but Scotland was not. Nothing could be more revealing about the underlying principle. It was not control, but English sovereignty that determined the geographic domain of habeas.

The result was that even a natural subject could not get a writ of habeas outside sovereign territory. The force of English law rested on claims of sovereignty rather than brute control, and although many persons at the edges of the Empire were beginning to question the king’s sovereignty over their lands, English law did not claim a coercive effect in places outside the territory that the English understood to be sovereign—meaning subject or annexed to the English Crown. This was the outer limit of the law’s geographic domain. In addition, as now will be seen, habeas also illustrates the law’s confined domain as to persons.

2. *No Habeas for Persons Outside Protection.* — The writ of habeas corpus could not be issued on behalf of prisoners of war and other persons outside protection. They owed no allegiance, and therefore, regardless of where they were held, they could not have the protection of the law, whether habeas or any other legal right.

207. *Id.* at 856, 97 Eng. Rep. at 599–600. Although an allusion to England’s “plantations” could have included the English settlements in India, see *supra* note 198, the locution “the plantations” was typically understood to refer to the various American colonies. Certainly, this is how Mansfield’s words in *Cowle* were understood in the eighteenth century. See 2 Robert Chambers, *A Course of Lectures on the English Law Delivered at Oxford 1767–1773*, at 8 (Thomas M. Curley ed., 1986).

The logic of this limitation has gotten lost amid recent arguments that in the seventeenth and eighteenth centuries even aliens could get writs of habeas corpus. For example, according to the Historian's Brief in *Boumediene*, "[c]ourts exercised common law habeas jurisdiction regardless of a petitioner's alienage."²⁰⁸ This sort of claim, however, overlooks the crucial distinction between aliens who were within protection and those who were outside it. In the traditional understanding, it was not disputed that all persons within protection, regardless of their alienage, had the protection of the law. In particular, the protection of the law was enjoyed by all citizens, all lawfully visiting aliens in amity, and even (to a lesser degree) licensed enemy aliens. It is therefore to be expected that many aliens could obtain writs of habeas. What is more relevant is to understand *which* aliens could get habeas. Once the question is thus narrowed, it can be seen that habeas was not available to aliens outside allegiance and protection and, indeed, could never be given to some of them, notably prisoners of war, whose status was incompatible with allegiance. They did not owe allegiance and therefore did not have the protection of the law.

Although prisoners of war could not get writs of habeas, this was not to say that they were without other means of seeking justice. Prisoners of war who were mistreated could seek relief from the Crown, and although this was a matter of grace rather than right, it was not negligible.²⁰⁹ In addition, although prisoners of war had no rights at law, the government itself could take measures against officers who mistreated prisoners.

More immediately, persons held as prisoners of war could have their classification as prisoners of war challenged on affidavits showing that they were, in fact, within the protection of the law and thus not really prisoners of war. Prisoners of war themselves had no right to make any claim in court, for they were, almost by definition, outside allegiance and protection. But a lawyer could move for habeas on behalf of a prisoner of war and could simultaneously file an affidavit showing that the prisoner was within protection. On this application, the court could hold a pre-habeas hearing to determine the prisoner's status. For example, if a natural subject joined the enemy, the court could have an opportunity to conclude that he was actually within protection and thus not really a prisoner of war, in which instance the court could issue the writ. This pre-habeas determination had the virtue of solving the classification problem, without recognizing any legal right in prisoners of war—whether to habeas or even to a pre-habeas proceeding. In retrospect, a hearing on an affidavit filed in conjunction with a third party's motion for habeas may seem a rather indirect mechanism, but it confirms the degree to which the principle of protection barred prisoners of war from claiming legal rights.

208. Historians' Brief, *supra* note 195, at 4; see also Petitioners' Brief, *supra* note 195, at 11.

209. For applications to the Crown for relief, see Chambers, *supra* note 207, at 8.

It has been claimed that a series of cases, from the seventeenth century to the nineteenth, show that courts were willing to grant habeas to prisoners of war; but when the evidence is examined carefully, it actually points in the other direction. This is apparent mostly from reported eighteenth-century cases, but before getting to them, it is necessary to consider four cases from the 1690s identified by Paul Halliday and G. Edward White.

According to Halliday and White, the English judges in these cases issued writs of habeas for prisoners of war.²¹⁰ The evidence, however, consists largely of formal court records and returns to the writs. Accordingly, without further information from reports, it is difficult to discern enough of the underlying facts, let alone the reasoning, to understand whether the judges, when granting habeas, thought the prisoners to be within protection or outside it. If the prisoners were within allegiance and protection, they were not really prisoners of war. Thus, even if held as prisoners of war, they had a right to habeas if they could persuade the judges, in pre-habeas proceedings on affidavits, that their status had been mistaken.

This appears to have been what happened in the cases from the 1690s cited by Halliday and White. In at least one of the cases and probably in all of them, the prisoners were seized within the British Isles.²¹¹ In two of the four cases, the prisoners had English names, which suggests the possibility that they were not aliens at all.²¹² If they were Englishmen who had joined the enemy, and if they could show this on affidavits, they would have remained within allegiance and protection, and they would have been able to get writs of habeas. In the two other cases, the prisoners had foreign names, and it is therefore at least possible that these were instances in which individuals outside protection were granted habeas and then released.²¹³ Yet even on the assumption that these prisoners were enemy aliens, it is also possible that they had been lawfully resident in England with a license of protection. If so, they would have had a right to habeas. As it happens, there is known to have been a pre-habeas hearing in at least one of these cases—that of Daniel Du Castro—and the hearing centered precisely on the question of whether his status allowed him a right to habeas.²¹⁴ Indeed, in his case and one of the cases involving a man with an English name, the judges bailed the prisoners after

210. Halliday & White, *supra* note 14, at 606; see also *Historians' Brief*, *supra* note 195, at 6.

211. John Dupuis was apprehended at Exeter. Halliday & White, *supra* note 14, at 606 n.75.

212. *Id.* (Abraham Fuller and Garrett Cumberford).

213. *Id.* (John Dupuis, Francis LaPierre, and Du Castro or DuCastre—the latter two being the object of a single writ).

214. According to the brief printed report, the noted Tory lawyer Sir Bartholomew Shower argued that the prisoner “might be discharg'd; for, if a habeas corpus were brought, Mr. Attorney General would have returned that he was an alien.” *Case of Du Castro*, (1697) *Fort. 195*, 195, 92 *Eng. Rep.* 816, 816 (K.B.). This is more cryptic than

hearing arguments on the return of writs of habeas. This reveals that the judges, at least at that stage, thought the prisoners to be within allegiance and thus subject to criminal charges.²¹⁵ After writs were granted in the four cases, only one prisoner was remanded as a prisoner of war, but even this case does not show that the judges thought they could issue habeas for an enemy alien who was outside allegiance and held as a prisoner of war, for the French-named prisoner in this case was the individual who is known to have been seized within the British Isles.²¹⁶ It is therefore very possible that the judges initially, when deciding whether to grant him habeas, assumed he was within local allegiance and protection and thus not really a prisoner of war.

Put simply, these cases from the 1690s do not prove what is claimed for them. Although it is said that they reveal a willingness to issue habeas for prisoners of war, they actually do not show this. Nor do they show that judges departed from the principle of protection. These cases, on the whole, are too poorly recorded to reveal much about the law on habeas in the seventeenth century—let alone the eighteenth century, when they would have been almost entirely forgotten. But if they suggest anything, they at least offer a glimpse of how courts used pre-habeas proceedings to try to avoid giving habeas to persons outside allegiance.

Indeed, the reported eighteenth-century cases emphasize that prisoners of war were not entitled to writs of habeas. One such case was *Rex v. Schiever*. This mid-century decision was represented in the *Boumediene* litigation in a manner that leaves the impression the judges issued a writ of habeas for a prisoner of war.²¹⁷ In fact, *Schiever* was merely decided on an affidavit in pre-habeas proceedings. The case arose during a war between England and France. Barnard Schiever was a subject of Sweden, a neutral power, but when sailing to join an English merchantman he was captured by a French privateer and forced to serve on it. He was then captured by the English, and being a prisoner of war, he had no legal rights. A lawyer moved for habeas and filed an affidavit showing that Schiever had been coerced into the enemy's service. It was understood to be an unfortunate situation, especially because, if Schiever remained a prisoner of war, he would be exchanged by cartel, sent back to France,

revealing, but it is at least explicit that the discussion occurred prior to any grant of habeas and that it centered on the prisoner's status.

215. Cumberford and both LaPierre and Du Castro were bailed. Halliday & White, *supra* note 14, at 606 nn.75 & 76.

216. *Id.* at 606 n.75 (Dupuis, apprehended at Exeter).

217. According to the Historians' Brief, "prisoners of war . . . could challenge the legality of their detention by way of habeas corpus. Even where in these cases courts ultimately declined to discharge the petitioner, they reviewed the basis for the prisoner's detention on the merits"—a point for which the brief cites *Schiever* and the *Case of Three Spanish Sailors*. Historians' Brief, *supra* note 195, at 6. The *Boumediene* petitioners alluded to "[h]abeas courts" and then, citing these cases, added that "[e]ven alleged prisoners of war in military detention were able to offer evidence supporting release." Petitioners' Brief, *supra* note 195, at 23.

and forced again into the service of the French navy.²¹⁸ Nonetheless, the judges in the end denied the motion.²¹⁹ They suggested that Schiever could find justice elsewhere, for “if the case be as this man represents it, he will be discharged upon application to a Secretary of State.”²²⁰ The judges, however, could do nothing, for “this man, upon his own shewing, [was] clearly a prisoner of war and lawfully detained as such.”²²¹

Another decision, in the equally poignant *Case of Three Spanish Sailors*, similarly shows that prisoners of war were outside protection. Again, it is suggested these days that this was a case of habeas for prisoners of war, but as might be expected, it was actually a decision decided in preliminary proceedings about the status of the prisoners.²²² In 1779, when Spain joined the American war against Britain, three Spanish sailors on a Spanish privateer were captured by the British and brought to Jamaica, where the captain of a British merchant vessel sailing home with the British fleet persuaded them to serve on his ship by promising them that they would receive wages and would promptly be exchanged for prisoners held by the Spanish. Upon arrival in Britain, however, the captain refused them their wages and turned them over to be held as prisoners of war. On their behalf, a lawyer moved for a writ of habeas, but the Court of Common Pleas denied the writ, saying that they “are alien enemies and prisoners of war, and therefore are not intitled to any of the privileges of Englishmen, much less to be set at liberty on a habeas corpus.”²²³ In other words, they failed to show that they were not really prisoners of war, and the court could therefore do nothing for them. Regarding the British captain’s misconduct toward the prisoners, the Court merely added that “[i]f they can shew they have been ill used, it is probable they may find some relief from the Board of Admiralty.”²²⁴ One of the judges, Blackstone, summarized in his reports: “No habeas corpus lies for an alien enemy, a prisoner of war, however ill used or deceived.”²²⁵

The bar against habeas for prisoners of war was so strong that the writ was even denied when it was sought for the sake of getting a prisoner’s testimony. In one instance, the lawyer for a plaintiff in an English lawsuit needed the testimony of a captured American who was being held in the Mill Prison in Plymouth. The plaintiff’s lawyer therefore sought a

218. *R v. Schiever*, (1759) 2 Burr. 764, 766, 97 Eng. Rep. 551, 551–52 (K.B.).

219. *Id.* at 551–52.

220. *Schiever’s Case*, (1758) 2 Keny. 473, 473–474, 96 Eng. Rep. 1249, 1249 (K.B.).

221. *Schiever*, 2 Burr. at 766, 97 Eng. Rep. at 552.

222. See *supra* note 217 and accompanying text. Oddly, the article by Halliday and White apparently does not even discuss the leading eighteenth-century English cases on habeas for prisoners of war (*Schiever* and *Spanish Sailors*); nor, apparently, does it discuss the most prominent judicial statement about the use of habeas in imperial contexts (*Cowle*). Cf. Halliday & White, *supra* note 14, *passim*.

223. *Case of Three Spanish Sailors*, (1779) 2 Black. W. 1324, 1325, 96 Eng. Rep. 775, 776 (K.B.).

224. *Id.* 1325, 96 Eng. Rep. at 776.

225. *Id.* 1324, 96 Eng. Rep. at 775.

writ of habeas to get the American into court, just as any lawyer would have done with a domestic prisoner. King's Bench, however, denied this request, for "there could be no habeas corpus to bring up a prisoner of war."²²⁶

As for eighteenth-century America, the known decisions on habeas are not revealing about prisoners of war, but some state statutes confirm that prisoners of war were understood to be outside allegiance and protection. The states regularly held their prisoners of war within their own borders, sometimes even in local jails, without bothering to explain that these men owed no allegiance and thus had no right to habeas.²²⁷ The underlying assumption, however, occasionally became explicit—for example, in Pennsylvania's 1777 treason statute. The Act applied the law of treason in Pennsylvania to all persons "under the protection of its laws," and as a preliminary matter, the statute established the extent of protection by broadly attributing allegiance to all persons within the state. Yet for fear that prisoners of war might thereby claim that they enjoyed protection, the statute carefully excluded them from the reach of allegiance: "That all and every person and persons (except prisoners of war) now inhabiting, residing, or sojourning within the limits of the state of Pennsylvania, or that shall voluntarily come into the same hereafter to inhabit, reside, or sojourn, do owe, and shall pay allegiance to the state of Pennsylvania."²²⁸ Ordinarily, it would be taken for granted that prisoners of war were not within allegiance and protection, but because this and similar state statutes generalized about allegiance in terms of who was present within the state, they had to make the exclusion explicit.²²⁹

226. *Furly v. Newnham*, (1780) 2 Dougl. 419, 419, 99 Eng. Rep. 269, 269 (K.B.). Nor was this a new or unusual problem. The solicitor general cited a similar opinion by Justice Aston, and as Lord Mansfield explained, "the presence of witnesses under like circumstances, was generally obtained by an order from the Secretary of State." *Id.* at 419, 99 Eng. Rep. at 269.

227. For example, in New Jersey, the legislature provided that prisoners of war could be held in local jails. An Act to Provide for the Security, Support and Exchange, of Prisoners of War, and to Repeal the Act, Intituled, An Act for Appointing a Commissary of Prisoners, and Vesting Him with Certain Powers § 1 (1780), in *Acts of the Council and General Assembly of the State of New-Jersey, from the Establishment of the Present Government, and Declaration of Independence, to the End of the First Sitting of the Eighth Session, on the 24th day of December, 1783; with the Constitution Prefixed* 139 (Trenton, Isaac Collins 1784).

228. An Act Declaring What Shall Be Treason, and What Other Crimes and Practices Against the State Shall Be Misprision of Treason § 2 (1777), in *The Acts of the General Assembly of the Commonwealth of Pennsylvania*, *supra* note 103, at 18.

229. Similar wording was used, for example, in North Carolina. See An Act to Amend an Act for Declaring What Crimes and Practices Against the State Shall Be Treason § 6 (1777), reprinted in 24 *The State Records of North Carolina* 84 (1905); An Act Declaring What Crimes and Practices Against the State Shall Be Treason § 3 (1777), in 24 *The State Records of North Carolina*, *supra*, at 9; An Ordinance Declaring What Shall Be Treason in This State, and for Punishing the Same, and Other Crimes and Practices Committed Therein (1776), reprinted in 23 *The State Records of North Carolina*, *supra*, at 997 (1904).

The eighteenth-century evidence thus makes clear that prisoners of war could not get writs of habeas, regardless of whether or not they were held within sovereign territory. Although the cases do not spell out the reason why prisoners of war were so emphatically unable to get habeas, the reason appears to have been that they were outside allegiance and protection. Such, as already suggested, seems to have been the meaning of Common Pleas when it expostulated about the Spanish sailors that they were “Alien Enemies and Prisoners of War, and therefore are not intitled to any of the Privileges of *Englishmen*, much less to be set at Liberty on a *habeas corpus*.”²³⁰ Persons held as prisoners of war could attempt to show in pre-habeas hearings that they were within allegiance and protection, but unless they succeeded in such proceedings, they were not within the domain of the law, and could not have legal rights.²³¹

3. *Some Later Evidence on Habeas.* — A postscript to the eighteenth-century evidence can be observed in early nineteenth-century cases decided under the federal Alien Enemies Act. Recent commentary suggests that these later cases justify the use of the writ of habeas corpus for enemy aliens, including prisoners of war.²³² In fact, although of a later date

230. *Case of Three Spanish Sailors*, 2 Black. W. at 1325, 96 Eng. Rep. at 776.

231. When prisoners of war were released on parole, however, and were thus no longer actually held as prisoners of war, they could enforce limited rights, as allowed by license. In this connection, Arthur Page notes that “[t]he two cases of *Sparenburgh v. Bannatyne* [1 B. & P. 163] and *Maria v. Hall* [1 Taunt. p. 33] are sometimes referred to as supporting the contention that prisoners of war, as such, and even when in confinement, are entitled to enjoy civil rights, e.g., the right to sue for wages for services rendered.” Arthur Page, *War and Alien Enemies* 13 (1915). He observes, however, that there is a more probable explanation—that “prisoners of war may . . . receive permission to work either in the service of the belligerent state, or for private persons, on their own account” and that “they may also be released *en parole*.” *Id.*

In such cases as these prisoners of war may, indeed, exercise such civil rights as are reasonably necessary to enable them to enjoy the privileges which *per licentiam regis* they possess. But except within the ambit of the license, it is submitted that prisoners of war possess the civil status which flows from their war domicile.

Id. Page then points out that the contract made by the prisoners in each case was entered into with the consent of the person to whom the prisoner was entrusted as a prisoner of war. In *Sparenburgh* the person responsible for the prisoner was a royal officer and his consent thus “amounted to a license by the Crown.” Even in the other case, *Maria*, “the contract of service was made with the consent of the person entrusted with the conveyance of the plaintiff as a prisoner of war to London, and may have been regarded as having been made under a license by the Crown.” *Id.* at 14–15.

[I]t is further to be observed that Rooke, J., who took part in the trial of both actions, in *Sparenburgh* . . . was of opinion that the prisoner of war in that case was in a position analogous to that of a prisoner of war on parole, who may be entitled to enter into contracts at any rate in respect of ‘necessaries,’ but who derives his capacity to do so from the license of the Crown, which is implied in the grand privilege of being ‘en parole.’

Id.

232. Halliday & White, *supra* note 14, at 709–12. Neuman and Hobson are slightly more cautious. On the one hand, they write that “[e]xecutive detention of enemy aliens may be authorized, but habeas corpus lies to determine the boundaries of that

than the other evidence here, these cases confirm the degree to which prisoners of war were understood to be outside allegiance and protection and thus not eligible for writs of habeas.²³³

Congress passed An Act Respecting Alien Enemies in 1798 during a low-level conflict with France and a version of it remains in effect.²³⁴ This statute—usually known as the “Alien Enemies Act”—was sought by Republicans to constrain the discretion of the President over enemy aliens, but even so, it left broad discretion in the executive to adopt regulations against such aliens.²³⁵ The executive’s regulations would eventually require such aliens to report to authorities, to relocate to designated places far from the coast, or to remove altogether from the United States.²³⁶ The executive would also eventually require federal marshals to imprison enemy aliens who did not immediately comply with the regulations.²³⁷ Enemy aliens did not have a right to the protection of the law and its courts, and the statute correspondingly did not require the executive to use any judicial process in its ordinary enforcement of its regulations.²³⁸

Nonetheless, the Alien Enemies Act did acknowledge some protection of the law for enemy aliens. In providing for additional enforcement, the statute permitted complainants, apparently private as well as public, to bring judicial proceedings against enemy aliens who did not comply with the executive’s regulations, and in these proceedings, the

authorization”—the suggestion being that habeas was available regardless of whether the aliens were prisoners of war. On the other hand, they add the caveat that the cases did not involve “combatants” and “[w]hether that distinction was crucial at the time is uncertain.” Gerald L. Neuman & Charles F. Hobson, John Marshall and the Enemy Alien: A Case Missing from the Canon, 9 *Green Bag* 2d. 39, 44 (2005). The caveat could have been much stronger, for the reported cases on both sides of the Atlantic are entirely clear that prisoners of war were not entitled to get writs of habeas.

233. See An Act Respecting Alien Enemies, ch. 66, 1 Stat. 577 (1798).

234. *Id.* For the contemporary version of this statute, see 50 U.S.C. §§ 21–24 (2006). In contrast to some other legislation from 1798, including the Sedition Act, the Alien Enemies Act was sought by Republicans. See James Morton Smith, *Freedom’s Fetters: The Alien and Sedition Law and American Civil Liberties* 21–49 (1956). Note that the war in 1798 was an undeclared war, but the statute applied only to “declared wars . . . or any invasions or predatory incursions.” Ch. 66, 1 Stat. 577, § 1.

235. See ch. 66, 1 Stat. 577.

236. See *Lockington v. Pennsylvania* (Pa. 1813), *in* 5 *Am. L.J.* 92, 93 (1814) (prosecuting defendant under federal order requiring aliens living within “forty miles of tide water” to remove to places beyond that distance).

237. *Id.*

238. Ch. 66, 1 Stat. 577, § 1. The absence of judicial process was no accident, as revealed by the Alien Act, which was passed the month before. This earlier act allowed the executive to expel even aliens in amity, and it allowed aliens to challenge any such order. An Act Concerning Aliens, ch. 58, 1 Stat. 570 (1798).

Incidentally, the executive regulations and orders authorized by this statute might be considered evidence that executive commands or “administrative regulations” could create legally binding constraints, but these were orders to executive officials as to persons outside the protection of the law.

courts were to hold hearings.²³⁹ Thus, at least in providing for private or executive use of the judicial system, the Act gave enemy aliens a degree of legal protection.²⁴⁰ Moreover, the act included a special proviso for such enemy aliens as were not “chargeable with actual hostility, or other crime against the public safety.”²⁴¹ Regardless of anything else in the Act, these aliens were to have the time determined by treaty (or else a “reasonable time” as determined by the President) to settle their affairs, including the “recovery” of their goods and effects.²⁴² The Act thus explicitly gave some protection to a broad range of enemy aliens.

During the War of 1812, when the executive ordered British subjects to remove to the interior, some refused to comply, and a number of these enemy aliens, after being tried and imprisoned, sought and obtained writs of habeas.²⁴³ On this basis, scholars have recently suggested that habeas may have been generally available to enemy aliens, perhaps including prisoners of war and other captured enemies.²⁴⁴ For example, in one such case, the prisoner, Thomas Williams, complained that he had not been told where to go and that he could therefore not be imprisoned for failing to go there. When the missing information was not forthcoming even at the habeas hearing, Chief Justice Marshall released Williams on the ground that the regulations did not authorize his confinement. The evidence, however, does not reveal the reasoning on which the writ was initially granted.²⁴⁵

Fortunately, other decisions leave no doubt as to why the enemy aliens held under the Alien Enemies Act could get habeas but prisoners of war could not. An initial hint comes from an action of *assumpsit* in New York, in which Chancellor Kent overruled an objection that the plaintiff was a British enemy alien.²⁴⁶ It was unclear from the pleadings whether the plaintiff had come before or after the beginning of the war, but he evidently had remained without objection. On these facts, Kent observed that the law of nations was evolving and that this law, as it had developed, favored an enemy alien who was present when war broke out, or who came with presumed permission during the war—if it was a war conducted with “moderation.”²⁴⁷ The 1798 Alien Enemies Act, it will be recalled, explicitly provided some protection to non-dangerous enemy

239. Ch. 66, 1 Stat. 577, § 2.

240. *Id.*

241. *Id.*

242. *Id.* § 1.

243. For enforcement of the Alien Enemies Act during the War of 1812, see generally Dwight F. Henderson, *Congress, Courts, and Criminals: The Development of Federal Criminal Law, 1801–1829*, at 99–108 (1985). Almost 7,000 aliens were registered. *Id.* at 103.

244. Neuman & Hobson, *supra* note 232, at 39.

245. *Id.* at 41–42.

246. *Clarke v. Morey*, 10 Johns. 69, 72–73 (N.Y. Sup. Ct. 1813).

247. *Id.*; see also *id.* at 74–75. The facts were presented to the court without argument.

aliens. Kent believed that “[t]his statute may be considered, in this respect, as a true exposition and declaration of the modern law of nations.” Thus, not only by the law of nations, but also by statute, many enemy aliens, even if under restrictions, were otherwise within the protection of the law. Kent concluded that the plaintiff had a license of protection under which he could bring his cause of action.²⁴⁸ Although this case concerned the commercial interests of an enemy alien whom the executive allowed to remain at large, the potential to apply similar reasoning to habeas was obvious enough, and it was eventually pursued in two habeas cases brought by Charles Lockington.²⁴⁹

Lockington was a British resident of Pennsylvania who was ordered to remove to Reading, but he refused on the ground that he lacked the means to subsist there. Indeed, he protested that he would go only if the government provided for his support.²⁵⁰ In the course of the argument on his writs of habeas, there were suggestions that he and other resident enemy aliens could have been held as prisoners of war.²⁵¹ But Congress and the executive had expressly allowed these individuals to remain, albeit under restrictions on their location and their rights, and the government thereby evidently allowed them to remain with at least some protection, including access to the courts, while they met the statutory conditions. In addition, enemy aliens who were allowed to remain were likely to come within the proviso allowing non-dangerous enemy aliens to settle their affairs. One way or another, enemy aliens who were permitted to stay had a statutory license to initiate proceedings in the courts, apparently including writs of habeas.

It should therefore be no surprise that Lockington and other British enemy aliens imprisoned under the Alien Enemies Act were able to get writs of habeas. In one of the *Lockington* cases, Justice Brackenridge misstated the law, arguing that “I do not see that any habeas corpus can issue, unless the applicant can make out an affidavit in the first instance, that he is not an alien enemy.”²⁵² The other judges, however, did not question the issuance of habeas, for they more accurately recognized that, although prisoners of war could not get habeas, Lockington was an enemy alien who had been licensed to remain with some protection.²⁵³

These judges emphasized that if Lockington had been a prisoner of war, he would not have been “entitled to a privilege, which never could

248. *Id.* at 73–74.

249. *Lockington v. Smith* 15 F. Cas. 758 (C.C.D. Pa. 1813) (No. 8448), *in* 5 Am. L.J. 301 (1814); *Lockington v. Pennsylvania* (Pa. 1813), *in* 5 Am. L.J. 92 (1814).

250. *Lockington*, 5 Am. L.J. at 92.

251. Most clearly, it was argued in the initial *Lockington* case “that congress, if it had pleased them, might have considered alien enemies as prisoners of war, who are not entitled to the benefit of a writ of *habeas corpus*.” *Id.* at 94.

252. *Smith*, 5 Am. L.J. at 327. Brackenridge acknowledged that Lockington was not a prisoner of war, but thought him “to be considered as out of the municipal law” and therefore “not the subject of a habeas corpus.” *Id.*

253. *Id.* at 301.

have been intended for persons of that description.” Chief Justice Tilghman explained:

A prisoner of war is subject to the laws of war; he is brought among us by force; and his interests were never, in any manner, blended with those of the people of this country. He has no municipal rights to expect from us. We gave him no invitation, and promised him no protection. His object was to injure us; and we bring him hither solely for safe keeping.²⁵⁴

Lockington, however, was one of the resident British subjects who had been allowed to remain with a limited protection. As Justice Yates said, although Lockington was “an alien enemy when the war was declared, yet, as resident amongst us at that period,” he was “entitled to certain rights, until he has forfeited them by some offence cognizable by the laws of war. I do not view him as a prisoner of war, subdued and forcibly brought into the United States.”²⁵⁵

Nonetheless, the judges refused to release Lockington, and because it will later be necessary to discuss the detention and removal of enemy aliens, it is worth pausing to observe why the judges granted Lockington his writs of habeas but declined to release him or even to weigh the merits of his complaint about the removal order. Enemy aliens could have protection only by express license, and although Congress had allowed enemy aliens such as Lockington to remain and make use of the legal system, it had at the same time authorized the executive to impose regulations on enemy aliens without relying on the courts. Lockington thus apparently had a license to seek legal remedies in the courts, including habeas, but not any legal right against his imprisonment or to enable him

254. *Lockington*, 5 Am. L.J. at 97. The court in *Clarke v. Morey*, he noted, had held that “British aliens residing in the *United States*, so far from being considered as prisoners of war, may sue, and be sued, as in time of peace.” *Id.* at 98.

255. *Smith*, 5 Am. L.J. at 318. A commentator later summarized: “Prisoners of war . . . are not entitled to the privilege of a writ of *habeas corpus*: but the relator was not to be considered a prisoner of war.” Thomas Sergeant, *Constitutional Law* 285 (Philadelphia, P. Niclin & T. Johnson 1830).

Note that the judges were distinguishing an enemy alien held under the federal statute from a mere prisoner of war, and although the statute made clear enough that aliens held under the statute were not being held as prisoners of war, the judges reinforced the statutory distinction by casually attributing dangerous motives and tendencies to prisoners of war. In these circumstances, the judges cannot be taken to have offered definitive accounts of who constituted a prisoner of war. In general, it was not necessary to show a design to injure, or a need to subdue, in order to hold an enemy alien as a prisoner of war.

At least in the reports of the opinions given by Tilghman and Yates, there apparently is some blurring of two distinct questions: on the one hand, the license under American law to remain with at least some protection and, on the other hand, the growing acknowledgment that enemy aliens present for commercial purposes should be given time under the law of nations to dispose of their goods or remove them. *Smith*, 5 Am. L.J. at 318.

to get judicial oversight of the executive's reporting, removal, and expulsion requirements.²⁵⁶

Habeas, in short, belonged only to persons within protection, and although this could include enemy aliens who were allowed to stay, it did not include prisoners of war. Of course, the courts could conduct pre-habeas proceedings on affidavits to reconsider the status of prisoners of war. Moreover, the courts could issue writs of habeas for enemy aliens who were licensed to remain with protection. Prisoners of war, however, including foreigners captured in irregular warfare, were by their nature outside any local allegiance, and they therefore could not get habeas or any other protection of the law.²⁵⁷

The principles of sovereign territory and protection thus placed constraints on the reach of habeas, and they are yet a further indication that there were limits on what could be done through the law of the land and its courts. The law could reach only within its domain.

D. *Limits on Protection: Foreigners in Amity Who Remained Outside Allegiance*

A third illustration of the limits on obligation and protection concerns foreigners in amity who remained outside allegiance. Not being within allegiance, they could not enjoy the protection of the law. Compared with the dramatic conclusions about enemy aliens and about prisoners of war seeking habeas, this point about foreigners in amity may seem mundane. Yet it is profoundly important, for it is a reminder that the way in which allegiance demarcated the boundaries of protection was not an emergency response to a military crisis, but rather a limitation inherent throughout the law, even in the most ordinary decisions.

This can be observed in a case decided in 1786 under the Connecticut alien claims act. It is just one case, and the opinions of the judges do not survive, but the pleadings themselves are illuminating about the law's limited domain.²⁵⁸ Moreover, because the case arose under a statute that incorporated aspects of the law of nations, it suggests how completely the law of nations was aligned with American law in barring protection for persons outside allegiance.

In 1782, Connecticut adopted an alien claims act—a statute that, in its jurisdictional section, generally authorized the state's courts “to hear, try and determine . . . Infractions or Violations of, or Offences against the known, received and established Laws of civilized Nations, agreeable to

256. In contrast, Williams had a right to be released because the executive had failed to comply with the rules it had previously established under the statute, and it therefore had acted outside its authority.

257. Persons who were no longer confined as prisoners of war, however—for example, because released on parole—were another matter. See *supra* note 231.

258. Pleading on the question of whether a foreigner outside allegiance could sue was probably very unusual, and it occurred in this case only because the foreign claimant apparently could not lawfully, or at least prudently, enter the state.

the Laws of this State, or the Laws of Nations.”²⁵⁹ Avoiding any doubt about civil as well criminal proceedings, the statute added a provision for damages.²⁶⁰ In retrospect, it may be thought that this statute was an early example of how an American state generally extended the protection of its law, including its courts, to persons outside its allegiance. Yet, to the extent the statute allowed civil actions for violations of the law of nations, it presumably only allowed actions as permitted by the law of nations, which included the principle of protection.

This became apparent in *Brinley v. Avery*. The parties were British subjects who contracted with each other while they were both resident in Nova Scotia.²⁶¹ Avery breached and prudently returned to his place of birth, Connecticut, where Brinley brought an action against him.²⁶² The parties were said in the court records to have appeared, but whether in person or by attorney is unclear.²⁶³ Even if Brinley actually appeared in court, he probably did not have local allegiance and protection, for he had earlier been banished and proscribed by Massachusetts and was therefore probably also unwelcome in Connecticut.²⁶⁴ One way or another, even Brinley did not dispute that he was outside any allegiance to Connecticut or the United States.

259. An Act to Prevent Infractions of the Laws of Nations, *in* Acts and Laws, Made and Passed by the General Court or Assembly of the Governor and Company of the State of Connecticut, in America; holden at Hartford (in said State) on the second Thursday of May, Anno Dom: 1782, at 602–03 (New London, 1782) [hereinafter Connecticut Laws 1782]. This was later printed as An Act for Securing to Foreigners in this State, Their Rights, According to the Laws of Nations, and to Prevent Any Infractions of Said Laws, *in* Acts and Laws of the State of Connecticut, in America 83 (New London, Timothy Green 1784).

For an account of the Connecticut statute in the context of a broader discussion of allegiance and obligation, reciting many of the points explained in Parts I and II of this article, see I Swift, *A System*, *supra* note 87, at 166–67.

260. An Act to Prevent Infractions of the Laws of Nations, *in* Connecticut Laws 1782, *supra* note 259, at 603.

261. *Brinley v. Avery*, 1 Kirby 25, 25 (Conn. Super. Ct. 1786).

262. George Brinley was Deputy Commissary General of Nova Scotia. Although Brinley brought his action as a trespass on the case, his underlying claim was not tort, but breach of contract: He had contracted in 1785 in Halifax to supply Avery with up to 1,000 cauldrons of merchantable coal and had actually delivered 682 cauldrons. Avery had not paid, however, and perhaps this was why, after living for many years in Halifax, he had returned in 1785 to his place of birth, Connecticut. Incidentally, Brinley had entered the contract in his official capacity as Deputy Commissary General. According to their written agreement, Avery was to pay Brinley “or his Successor in Office” eighteen shillings per cauldron for the use of “the Government”—a term that (as put in Brinley’s averments) “meant the Government of His Majesty George the third King of Great Britain and the Dominions thereon depending.” *Brinley v. Avery*, writ of attachment, in case file, Connecticut Superior Court Records. For the action having been brought in trespass on the case, see Connecticut Superior Court Records, Vol. 25, July 1786–March 1788, at 72, Connecticut State Library [hereafter, Conn. Super. Ct. Records].

263. Conn. Super. Ct. Records, *supra* note 262.

264. *Brinley*, 1 Kirby at 25.

Avery defeated Brinley's claim in the Hartford County Court and again in the Connecticut Superior Court. The parties focused on a range of issues, but it should be no surprise that Avery's first plea in abatement began by alleging that Brinley lacked allegiance to Connecticut—"that the plaintiff is an alien, . . . an inhabitant of Halifax, . . . without the allegiance of the state of Connecticut, and of the United States of America."²⁶⁵ This evidently laid the foundation for an argument that the plaintiff was outside the protection of Connecticut's laws.

Whereas this first plea set up the basic point that Brinley was outside protection, Avery's second plea set up a parallel statutory argument about the alien claims act, explaining that "by the law of nations, no such action can be supported."²⁶⁶ In other words, even if the plaintiff, notwithstanding his lack of allegiance, could make a claim in the state's courts, the Act itself, by incorporating the law of nations, barred the plaintiff's action. Avery then proceeded to set up other arguments, but his leading point in his first and second pleas was that Brinley was beyond allegiance and thus presumably protection.

Brinley's replication attempted to shift the focus of the controversy away from his current lack of allegiance and protection to suggest that nonetheless he could bring his claim. After referring to the king and Great Britain, his replication explained:

[T]heir subjects have right by the treaty of peace . . . and by the laws of nations & of this state to maintain actions in the courts of common law in this state for the recovery of their just dues, against the citizens of this state or others that were subjects of the king and kingdom of Great Britain, who may come to reside here, and take up their abode in this state . . . in any action that is personal & transitory.²⁶⁷

The statement about "the Laws of Nations and of this State" was an allusion to the law of nations and its incorporation within Connecticut's alien claims act.²⁶⁸ Brinley's lawyers apparently thought that they could rely on these laws and the peace treaty to make a claim notwithstanding that he was currently outside allegiance. But this was not a winning argument—in part because the reciprocal relation between allegiance and protection, which stood in the way of Brinley's action, was a principle of not only the law of Connecticut but also the law of nations.²⁶⁹ Confident of

265. *Id.* In contrast, the rest of Avery's first plea focused on Brinley's allegiance only at the time of contracting, which is what mattered for the other issues in the case.

266. *Id.* at 26.

267. *Id.*

268. The reference to the Connecticut statute is clear from the phrase "Laws of Nations," which echoes the solecism in the statute.

269. An Act to Prevent Infractions of the Law of Nations, *in* Connecticut Laws 1782, *supra* note 259, at 603. Incidentally, when Connecticut in 1776 declared its pre-existing constitution, it stated:

That all the free Inhabitants of this or any other of the United States of America, and Foreigners in Amity with this State, shall enjoy the same Justice and Law

prevailing on this and the other issues, Avery simply demurred. In light of Brinley's replication, which attempted to shift to the other issues, it would not be surprising if the judges did not focus on the question of allegiance and protection.²⁷⁰ The absence of allegiance, however, was raised, and the justices of the Superior Court (including Oliver Ellsworth, who afterward drafted the federal alien claims act) held that "the plea in abatement" was "sufficient."²⁷¹

Standing alone, the mere pleadings in *Brinley v. Avery* do not prove very much about the principle of protection. They concern, moreover, only the most mundane sort of problem—that of an alien in amity who fails to come within allegiance. Yet taken together with the more dramatic evidence about enemy aliens and about prisoners of war seeking habeas, these pleadings about an alien in amity are a valuable reminder that the limitations on the obligation and protection of the law were not lawless emergency responses to military exigencies, but rather were aspects of the relationship between allegiance and protection—a relationship that was part of the law itself. Both in Anglo-American law and in the law of nations, a person outside allegiance to a sovereign was outside the protection of its law. Being outside allegiance, he was not bound by the law; being outside protection, he had no rights under the law.

E. *How Were These Limits Legally Binding?*

It remains to be considered how these limitations on the domain of national law were considered binding as part of the law of the land. To be sure, the reciprocal relationship of protection and allegiance was a central foundation of the law of nations and of Anglo-American government. But how did it actually bind governments, thus limiting what they could do with their laws?

At least in America, a constitution could directly mention the law of nations and thereby also incorporate its principle of protection. For example, the United States Constitution granted Congress the power to "define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations."²⁷² This provision authorized Congress to criminalize violations of the law of nations, and this authorization of Congress in terms of the law of nations presumably included the limitations, such as the principle of protection, that were understood to

within this State, which is general for the State, in all cases proper for the Cognizance of the Civil Authority and Courts of Judicature within the same
An Act Containing an Abstract and Declaration of the Rights and Privileges of the People of this State, and Securing the Same, *in Connecticut Laws 1782*, supra note 259, at 2.

270. The reporter's marginal note alluded to one of the other issues: "An action is not maintainable in this state upon a contract made in a foreign country, between citizens of that country, and to be there performed." *Brinley*, 1 Kirby at 25. It is not clear, however, how much weight can be placed upon this note, for it appears that Kirby merely relied on the formal record when reporting this case.

271. *Id.* at 27.

272. U.S. Const. art. I, § 8, cl. 10.

be a part of this law. Similarly, a statute's incorporation of the law of nations incorporated the principle of protection and its impediment to claims by foreigners—this being what allowed Avery to object that Brinley was without allegiance.²⁷³

A constitution or statute could also directly specify that it guaranteed rights or the protection of the law for subjects—meaning persons within allegiance. Englishmen frequently spoke of their rights, including habeas, as the liberties of the subject. There was an ambiguity in this locution, for although the word “subject” usually denoted natural subjects, it also sometimes meant all persons within allegiance and thus subject to the law.²⁷⁴ Apparently with this broader connotation, some state constitutions in America spelled out that they were guaranteeing rights to subjects—as when the New Hampshire Constitution stated that “no subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled or deprived of his life, liberty, or estate, but by the judgment of his peers or the law of the land.”²⁷⁵ Such specificity, however, was unnecessary, for it could be assumed that only such persons as were subject to the law had legal rights and the protection of the law.

The principle of protection, including the reciprocal notion of allegiance, was therefore usually just taken for granted. As already discussed, the principle of protection seemed discernable in human nature and the laws of nature. More to the point here, it was a foundational ideal that informed the adoption of laws. Accordingly, when early state constitutions and judicial opinions recited the reciprocal relationship of allegiance and protection, they were making use of an existing principle rather than trying to give authority to it. Rather than a freestanding constitutional requirement, the principle of protection was a basis for understanding the law of the land and the jurisdiction of its courts. In these

273. See *supra* text accompanying notes 266–271.

274. Hale distinguished between “a natural or acquire subject of the king.” Hale, *Prerogatives*, *supra* note 70, at 56. Note also the distinction he recorded between natural subjects and loving subjects. See *supra* note 84. From this sort of perspective, the liberties of the subject could be distinguished from the liberties of Englishmen. Similarly, in America, a newspaper essayist in Philadelphia loosely explained that “inhabitants and subjects, as distinguished from citizens, are strangers who are permitted to settle and stay in the country.” *Citizen, Chronicle of Freedom*, *supra* note 79. For an attempt to include visiting aliens with other locutions, see *supra* note 86.

275. N.H. Const. art. XV (enacted in 1784). Along the same lines, this constitution also stated: “Every subject of this state is entitled to a certain remedy, by having recourse to the laws, for all injuries he may receive . . .” *Id.* art. XIV.

That the word “subject” in Articles XIV and XV, which were guarantees of protection, referred to all persons subject to the laws, including aliens, is suggested by Article XII, which stated: “Every member of the community has a right to be protected by it in the enjoyment of his life, liberty and property . . .” *Id.* art. XII. The care with which such words could be chosen is evident from the rest of Article XII, which made guarantees about “a man’s property” and about the law under which “inhabitants” could be controlled. *Id.*

circumstances, when judges faced questions about who was within their system of law and who was not, they apparently recognized that they needed to fall back on the principle of protection.

Structurally, such assumptions rested on the lawmaking authority of the people. The people of the United States, for example, established their constitution and other laws to govern themselves and their land, not other peoples and their lands. The people, moreover, spelled this out in the U.S. Constitution. They recited that “the People of the United States” made their constitution “for the United States of America,” and they carefully explained that their constitution, statutes, and treaties were “the supreme Law of the Land.”²⁷⁶ In such ways, they made clear that their law was for their society and land rather than other peoples and their countries. Thus, the laws of the United States no more obliged Frenchman and had coercive effect in Paris, than French law obliged Americans and had coercive effect in Philadelphia. Although American citizens who went abroad remained bound and protected by American law, they were not subject to its legal process or other coercion until they were back in the United States or at least its sovereign territory.²⁷⁷ From the other direction, foreigners who did not owe any American allegiance were not even subject to the obligation of American law until they came within allegiance.²⁷⁸

Evidently, in both its structure and its words, the Constitution assumed the principle of protection, including the implication that the law of the United States was the law for the people of the United States and their land, not other peoples and places. Of course, such assumptions about the limited domain of the law would not frequently require holding anything unconstitutional. But they would often be very significant for recognizing the limited reach of the law, whether in interpreting enactments, understanding common law, or refusing jurisdiction.

In sum, the reciprocal relation of allegiance and protection had consequences for when the use of a nation’s law was mandatory, optional, or simply barred. The last category has been of particular interest here, for it reveals the outer limits of the law’s domain. Already in Part II, it was apparent (from the evidence on treason, disaffection, oaths, and visiting aliens in amity) that some persons were thought to be outside allegiance

276. U.S. Const. pmbl., art. VI, § 2.

277. This was also true of aliens who visited with a local allegiance and protection and then went abroad without giving up their local protection.

278. There were interesting but secondary questions here about choice of law. For example, if a Frenchman in France entered a transaction with an Englishman in England and then came to England, the Frenchman could sue or be sued in an English court, and in some circumstances French law might seem more applicable. See *Mostyn v. Fabrigas*, (1774) 1 Cowp. 161, 174, 98 Eng. Rep. 1021, 1028 (K.B.) (reciting in dicta that an English court would apply French law if it had to construe “a French settlement the construction of which depends upon the custom of Paris”). In such instances, the Frenchman’s entry into England brought him within the obligation and protection of English law, under which the judges decided which nation’s law was applicable.

and protection. Here, in Part III, not only has this point been confirmed, but it also has been shown (from the evidence on enemy aliens, prisoners of war seeking habeas corpus, and foreigners in amity) that sometimes persons could not be bound by law or given its protection.

It is worth reiterating the details. The limits on domain concerned both places and persons. As to locations, the law generally had no coercive force (and thus a court had no jurisdiction or process) outside sovereign territory. More central in this inquiry about protection and allegiance were the limits as to persons. A person outside allegiance was not bound by the law, and a person outside protection had no rights under the law. Accordingly, although the law, including both its obligation and its rights, could reach a wide range of visitors, including even enemy aliens, it could not reach those who were outside allegiance and protection. For example, it could not reach enemy aliens who lacked an express license of protection, or who were in open hostility or who otherwise did not give at least presumptive consent for allegiance and protection. Nor could the law's obligation or rights be extended to prisoners of war, whose status precluded allegiance; nor even could such obligation and rights reach foreigners in amity who remained outside allegiance. All these persons were outside allegiance and protection, and they were therefore outside the realm of the law.

Having introduced the theory of protection and allegiance, and how it limited the law's domain, this Article must now turn to the practical implications for executive action. In different circumstances, as might be expected, the principle of protection led in divergent directions.

IV. THE NEED FOR SUSPENSION OF HABEAS AS TO PERSONS WHO WERE WITHIN PROTECTION: PENNSYLVANIA

Emergency executive detention is a familiar question. So too is an answer in terms of the suspension of habeas corpus. Both the question and the answer, however, must be considered afresh in the context of the relationship between allegiance and protection.

This broader framing of the problem sets the stage for a sharp contrast between two types of executive measures: those against persons within protection and those against persons outside protection. As to persons within protection, Part IV shows that an executive could take only limited, temporary, emergency measures, and it could do so only after the legislature authorized the detention and suspended habeas corpus. As to persons outside protection, however, it will be seen in Part V that an executive could regularly take more permanent measures without a suspension of habeas and, in most states, even without legislative authorization.

Some events in Pennsylvania offer a dramatic illustration of how, even during war, when the very survival of the nation was at risk, an executive could not take emergency action to detain persons who were within the protection of the law, unless it had authorization and a suspension of

habeas. In 1777, during the War of Independence, the executive of Pennsylvania feared an invasion of Philadelphia, and it therefore imprisoned and removed some individuals it suspected of loyalty to the British. The executive did all of this, however, without a suspension of habeas or other legislative sanction. Its experience was therefore not very happy. Today, in a study of protection, the story of what happened in Pennsylvania suggests the layers of preparation, including both legislative authorization and legislative suspension, that were necessary for even limited emergency measures against persons who were within protection.

A. *Authorization and Suspension*

Before turning to eighteenth-century Pennsylvania, it is necessary to step back to seventeenth-century England, to observe how legislative authorization and suspension gave legality to what would otherwise have been an emergency power above the law. To detain individuals who were within the protection of the law, without affording them judicial process, the Crown needed a pair of legislative foundations—not merely authorization but also suspension. Although today it may be thought that the suspension of habeas is a denial of the protection of the law, the suspension of habeas, together with authorization of the imprisonment, was the means by which the law tamed the Crown's emergency power to detain. It was the mechanism by which the law acknowledged the occasional necessity of such a power but simultaneously brought it under the law. The requirement of legislative authorization and particularly suspension thus reveals not a denial of the protection of the law, but rather how carefully this protection was preserved.

The measures necessary for lawful executive detention during an emergency have recently been disputed. Drawing on eighteenth-century sources, Trevor Morrison suggests that a legislative suspension of habeas could not fully authorize executive detentions, but only delay judicial action, unless there was also legislative indemnification.²⁷⁹ Working from eighteenth-century American sources, Amanda Tyler observes that the combination of legislative authorization and suspension established the underlying lawfulness of executive detentions.²⁸⁰ The latter view will be seen to have support in earlier, English evidence. The goal here, however, is not merely to confirm that legislative authorization and suspension together gave legality to emergency detentions, but to understand

279. Trevor W. Morrison, *Hamdi's Habeas Puzzle: Suspension as Authorization?*, 91 *Cornell L. Rev.* 411, 432 (2006); Trevor W. Morrison, *Suspension and the Extrajudicial Constitution*, 107 *Colum. L. Rev.* 1533, 1543–51 (2007) [hereinafter Morrison, *Suspension*].

280. Amanda L. Tyler, *Is Suspension a Political Question?*, 59 *Stan. L. Rev.* 333, 386 (2006); Amanda L. Tyler, *Suspension as an Emergency Power*, 118 *Yale L.J.* 600, 613 (2009) [hereinafter Tyler, *Emergency Power*]; see also David L. Shapiro, *Habeas Corpus, Suspension, and Detention: Another View*, 82 *Notre Dame L. Rev.* 59, 86–87 (2006).

why.²⁸¹ If Parliament could authorize such detentions, why did it need to suspend habeas? And why did a suspension of habeas come to seem essential not only for practical purposes but also apparently for the underlying constitutionality of the detentions? The answers suggest how emergency detentions were rendered compatible with the protection of the law.

A suspension of habeas came to be significant because of seventeenth-century disputes about emergency detention. The king had traditionally claimed a prerogative to detain individuals, without judicial reconsideration, whether on a writ of habeas corpus or otherwise. Lawful warrants for the search and seizure of persons or goods, including papers, were judicial acts, and therefore when members of the privy council in the sixteenth century ordered arrests, the imprisoned individuals could ordinarily get released on writs of habeas on the ground that the arrests were “against the laws of the realm.”²⁸² Arrests on the order of the king himself, however, and perhaps even arrests for treason by members of his council, were another matter. These arrests were said by the Crown to be beyond legal challenge. It was not merely that the monarch was above liability for damages; more fundamentally he claimed that, to preserve the nation in emergencies, he necessarily had a prerogative or power to imprison individuals without explaining the particular cause in court.²⁸³ In this, as in so many other matters, although the Crown relied on ideas of sovereign power above law, it more narrowly asserted a freedom from accountability in the common law courts.²⁸⁴ From this perspective, when a prisoner imprisoned at the king’s command obtained a writ of habeas corpus, it was enough for the detaining officer to bring the prisoner’s body into court and to state on the return of the writ that the prisoner had been confined at the king’s behest. Of course, the issuance

281. The recent writings on this question largely skip over the seventeenth-century English evidence. Morrison’s article quotes some late seventeenth-century Parliamentary debates on the possibility of remedies for unjustified imprisonments under suspension acts. Morrison, *Suspension*, supra note 279, at 1546. But notwithstanding what is suggested by Morrison, the debates clearly refer to Parliamentary remedies.

282. The Opinion Given by the Judges in 1591 as to Imprisonments by Order of the Council (1591), in 5 William S. Holdsworth, *A History of English Law* 495–96 (1924). The 1591 opinion survived in two versions, the least restrictive of which recited:

[I]f any person be committed by her Majesties commandment from her Person, or by order from the Council-board, or if any one or two of her Council commit one for high treason such persons so in the case before committed may not be delivered by any of her Courts without due tryal by the Law, and Judgment of acquital, had.

Id. at 497.

283. For example, Serjeant Ashley argued for the king in Parliament in 1628 that “for offences against the State, in case of State Government, the king and his council have lawful power to punish by imprisonment, without shewing particular cause, where it may tend to the disclosing of State Government.” 3 *State Trials*, supra note 131, at 151.

284. For the shift from substantive claims about power over law to claims about what was disputable in court, see Hamburger, *Law and Judicial Duty*, supra note 3, at 206–08.

of the writ still interrupted the imprisonment by requiring the production of the prisoner's body. At least, however, the Crown could avoid revealing its reasons for the detention and could prevent the court from releasing the prisoner.

The lawfulness of an emergency arrest and detention thus came down to a more technical question about the king's power to hold individuals without reciting the cause on the return. This technical focus became particularly clear when King Charles I imprisoned men for a reason that was not obviously a matter of national safety. In order to pursue an unpopular foreign policy, Charles sought to rule without reliance on Parliament. He therefore had to raise money by recourse to extra-Parliamentary means, including forced loans, which he collected by imprisoning men who were recalcitrant. In 1627, five men who were imprisoned for this reason obtained writs of habeas corpus, but when they were brought into court, the return on their writs stated that they were committed at the special command of the king. After hearing extensive arguments, the judges accepted the Crown's view that the king had a prerogative to avoid stating a cause, and the judges therefore refused to order the prisoners' release.²⁸⁵ In this way, the substantive problem about the king's authority to detain individuals got collapsed into the secondary question about the return of a writ of habeas: "Whether a Freeman can be imprisoned by the king, without setting down the cause?"²⁸⁶ It is an early hint of the constitutional significance of a suspension of habeas.

Of course, at the same time that the king and his opponents disputed the question at the technical level, they acknowledged that what was really at stake was emergency power. The Crown defended its position by arguing that there was an inherent power in a sovereign to secure the nation in an emergency and that, if this power was to be useful, it had to be absolute.²⁸⁷ This was essentially an argument from necessity—that there were necessities that could not be anticipated by law, and that a sovereign therefore had to have a power above law to protect against such exigencies. The king's position on emergency imprisonments thus came into conflict with ideals of lawful and, indeed, constitutional governance. Such ideals were increasingly popular in the seventeenth century, and were vigorously espoused by Parliament. In this spirit, Parliament in 1628 in the Petition of Right repudiated lawless imprisonments and in 1641 more specifically required that the Crown return writs issued for prisoners of the Privy Council with "the true cause" of their detention or imprisonment.²⁸⁸ Parliament itself soon violated these ideals when it fought

285. Darnel's Case (K.B. 1627), *in* 3 State Trials, *supra* note 131, at 2–5.

286. Sir Edward Coke, Proceeding in Parliament Relating to the Liberty of the Subject, *in* 3 State Trials, *supra* note 131, at 77–78.

287. Attorney General, *in* 3 State Trials, *supra* note 131, at 44–45; Letter from Charles I to the Lords, *in* 3 State Trials, *supra* note 131, at 191.

288. An Act for [the Regulating] the Privie Councill and for Taking Away the Court Commonly Called the Star Chamber, 1640, 16 Car. I (Eng.), c. 10, § 6; Petition of Right,

and defeated the king in the civil war of the 1640s.²⁸⁹ At least, however, Parliament largely put an end to royal claims of a detention power above the law.²⁹⁰

The legal barrier to royal imprisonments without accountability at law became particularly clear in the 1679 Habeas Corpus Act.²⁹¹ Although the Crown in the 1670s still attempted to evade writs of habeas in various ways, it was a time when many members of Parliament were contemplating that they might have to oppose the succession of the king's brother to throne. They therefore had reason to worry about the misuse of emergency imprisonments. With these fears weighing on their minds, they secured an act preventing evasions of habeas.²⁹²

As might be expected of careful common lawyers, they responded to the general problem of lawless imprisonment in a legalistic manner: by ensuring the availability of the old common law writ. Their statute required that any person served with the writ had to return the cause of the imprisonment. The Act thus emphasized what many surely already assumed: that the Crown could not simply insist that the imprisonment was on the king's orders.²⁹³ Once again, therefore, the theoretical question about absolute power and emergency imprisonment came down to the more concrete and narrowly legal question of how an imprisoning officer should fill out the return of a distinctively common law writ. It was but one more step in the process by which the suspension of habeas became essential for lawful emergency imprisonment.

After the adoption of the Habeas Corpus Act, the Crown could still keep persons imprisoned during emergencies, but it needed legislative authorization and a legislative suspension of the writ of habeas corpus. If the Crown could no longer easily claim a prerogative of imprisonment

1627 [i.e., 1628], 3 Car. I, c. 1, §§ 3, 5 (Eng.) (1628); see also Halliday & White, *supra* note 14, at 621.

289. For William Prynne's defense of Parliament's power to hold prisoners indefinitely, notwithstanding writs of habeas, see Hamburger, *Law and Judicial Duty*, *supra* note 3, at 245 & n.19.

290. See Sharpe, *supra* note 202, at 14. More generally, Matthew Hale explained: *Potestas imperii or regalis in England hath two qualifications: (1) That it is not absolute and unlimited, but bounded by rule and law. (2) It is not simple but mixed with jurisdiction, for the contempt or disobedience to his command ought to receive his punishment by that jurisdiction which the king is intrusted with, viz. in his courts of justice.*

Hale, *Prerogatives*, *supra* note 70, at 268.

291. An Act for the Better Securing the Liberty of the Subject and for Prevention of Imprisonments Beyond the Seas, 1679, 31 Car. II, c. 2, § 1 (Eng.).

292. Perhaps the most sensitive account of the politics of the act remains Andrew Amos, *The English Constitution in the Reign of King Charles the Second 170–205* (Cambridge, C.J. Clay 1857); see also Sharpe, *supra* note 202, at 18–20 (discussing abuses of power that led to 1679 Habeas Corpus Act).

293. An Act for the Better Securing the Liberty of the Subject and for Prevention of Imprisonment Beyond the Seas, c. 2, § 1. For the statute's other requirements, see *id.*; see also Sharpe, *supra* note 202, at 19.

above the law, it needed Parliamentary authorization. As for a suspension of habeas, the writ was now protected by statute; and lest the implication be unclear, the Declaration of Rights in 1689 put an end to any royal power to suspend the laws.²⁹⁴ From that date, therefore, the Crown could escape habeas only by obtaining an act of Parliament suspending the writ. Indeed, because the question about the lawfulness of emergency imprisonments had been reduced to the more technical question about whether the king could imprison individuals without having to specify the cause on the return of a writ of habeas, a suspension of habeas was perhaps necessary to ensure that emergency imprisonments were constitutional.

The result was that if the Crown was to imprison men during a rebellion or invasion, it needed legislative authorization; and if it was to avoid constitutional doubts, let alone the practical risks of specifying the cause or bringing the individuals into court, it needed a legislative suspension of habeas. Parliament could accomplish the suspension simply by combining the temporary authorization with a general *non obstante* clause, which explained that the imprisonments were authorized notwithstanding anything in the law to the contrary.²⁹⁵ Indeed, from 1689 onward, when the Crown anticipated that it might have to imprison persons without trial during an invasion or rebellion, it obtained statutes authorizing the Crown to detain the individuals notwithstanding contrary laws.²⁹⁶

It was only incidentally that the Crown might also need statutory indemnification. The king, on account of his sovereignty, could not be sued for damages, and public officials, even if only local officials, could defend themselves in actions for damages by pleading their reliance on a facially lawful warrant.²⁹⁷ But what if the Crown had to act against dangerous persons before it could consult Parliament? If it therefore had to rely on retrospective Parliamentary authorization and suspension, public officials would need indemnification. And even if they got prospective authorization and suspension, what if, when acting quickly and without a warrant, they detained the wrong person? And what if the Crown sought the cooperation of members of the public? Would these cooperative individuals perhaps be vulnerable even if they relied on a warrant? In short, with or without prospective legislative authorization and suspension, the government might need to assuage fears of litigation. The mere anticipation of having to spend time and money in defending against meritless suits could persuade law-abiding officials and members of the

294. Declaration of Rights, 1688 [i.e., 1689], 1 W. & M., c. 2, sess. 2 (Eng.).

295. Halliday & White, *supra* note 14, at 619.

296. Lists of suspension acts can be found in Forsyth, *supra* note 64, at 452; Halliday & White, *supra* note 14, at 617.

297. 4 Blackstone, *supra* note 36, at *291; 2 William Hawkins, *A Treatise of the Pleas of the Crown*, bk. II, ch. XIII, § 11, at 82 (London 1726). This did not mean that members of the public could not rely on such a warrant, but the standard line in treatises focused on officials.

public to worry more about themselves than the nation. For this reason alone, it is hardly surprising that Parliament not only authorized detentions and suspended habeas, but also sometimes offered indemnification.²⁹⁸

In sum, the English experience explains why authorization had to be supplemented with a suspension of habeas. The authorization was necessary for the lawful imprisonment of a person who was within the protection of the law, but it was not sufficient. In addition, the Crown needed a suspension of habeas—at the very least for practical reasons, such as not having to bring the prisoner into court, not having to explain the reason for the detention, and not ultimately having to release the prisoner. More seriously, the Crown might need the suspension to establish the underlying legality or even constitutionality of the detention. The substantive question about the king's power to imprison in emergencies had been reduced to the technical question of whether a Crown officer could hold a person without specifying the cause of imprisonment on the return of a writ of habeas corpus. Accordingly, any constitutional doubts about the substantive power to imprison would have been resolved by the suspension of the writ.

Emergency detentions of individuals within protection were thus subject to two requirements: legislative authorization and legislative suspension. For other constraints on persons within protection, legislative authorization was ordinarily enough. Yet because the royal power of emergency imprisonment was wrapped up within the question of habeas, it also needed a legislative suspension of the writ.

In retrospect, this additional requirement may seem strangely redundant. It may even seem a mechanism for denying legal protection. A legislative suspension of habeas, however, together with legislative authorization, was the means of bringing emergency detentions within the law. In this manner it was possible to have emergency detentions while preserving the protection of the law.²⁹⁹

298. W.F. Finlason, *A Review of the Authorities as to the Repression of Riot or Rebellion, with Special Reference to Criminal or Civil Liability* 89, 151 (London, Stevens & Sons 1868); Sharpe, *supra* note 202, at 92, 95; Morrison, *Suspension*, *supra* note 279, at 1548; Tyler, *Emergency Power*, *supra* note 280, at 618. Incidentally, for the actual significance of the 1803 indemnification statute relied upon by Morrison, see Finlason, *supra*, at 154.

299. Incidentally, the suspension requirement had the advantage of forcing Parliament to be self-conscious about authorizing emergency detentions. In the learned law, *non obstante* clauses had long been employed in circumstances in which they forced rulers to be self-conscious about enactments that deprived persons of their property or that otherwise might seem lawless. Walter Ullmann, *The Medieval Idea of Law as Represented by Lucas de Penna: A Study in Fourteenth-Century Legal Scholarship* 104 & n.3 (1969).

B. *Detention and Removal in Pennsylvania Without Authorization and Suspension*

In an emergency, an executive may think that it must, of necessity, detain suspected persons, regardless of whether the legislature has authorized the detention and suspended habeas. Such was, ultimately, Abraham Lincoln's conclusion. It was also the initial reaction of the executive of Pennsylvania when the state was threatened by invasion. Even during this extreme sort of crisis, however, an executive could not take emergency action to detain persons who had the protection of the law, without getting authorization and suspension from the legislature. Pennsylvania is thus yet another reminder of the underlying contrast: Whereas Part V will show that most executives could act on their own to detain persons who were outside protection, it is evident here in Part IV that, even in the most alarming circumstances, an executive could not detain persons who were within protection unless it had legislative authorization and suspension.

Pennsylvania's difficulties in 1777 arose from the uncertain loyalty of Quakers. The Quakers of Pennsylvania were largely of English origin, and many of them, particularly among their leadership, had deep attachments to the Crown. Their religious pacifism was enough to make them hesitant about the Revolution, but Quakers pursued this tradition in a way that sometimes seemed difficult to distinguish from a lingering attachment to Britain. The Mennonites, being of Germanic origin, were not at all sympathetic to the British, and although, like the Quakers, they sought an exemption from fighting, they were split on the question of paying an equivalent.³⁰⁰ In contrast, some Quaker leaders continued into early 1776 to express attachment to the Crown, and Quakers generally refused either to fight or to pay an equivalent.³⁰¹ It is therefore no surprise that many Revolutionaries feared the worst from the Quakers. In particular, Revolutionaries in Pennsylvania feared that Quakers were passing information to the enemy and otherwise cooperating with them.³⁰²

300. For the divisions among the Mennonites and the degree to which Quakers felt they stood alone against paying an equivalent, see Philip Hamburger, *Religious Freedom in Philadelphia*, 54 *Emory L.J.* 1603, 1622 (2005).

301. For discussion of the equivalent, see *id.* at 1611, 1622, 1628. In the winter of 1776, some Quaker leaders published a tract that emphasized the advantages of "our dependence on, and connection with, the kings and government" of Britain and that urged Quakers "to guard against every attempt to alter, or subvert that dependence and connection." *The Ancient Testimony and Principles of the People Called Quakers, Renewed, with Respect to the King and Government* 3 (Philadelphia 1776).

302. Of course, some of the fears about the Quakers arose from deliberate attempts to embarrass them—most notably, a forged document communicating intelligence about American forces, purporting to be from a Quaker Yearly Meeting at Spanktown. *Exiles in Virginia: With Observations on the Conduct of the Society of Friends During the Revolutionary War, Comprising the Official Papers of the Government Relating to that Period 61–62* (Philadelphia, C. Sherman 1848) [hereinafter *Exiles in Virginia*] (printing the forged document). As pointed out by the Quakers, however, "there is not, nor ever was

The more extreme anxieties were very probably unfounded and led to unnecessarily harsh measures. It was not unreasonable, however, for Revolutionaries to have at least some concerns, because many Quakers were in a genuinely ambiguous position.

When the British troops under General Howe landed in the Chesapeake in late August 1777, the Continental Congress prepared for the ensuing attack on Philadelphia by recommending action against what it feared was a fifth column. It worried that because many Quakers were deeply "disaffected to the American cause . . . it will be their inclination, to communicate intelligence to the enemy, and, in various other ways to injure the counsels and arms of America." It therefore named some Pennsylvania Quakers who had manifested a "disposition highly inimical to the cause of America" and recommended to the state's executive that it "apprehend and secure" these persons, "together with all such papers in their possession, as may be of a political nature."³⁰³ Indeed, Congress generally urged the executives of all of the states "to apprehend and secure all persons," not necessarily just Quakers, "who have in their general conduct and conversation evidenced a disposition inimical to the cause of America."³⁰⁴ It added that such persons should be "confined in such places and treated in such manner as shall be consistent with their respective characters and security of their persons."³⁰⁵

The executive council of Pennsylvania responded with alacrity. Within three days, it ordered that "a suitable number of friends to the

a yearly-meeting of the society . . . held at or near Spanktown." *A Short Vindication of the Religious Society called Quakers 3* (Philadelphia, Joseph Crukshank 1780).

Perhaps the most severe measure contemplated against the Quakers was that proposed by General Lacey:

While the British were in the city [of Philadelphia], an American order was issued to prevent the attendance of Friends at the Yearly Meeting, on the plea that these meetings were centres of plotting against the government [E]ven Washington seemed to have entertained some suspicion. General Lacey, to whom the orders were given, passed them on with the injunction "to fire into those who refused to stop when hailed, and leave their dead bodies lying in the road."

2 Isaac Sharpless, *A History of Quaker Government in Pennsylvania 183* (Philadelphia, T.S. Leach & Co. 1898).

303. U.S. Cong., *Journals of Congress Containing the Proceedings from January 1st, 1777 to January 1st, 1778* at 360, 361 (Philadelphia, John Dunlap 1778).

304. *Id.* at 361.

305. *Id.* Desiring to protect the dignity of two former governors of Quaker origin, Congress ordered that "the board of war remove under guard to a place of security out of the state of Pennsylvania, the honorable John Penn, esquire, and Benjamin Chew, esquire; and that they give orders for having them safely secured and entertained agreeable to their rank and station in life." *Id.* at 361-62.

Incidentally, Congress also feared that Quakers had used their Meetings of Sufferings for dubious purposes, and it therefore recommended that "the records and papers of the Meetings of Sufferings in the respective states be forthwith secured and carefully examined, and that such parts of them as may be of a political nature be forthwith transmitted to Congress." *Id.* at 361.

public cause” be authorized to seize and secure various members of the Society of Friends, who were “deemed inimical to the cause of American liberty,” together with their papers. The council explained that its measures were “necessary for the public safety at this time, when a British army . . . is now advancing toward this city, as a principle object of hostility.” Even in taking these severe measures, however, the executive, echoing Congress, expressed a desire to “treat men of reputation with as much tenderness as the security of their persons will admit.” It therefore ordered that most of the named Quakers be offered the opportunity to remain in their homes if they would promise to stay there, to be ready to appear on demand before the council, and to “refrain from doing anything inimical to the United States.” Otherwise, they were to be confined, if possible, in the Freemasons’ Lodge. The overall goal was to secure the suspected Quakers while minimizing the necessity of sending them “to the common jail or even to the state prison.”³⁰⁶ As a result, the Freemasons’ Lodge soon held at least twenty-two Quakers.³⁰⁷

Of course, it was not sufficient to hold the Quakers in Philadelphia if the city might be captured. The point of detaining them was to prevent them from supplying the enemy with information or otherwise endangering the defense of the state, and the executive therefore soon decided to remove the Quakers to Virginia.³⁰⁸ This combination of temporary detention and removal, however, approached the limit of what was lawful against persons within protection. As will be seen later, what was lawful against persons outside protection went much further, including questioning, confinement, and expulsion.

The prisoners did not accept their fate quietly, and being within the protection of the law, they immediately protested that they had been denied their rights. One problem with the executive’s conduct was that it “limit[ed] no time for the duration of our imprisonment.”³⁰⁹ Further, the council had acted without a judicial warrant and had made no provision for a judicial hearing.³¹⁰ In fact, rather than rely on a judicial determination, the executive had ordered the detention on the basis of a congressional recommendation.³¹¹ All of this outraged the Quakers, for they were inhabitants and even citizens of Pennsylvania, and thus had a right to the protection of the laws. In fact, when they were removed to

306. Resolutions of Council (Aug. 31, 1777), reprinted in *Exiles in Virginia*, supra note 302, at 71–73.

307. *Id.*

308. Order (1777), reprinted in *Exiles in Virginia*, supra note 302, at 267.

309. To the President and Council of Pennsylvania (Sept. 4, 1777), reprinted in *Exiles in Virginia*, supra note 302, at 80.

310. It had not pointed out “any hearing, which is absolutely requisite to make a legal warrant, but confounds in one warrant the power to apprehend and the authority to commit, without interposing a judicial officer between the parties and the messenger”—that is, the official making the arrest. *Id.*

311. *Id.* at 79.

Virginia, they wrote to the governor of Virginia and requested that he give them protection.³¹²

The Pennsylvania executive initially defended itself by suggesting that the Quakers were outside the protection of the law. This was not the theory on which Congress had requested action from the Pennsylvania executive. Yet now that the Pennsylvania executive faced criticism and did not have a statute to fall back upon, it resolved that the Quakers had "refused to promise to refrain from corresponding with the enemy; and [had] also declined giving any assurance of allegiance to this State," and that they were therefore to be understood as having "renounce[d] all the privileges of citizenship."³¹³ Along these lines, the executive explained that the imprisoned Quakers "consider themselves as subjects of the King of Great Britain, the enemy of this and the other United States of America."³¹⁴

The imprisoned Quakers, however, as already observed, were citizens of Pennsylvania, who undoubtedly enjoyed a right to the protection of its law. Therefore, in contrast to what will be seen regarding prisoners who were outside protection, the executive could not justify its actions as lawful or escape judicial remedies, unless it got a legislative authorization and suspension of habeas.

The prisoners promptly obtained writs of habeas from Chief Justice Thomas M'Kean, and the writs arrived at various times while the prisoners were still in Pennsylvania on their way toward Virginia.³¹⁵ Their military guards, however, a troop of light horse, simply ignored the writs—apparently after being persuaded by the executive that the legislature would soon solve the legal problem.³¹⁶ Although this conduct may seem

312. *Id.* at 167, 170, 190, 195.

313. *Id.* at 112.

314. Resolution of the Council (Sept. 9, 1777), reprinted in *Exiles in Virginia*, *supra* note 302, at 272. The Council added:

That persons of like character, and in emergencies equal to the present, when the enemy is at our door, have, in the other states, been arrested and secured, upon suspicions arising from their general behaviour, and refusal to knowledge their allegiance to the state of which they were the proper subjects; and, that such proceedings may be abundantly justified by the conduct of the freest nations and the authority of the most judicious civilians.

Id.; see also 11 Minutes of the Supreme Executive Council of Pennsylvania, From Its Organization to the Termination of the Revolution 296 (1777) (Harrisburg, Theo Fenn & Co. 1852).

315. *Exiles in Virginia*, *supra* note 302, at 135, 140–41.

316. *Id.* at 135, 137, 140–41. In their "Journal of Transactions," the exiled Quakers recorded:

When the writs of habeas corpus were served on our keepers at Pottsgrove, they were at a loss what to do, and the Council equally puzzled. Yet, determined to blunder through the matter, [the Council] issued the [additional] warrant dated the 16th, which is directed to our keepers at Philadelphia, and commands them to remove us to Reading, though we had been removed five days before it was dated. The intention in this jumble of inconsistencies was, probably, to supersede the writs of habeas corpus by a warrant of a later date, which they

questionable, it is at least revealing about the reach and obligation of the writs of habeas. The writs ran only within the state, but the military officers did not assume that they could avoid their legal responsibility merely by hurrying the prisoners to Virginia. On the contrary, the military officers apparently refused to obey the writs only because they understood that the legislature would soon sustain them in their recalcitrance.

As expected, the legislature came to the aid of the executive with a statute authorizing detention and removal and suspending habeas corpus.³¹⁷ The Act began by authorizing the president of the state, the vice-president, and the council, or any two of its members. In particular, upon the recommendation of Congress or a military commander, or upon information from credible subjects, these executive officers could arrest persons who seemed dangerously disloyal and could seize and examine any of their papers that affected the public. The executive, moreover, could remove the suspected persons and confine them in "any distant place, where it will be out of their power to disturb the peace and safety of the States."³¹⁸ In accord with American policy during the war, the Act also authorized the executive to release the prisoners upon their giving oaths or affirmations of allegiance. All of this was merely prospective, but the statute, of course, also suspended habeas, and this provision looked both forward and backward. It barred any judge or other judicial officer from issuing or even allowing "any writ of habeas corpus, or other remedial writ to obstruct the proceedings of the said Executive Council against suspected persons in this time of imminent danger to the State."³¹⁹

The retrospective effect of this suspension would not be enough to impede the recovery of damages for executive actions prior to the adop-

apprehended would more readily be obeyed than the writs; to insure which, they procured the Assembly to publish an intended act to indemnify all persons acting contrary to law under their authority.

This bill, though not known at that time to be enacted into a law, had the desired effect, and induced the lieutenant of Berks to send us forward.

Id. at 154; see also id. at 273.

The Journal was apparently a communal product and was probably transcribed by different prisoners. The copy printed in *Exiles in Virginia* belonged to Samuel R. Fisher. Id. at 197. A private diary of the same events is in the New York Historical Society. Diary of Thomas Gilpin, microformed on Misc. Mfm. Reel No. 85 (on file with the New York Historical Society).

317. The statute began by reciting:

[T]he preservation of this State and all its members, and of the army acting in support thereof, at the time of a hostile invasion, may require the immediate interposition of the Supreme Executive Council, when the judicial powers of the Government cannot, in the ordinary course of law, sufficiently provide for its security.

An Act to Empower the Supreme Executive Council of This Commonwealth, to Provide for the Security Thereof in Special Cases Where No Provision is Already Made by Law (1777), reprinted in *Exiles in Virginia*, supra note 302, at 137–38.

318. Id. at 139.

319. Id.

tion of the statute, and the legislature therefore also cut off the prisoners' monetary remedies. It provided that the president, vice-president, council members, and all persons acting on their commands, as authorized by the statute, were "fully and absolutely indemnified and saved harmless from all process, suits, and actions," whether for their prior conduct in response to Congress's recommendation or their future actions under the statute.³²⁰

These were emergency measures against persons within protection, and they could therefore be justified only for roughly the duration of the danger. One approach was expressly to limit such measures to times of invasion or rebellion. Another approach, as in Pennsylvania and some other states, was to stipulate that the authorization and suspension statute would be in force only until the end of the first sitting of the state's next general assembly. Indeed, before the end of the British occupation of Philadelphia, Congress urged that the Quaker prisoners be released, and the Pennsylvania executive eventually complied.³²¹

The executive's conduct stood out as a sorry example of unnecessary severity imposed without legislative foundation. The executive needed discretion in deciding whom to imprison and remove during an emergency, but it was probably unjustified in believing that the Quakers were so dangerous as to require these harsh measures. More relevant here, the executive had acted without legislative authorization and suspension against persons who were within the protection of the law, and this was a

320. *Id.* Pennsylvania was not the only state in which the executive found that it had to act quickly without legislative authorization against persons within protection. For example, when Virginia in 1777 faced the threat of invasion, the executive had "removed or restrained" persons of doubtful loyalty without having a chance to consult the legislature, and it therefore required a subsequent legislative cure. In this instance, though, all that was necessary from the legislature was indemnification, not authorization or a suspension of habeas, for the prisoners there had already been released by the time the legislature acted and the statute did not address future threats. An Act for Indemnifying the Governour and Council, and Others, for Removing and Confining Suspected Persons During the Late Publick Danger (1777), in 9 *The Statutes at Large, Being a Collection of All the Laws of Virginia 373-74* (William Waller Hening ed., Richmond, George Cochran 1827); see also Bill Indemnifying the Executive for Removing and Confining Suspected Persons (1777), reprinted in 2 *Papers of Thomas Jefferson*, supra note 112, at 119.

321. Although Philadelphia remained in British hands, Congress resolved in January 1778, after five months of detention, that the prisoners should be "discharged from their confinement, on their taking or subscribing either the oath or affirmation of allegiance, as prescribed by the laws of Pennsylvania"—or, if this was too much, then at least on their subscribing a substitute affirmation reciting that they were subject to the state of Pennsylvania as a free and independent state. Exiles in Virginia, supra note 302, at 206. (The alternative affirmation was that "I, A.B., do swear, (or affirm) that I acknowledge myself a subject of the State of Pennsylvania, as a free and independent state, and that I will in all things demean myself as a good and faithful subject ought to do." *Id.*) The Quakers, however, do not appear to have given this affirmation, and it was not until mid-April 1778 that the council finally voted to bring the prisoners back to Pennsylvania and have them released. *Id.* at 218-19, 224. Thus, after seven and a half months in captivity, during which time two of the prisoners died, the Quakers regained their freedom.

legal as well as a moral problem. As later put by a committee of the Council of Censors, the executive's conduct was "highly unconstitutional."³²² In a sense, the legal failure lay not so much with the executive as with the legislature, which failed to anticipate the emergency with legislation. Ultimately, the problem originated with the people, whose constitution may have guaranteed habeas but did not authorize the legislature to suspend this right.³²³ In the end, the legislature offered a retrospective cure, but the reality was that the executive had violated the rights of individuals who were within the protection of the law.

Pennsylvania thus illustrates that even in the most dire emergency, and amid the most severe suspicions, an executive could not lawfully detain persons who were within the protection of the law, unless it had legislative authorization and suspension. Although these foundations for emergency executive detentions were not handled very well in Pennsylvania, some other states prepared for such matters more successfully.

C. *Detention and Removal with Authorization and Suspension*

Notwithstanding the events in Pennsylvania, emergency detention and removal could be entirely lawful. What was needed was a combination of constitutional and legislative action. On these foundations, the executive could legally take action against persons within the protection of the law.

The model for lawful detention and removal came from England. There, as already seen, habeas was guaranteed by statute and was sometimes even considered a constitutional right, but Parliament could suspend statutes, including the Habeas Corpus Act. Parliament could therefore respond to invasion or rebellion, whether in Scotland or America, by authorizing detentions, suspending the writ, and, where necessary, offering indemnification.

322. A Report of the Committee of the Council of Censors [on the executive branch] 6 (Philadelphia, Francis Bailey 1784). The Committee also listed as a violation of the constitution "An act of assembly to indemnify the Supreme Executive Council for these irregularities." *Id.* at 7.

323. Article X of the Pennsylvania Declaration of Rights protected the right of the people "to hold themselves, their houses, papers, and possessions free from search and seizure," and if this were construed to include a right to habeas, then the legislature could not easily clear a path for lawful executive detention of persons who were within the protection of the law. Pa. Const. of 1776, art. X. Of course, it may be doubted whether Article X really guaranteed habeas, but if it did, then even when the legislature eventually suspended habeas, it violated the Constitution. In the next decade, a committee of the Council of Censors recognized that the Assembly at various times had thought it necessary to suspend habeas "to secure the persons, and restrain the traitorous practices of the disaffected, when legal evidence could not be obtained against them." Far from approving such legislative action, the Committee concluded that "*the acts of Assembly, which restrained for a time, the full operation of the writ of HABEAS CORPUS, are infringements of the Constitution.*" A Report of the Committee of the Council of Censors [on the legislative branch], *supra* note 322, at 24.

American constitutions followed this model along two paths, one of which was to treat habeas as a common law and statutory right. The Maryland Constitution, for example, did not guarantee habeas, and it therefore did not have to specify when the writ could be suspended. The state's constitution merely had a general suspension clause that limited executive power—a clause emphasizing that “no power of suspending laws, or the execution of laws, unless by or derived from the legislature, ought to be exercised or allowed.”³²⁴ Under this provision, the legislature could suspend any statute, including that on habeas corpus, for any reason.³²⁵

In contrast, some constitutions guaranteed habeas and therefore had to specify when the legislature could suspend the writ. Even in England, many commentators increasingly considered habeas one of the essential privileges of Englishmen, and it is therefore no surprise that many American constitutions specifically guaranteed this right. Having done this, though, they then had to provide for legislative suspension of the writ in emergencies. The Massachusetts Constitution, for example, guaranteed habeas and then stated that “[t]he privilege and benefit of the writ of *habeas corpus* . . . shall not be suspended by the Legislature, except upon the most urgent and pressing occasions, and for a limited time not exceeding twelve months.”³²⁶ More narrowly, the U.S. Constitution, after its enumeration of legislative powers, assured that “the Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.”³²⁷ These constitutions secured habeas, and because they raised habeas above mere legislation, they specifically allowed for legislative suspension of this writ.

Of course, it was not a coincidence that whereas state constitutions tended to permit legislative suspension of habeas for emergencies in general, the federal Constitution allowed it only in cases of invasion and rebellion. The states were sovereigns of general jurisdiction or police power, and they therefore were responsible for the full range of possible emergencies, including, for example, epidemics and other public health crises. Their legislatures might therefore need the power to suspend habeas in any number of different circumstances, and it is thus to be expected that some of their constitutions did not confine the suspension of habeas to invasion and rebellion.³²⁸ The federal government, how-

324. Md. Decl. of Rights of 1776, § 7. This was the approach taken when the Pennsylvania Constitution was revised in 1790—that “no power of suspending laws shall be exercised, unless by the legislature or its authority.” Pa. Const. of 1790, art. IX, § 12.

325. Section 3 of the Maryland Declaration of Rights preserved the obligation of the common law and many English and colonial statutes, and these presumably included England's 1679 Habeas Corpus Act.

326. Mass. Const. pt. 2, ch. 6, art. VII (enacted 1780).

327. U.S. Const. art. I, § 9, cl. 2.

328. The Massachusetts Constitution provided that the writ should not be suspended by the legislature “except upon the most urgent and pressing occasions.” Mass. Const. pt. 2, ch. 6, art. VII. Similarly, see N.H. Const. art. XCI (enacted 1784). In contrast, the

ever, was established with limited powers, and Congress was therefore not given authority to suspend habeas, other than in instances of rebellion or invasion.

Regardless of these constitutional variations regarding suspension, the next, legislative level of action was fairly uniform. As in England, it began with authorization—if possible before rather than after it was needed. The dramatic character of a suspension of a cherished right has given the suspension of habeas pride of place among the legislative actions necessary for such emergencies. But it should not be a surprise that American legislatures first had to authorize any executive confinement or removal. Similarly, as recognized in *Youngstown v. Sawyer*, an executive could not, even during an emergency, seize the property of persons who were within the protection of the law without legislative authorization.³²⁹ In other words, whether as to property rights or personal liberty, the executive could not constrain the natural liberty of persons who were within the protection of the law, unless it had legislative authorization.

In addition to authorizing imprisonment and sometimes removal, legislatures also suspended habeas. This seemed necessary at the very least to avoid judicial interruption of the confinement, to spare the executive from having to recite the cause of detention, and to prevent the judges from releasing the prisoners. But a suspension also served to ensure the constitutionality of the underlying imprisonment and removal. In the seventeenth century, as has been seen, the lawfulness of royal detentions got collapsed into the more technical question of whether the Crown could hold a person without specifying the cause on a return of a writ of habeas corpus.³³⁰ Accordingly, the suspension of the writ could satisfy any constitutional doubts about the authority to detain and remove persons who were within protection. This was the traditional need for a suspension of habeas, and the need became all the more clear when American constitutions guaranteed habeas and specifically authorized its suspension.³³¹

Delaware Constitution confined suspension to the familiar pair of invasion and rebellion. Del. Const. of 1776, art. I, § 13. More ambiguously, the Georgia Constitution stated that “[t]he principles of the Habeas Corpus Act, shall be a part of this Constitution.” Ga. Const. of 1777, art. LX.

329. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). Justice Black’s opinion was clearer on this point than Justice Jackson’s. *Id.* at 582. On close examination, however, Jackson’s three categories support the argument here. *Id.* at 635–38. A lawful exercise of executive power could rest only on constitutional legislation or directly on the Constitution itself, and the exclusive character of these two lawful possible avenues for executive power are not altered by instances of ambiguity. Of course, even an authorized seizure of property remained subject to constitutional requirements about compensation.

330. See *supra* Part IV.A.

331. These constitutional concerns, incidentally, were ignored by the state statutes that established councils of safety (or that gave the power of such councils to executive councils). Such statutes typically authorized the councils to detain individuals but did not suspend habeas. See, e.g., Act for Investing the Governor and a Council, Consisting of

An illustration of a traditionally worded authorization and suspension statute can be observed in the response of the Massachusetts legislature in 1786 to Shays' Rebellion. The preamble of the Massachusetts statute explained in modern style that it was "expedient and necessary, that the benefit derived . . . from the issuing of writs of Habeas Corpus, should be suspended for a limited time, in certain cases." The body of the Act, however, was more traditional, for it simply "authorized and empowered" the executive to order any person to be "apprehended, and committed"—"any law, usage or custom to the contrary notwithstanding."³³² Tellingly, as Amanda Tyler has observed, this Act, like other state suspension acts, did not provide for indemnity.³³³ In fact, the only indemnity considered necessary in Massachusetts in 1786 was the indemnity conditionally offered to the rebels to induce them to submit and take the oath of allegiance.³³⁴ A more explicit, modern-style authorization and suspension statute can be found in Maryland:

Twelve, with Certain Powers Therein Mentioned for a Limited Time, §§ 1, 4 (1777), in *Acts of New-Jersey of 1777*, supra note 104, at 40–41.

Such statutes, however, cannot be taken as examples of lawful power. Although some of the statutes establishing councils of safety were responses to actual or threatened British occupation, others could merely allude to the invasion of other states or conveniently remained silent about any invasion. Rather than suspend habeas, they tended to offer crude, administrative versions of due process—for example, by requiring the council to examine witnesses before detaining individuals and to state the cause of detention in the warrant to the jailor. *Id.* These statutes thus mimicked aspects of lawful emergency detention statutes and aspects of regular due process, without actually living up to either model. One of the Pennsylvania statutes was particularly candid about its lawlessness. It bluntly explained that "the legislatures of countries most jealous of their liberties, have, in times of public danger, consented to a temporary suspension of laws, which they have considered as the greatest support of those liberties." An Act to Empower the Supreme Executive Council and Justices of the Supreme Court to Apprehend Suspected Persons (1779), reprinted in *9 The Statutes at Large of Pennsylvania from 1682–1801*, at 441 (1903). Instead of lawfully suspending habeas, this sort of statute unlawfully suspended a wide range of other laws, including constitutional guarantees of judicial process.

332. An Act for Suspending the Privilege of the Writ of Habeas Corpus, ch. X (1786), in *Acts and Laws Passed by the General Court of Massachusetts* 510 (Boston, Adams & Nourse 1786). The statute also authorized local officers "or any other persons" to "require the aid and assistance of such and so many of the citizens of this State, in executing the same, as they shall judge necessary." *Id.* Those persons who did not comply were to forfeit a sum to be recovered by indictment. *Id.* Moreover, "any person who shall be apprehended and imprisoned, as aforesaid, shall be continued in imprisonment, without bail or mainprize, until he shall be discharged therefrom by order of the Governour, or of the General Court." *Id.* For the minimal wording of English suspension acts, see Halliday & White, supra note 14, at 618.

333. Tyler, *Emergency Power*, supra note 280, at 626.

334. See *Resolve for Appointing Three Commissioners to Proceed to the Western Counties, for the Purposes Mentioned* (1787), in *Acts and Laws of the Commonwealth of Massachusetts* 515 (Boston, Adams & Nourse 1893); *Resolve Requesting the Governour to Issue His Proclamation, Publishing Indemnity and Pardon Agreeably to the Resolution of the 13th Instant* (1787), in *Acts and Laws of the Commonwealth of Massachusetts*, supra, at 680; George Richards Minot, *The History of the Insurrections in Massachusetts* 66

[I]n case this state shall be invaded by the enemy, the governor for the time being, with the advice of the council, shall have full power and authority to arrest, or order to be arrested, all persons whose going at large the governor and council shall have good grounds to believe may be dangerous to the safety of this state, and the same persons to confine during such invasion, to such places as the governor and the council shall think proper, or to limit such persons to particular districts in this state, or in their discretion to discharge such person on security; and that during any invasion of this state by the enemy, the habeas corpus act shall be suspended, as to all such persons arrested by the order of the governor and council.³³⁵

Whether relatively understated, as in Massachusetts, or more explicit, as in Maryland, such statutes authorized the executive and suspended habeas.

Put succinctly, executives had an emergency power to detain and remove individuals who were within the protection of the law; but this was only a narrow, temporary power, which was entirely under law, and it required legislative cooperation, including both authorization and a suspension of habeas. Where there was a failure to anticipate the problem, as in Pennsylvania, the executive could find itself acting unlawfully. More typically, however, American executives were given the constitutional and statutory foundations they needed to take emergency action against persons who were within the protection of the law.

V. NO NEED FOR SUSPENSION OF HABEAS AS TO PERSONS WHO WERE OUTSIDE PROTECTION: VIRGINIA

In contrast to the narrow emergency power that an executive could employ against persons who were within protection, an executive could enjoy a very broad and regular power against persons who were outside protection. It has been seen that most persons within a society, including aliens with a local allegiance, were within the protection of the law. Yet persons outside allegiance and protection were another matter. Enemy aliens in particular had no right to protection, and unless they were expressly licensed to remain or come within protection, a state's executive could lawfully hold them without giving them habeas. Moreover, it could lawfully question them, expel them, and search for and seize their papers. Although this power was probably exercised in most of the states against British subjects, it was pursued in especially interesting circumstances in Virginia, which in 1785 had to respond to the arrival of the "Algerians."

The history thus presents a sharp contrast to some contemporary assumptions. Today, it is often said that captured enemy combatants gener-

(London, Isaiah Thomas 1788). More generally, Minot discusses the difficult political circumstances in which the statute was adopted. *Id.* at 62–66.

335. An Act to Punish Certain Crimes and Misdemeanors, and Prevent the Growth of Toryism, § 12 (1777), in *Laws of Maryland* ch. XX (Annapolis, Frederick Green 1787).

ally have constitutional rights to habeas and other judicial process.³³⁶ It is widely thought, moreover, that their claim to such rights depends largely on where they are held—to be precise, whether they are held in places under the “control” of the United States.³³⁷ More generally, it is taken for granted that terrorism and any adequate response to it lie beyond American experience and law—that this sort of informal warfare is a modern phenomenon, unanticipated by American constitutions, and that America therefore lacks the legal resources to respond to it without acting above law. The events in Virginia, however, illustrate that Americans once were familiar with such problems and understood them on the basis of the principle of protection. From this perspective, enemy aliens ordinarily were outside allegiance and therefore had no rights under American law.

Of course, even as to persons outside the law, there were profound limits on executive power. It will be seen that an executive might sometimes need legislative authorization. Moreover, although persons outside protection did not have rights against executive officials, such officials still had to act within the law and could sometimes be held accountable under it. Executive officials also had reasons to take into account a range of considerations that were not necessarily a part of the law of the land, such as the law of nations, the international interests of the United States, and domestic concerns, such as simple decency. Thus, even when dealing with persons outside protection, executive officials, including those in Virginia, were not unconstrained.

A. *Not Just Middle Easterners: Anglo-Americans with British Allegiance*

Before turning to Virginia and its encounter with Middle Easterners who were viewed with suspicion, it is essential to understand that probably all of the American states detained and expelled Anglo-Americans who retained their British allegiance, for such persons were enemy aliens and were outside the protection of the law. That the states took these harsh measures against Anglo-Americans of this sort is important, for it provides some initial evidence that the American states did not obviously act with any particular prejudice against the Algerians.³³⁸

336. See, e.g., *Boumediene v. Bush*, 128 S. Ct. 2229, 2262 (2008) (“If the privilege of habeas corpus is to be denied to the detainees now before us, Congress must act in accordance with the requirements of the Suspension Clause.”); *Historians’ Brief*, *supra* note 195, at 2 (“[C]ommon law history from England and the United States shows that habeas corpus was available to petitioners regardless of their alienage . . .”); *Halliday & White*, *supra* note 14, at 713, 576, 605 (arguing writ had “utility for the widest array of prisoners”).

337. See *Boumediene*, 128 S. Ct. at 2260–62; *Halliday & White*, *supra* note 14, at 586, 707.

338. It may be assumed that Americans must have felt deep racial or religious prejudice against Middle Easterners, but simplistic conclusions of this sort are more likely to reflect contemporary preconceptions than historical realities. As noted by one scholar, “the press in the 1780s did little to vilify Algerians beyond the usual references to

At the beginning of the War of Independence, many individuals who adhered to Britain fled from their states but remained within the United States. These refugees were potentially dangerous, for some of them were apt to engage in sabotage and spying. More to the point from the perspective of the law, such persons were the sort of aliens who could not be presumed to have submitted allegiance to the state they had entered. Persons who remained in a state after its independence were understood to have accepted its protection, and they therefore owed it allegiance, regardless of whether they retained loyal feelings for Britain. But this could not be said of those who promptly abandoned their own state.³³⁹ They had revealed an allegiance to Britain, and being unwelcome enemy aliens, these refugees were outside the protection of both their own state and usually any other state they entered. They could therefore be held, questioned, and expelled without habeas or any other judicial process.³⁴⁰

'Barbarians' or 'piratical bandits.'" Lawrence A. Peskin, *The Lessons of Independence: How the Algerian Crisis Shaped Early American History*, 28 *Diplomatic Hist.* 297, 308 (2004).

339. For example, in an advisory opinion of 1785, the justices of the Massachusetts Supreme Judicial Court explained:

[A]ll the Inhabitants of the Territory of Massachusetts, as well as such, who were Inhabitants of the other States in the Union, were equally Subjects of the Crown of Great Britain: And such of them as did not, at the American revolution become Subjects of this, or some other of the united States, remained Subjects of the Crown of Great Britain, and were necessarily Aliens to this, and the other United States.

Opinion of Justices of the Supreme Judicial Court on an Article of the Confederation (June 22, 1785) (docketed Oct. 19, 1785), Mass. State Archive, Senate Documents, Rejected Bills, 1785, No. 344 at Box 11. (For further details of the opinion, see *infra* note 488; Hamburger, *Law and Judicial Duty*, *supra* note 3, at 597–600.) All of this created an interesting timing question: If an inhabitant of an American state was to leave in time to preserve British allegiance, he had to leave before he could be considered to have acquired American allegiance.

340. They could also be deprived of their property, but that is not the point under discussion here.

Incidentally, the situation of a person who was outside the protection of the law on account of his alienage was somewhat different from outlawry, in part because the latter was the result of the law itself, which placed a person outside protection for his refusal to cooperate with the legal system. As put by Matthew Bacon, an outlawed person "is out of the protection of the law; for not having been amenable to the law, he ought not to have any privilege or benefit from it." 1 Matthew Bacon, *A New Abridgment of the Law 3* (Henry Gwillim ed., 5th ed., London, W. Strahan and M. Woodfall 1798). It was, moreover, a very qualified exclusion from the protection of the law.

Unlike ancient Greek and medieval Italian cities, common law jurisdictions had not traditionally imposed exclusion, exile, or transportation upon persons who were within the protection of the law. The primary medieval exception was outlawry, which was imposed on those who refused to submit to the Crown's legal processes. In the seventeenth and eighteenth centuries, deportation became a notable exception. There still remained a sense among many lawyers, however, that at least for natural subjects or citizens, the common law approach was to punish rather than exclude wayward members of the society.

Many of the states expelled persons who refused to take an oath of allegiance, but would usually readmit them if they later complied. Such statutes were sometimes prefaced with statements about the reciprocal relationship of protection and allegiance, thus

Once again, Maryland can serve as an example. It will be recalled that the Maryland legislature in 1777 adopted a suspension act, which allowed the executive, during an invasion, to detain and temporarily remove persons who were within protection.³⁴¹ But what about persons who owed no allegiance and were thus outside protection? Slightly later in 1777, the legislature addressed this other problem. In both statutes, the government was worried about persons with British sympathies, but it now focused on those whose allegiance was owed to the enemy.

Being outside the protection of the law, such persons could be expelled without judicial process. The Maryland legislature began by observing that "in every free state, allegiance and protection are reciprocal, and no man is entitled to the benefits of the one, who refuses to yield the other." On this familiar principle, the legislature authorized the executive (or justices of the peace acting in their administrative capacity) to apprehend, question, and expel, without trial, any persons who entered the state and had not sworn or at least affirmed their allegiance:

[T]o prevent this state from becoming an asylum for the disaffected fugitives from other states, Be it enacted, That the governor and council, or any magistrate of the county, on their or his own knowledge, or on information, that any male person above the age of eighteen years, belonging to any of the United States, has taken shelter in this state, shall immediately cause such person to be apprehended and examined, and if such person can-

suggesting that the states did not consider the excluded persons within the protection of the law until they took the oaths. See, e.g., Act Enforcing an Assurance of Allegiance and Fidelity to the State (1778), reprinted in 1 *The Statutes at Large of South Carolina*, supra note 67, at 147; An Ordinance for Establishing an Oath of Abjuration and Allegiance (1777), reprinted in 1 *The Statutes at Large of South Carolina*, supra note 67, at 135.

When American states pursued a more aggressive form of banishment, they clearly collided with common law traditions. South Carolina sought to avoid offering trials for treason to citizens who were British sympathizers, and it therefore simply banished them. Recognizing that it might face objections, it claimed to be acting with generosity, explaining that "instead of inflicting capital punishment on such persons, they shall be, and they are hereby declared to be forever banished from this state." An Act for Disposing of Certain Estates, and Banishing Certain Persons Therein Mentioned (1782), in *The Public Laws of the State of South-Carolina* 306, 309 (John Eaucheraud Grimke ed., Philadelphia, R. Aitken & Son 1790). In Virginia, legislative pardons sometimes came with a condition of banishment. See, for example, the condition of banishment imposed on two of the defendants in 1782 in *Commonwealth v. Caton*. An Act Granting a Conditional Pardon to Certain Offenders (1782), in 11 *The Statutes at Large, Being a Collection of All the Laws of Virginia*, supra note 320, at 129; Letter from Edmund Pendleton to James Madison (Dec. 9, 1782), in 2 *The Letters and Papers of Edmund Pendleton, 1734-1803*, at 433 (David J. Mays ed., 1967) ("The poor fellows are since pardoned by the Assembly upon condition of the Banishment of the two of them . . ."). Banishment, however, was not a punishment in Virginia. In North Carolina, the judges of the Superior Court convicted two Tories, Francis Brice and Daniel McNeil, for returning to the state after the war without permission, and sentenced them to banishment, but apparently without any support in law. This therefore became one of the impeachment charges against the judges. Hamburger, *Law and Judicial Duty*, supra note 3, at 457, 591-92 n.12.

341. See supra note 335 and accompanying text.

not, upon such examination, produce a certificate of his having taken the oath or affirmation prescribed by his state, or if such person has not taken the oath, or affirmation . . . which has been prescribed by this state, and refuses to take the said oath or affirmation . . . the governor and council, or the said magistrate, may commit such person to the public gaol, or the governor and council may remand such person back to his own state, and in such manner as they may adjudge the most expedient . . .³⁴²

Persons who came to Maryland would ordinarily be presumed to have submitted to a local allegiance, and thus to have come within the protection of the law; such persons therefore had a right to judicial process, and they could not be expelled, for banishment was not traditionally a punishment at common law.³⁴³ The persons subject to summary expulsion under the Maryland statute, however, were British refugees who evidently did not concede allegiance to the state, and they therefore had no right to any judicial process, whether a trial, habeas, or anything else.

The Maryland statute is thus an initial illustration of how states could summarily detain, question, and expel persons who were outside protection, without giving them habeas or any other judicial process or rights. It is also a reminder that the American states usually employed these harsh measures against Anglo-Americans. The states were utterly accustomed to denying the protection of the law to Anglo-Americans who had retained their British allegiance, and against this background, it cannot be assumed that when Virginia took similar measures against the Algerians, it was acting on the basis of prejudice.

B. *The Algerians and Executive Power*

In the autumn of 1785, at least three Middle Easterners came to Virginia. The state's executive identified the visitors as being from the Barbary Coast and more specifically from Algeria, but their actual origin was unclear.

Although these visitors apparently did not violate any law, their mere presence gave rise to disturbing suspicions, which in turn prompted questions about the power of the executive. Then, as now, the executive needed to know, first, how could it question the visitors or otherwise

342. An Act For the Better Security of the Government, pmbl. & § XXV (1777), in *Laws of Maryland*, supra note 335, at ch. XX. In light of the shared duties of executive officers and justices of the peace under the statute, it cannot be assumed that the latter were acting in their judicial capacity.

Almost all the states attempted to persuade doubtful Americans to attach themselves to the American cause, and in accord with this policy, the Maryland statute offered individuals a last chance to take an oath of allegiance (or at least an alternative oath renouncing Britain and pledging faith to the United States). This generous approach was recommended to the states by Congress on April 23, 1778, but it was merely a matter of legislative policy. Resolution of April 23, 1778, reprinted in *10 Journals of the Continental Congress 1774–1789*, at 381–82 (Worthington Chauncey Ford ed., 1908).

343. See supra note 340.

make inquiries to learn their intentions? And, second, even if they had injurious intentions, how could the executive take action to prevent the harm, given that the criminal law provided for imprisonment only after the commission of an offense?

At the time, there was a conflict under way between the United States and the Barbary States—or, as some preferred to put it, the Barbary pirates. The Barbary States had long engaged in systematic piracy, enslavement, kidnapping for ransom, and other forms of extortion against European and American sovereigns.³⁴⁴ Recently, some of their ships had seized American vessels and sailors.³⁴⁵ These hostilities amounted to an act of war, and although it remained uncertain whether the Barbary States had formally declared war, the apparent existence of hostilities obviously raised the question as to whether the visitors to Virginia could be presumed to have the protection of the law.³⁴⁶ If they were really enemy aliens, who lacked a local safe-conduct, they were not entitled to protection. And if, as thus seemed probable, they did not enjoy the protection of the law, did they pose a threat? As in so many instances today, it was difficult to discern the identity and intentions of the visitors. In contemporary terms, were they terrorists or tourists? Enemy spies or merely foreign students?

The Governor of Virginia was Patrick Henry, and he and his council began by bringing the Algerians to Richmond for questioning. A newspaper correspondent from the capital reported: “Three or four Algerines are brought here on suspicion that they are spies; they give very inconsistent accounts of themselves; they came in an English ship to Norfolk, and have been examined by the governor; but what will be done with them, is yet uncertain.”³⁴⁷ The next step was uncertain, in part because of the conflicting explanations given by the Algerians, but more substantially because of a legal difficulty.

344. Gregory Fremont-Barnes, *The Wars of the Barbary Pirates* 32 (2006).

345. For details of the captures in July and August 1785, see Frederick W. Marks, *Independence on Trial: Foreign Affairs and the Making of the Constitution* 38–39 (1986); Peskin, *supra* note 338, at 298–300; Gary E. Wilson, *American Hostages in Moslem Nations, 1784–1796: The Public Response*, 2 *J. Early Republic* 123, 126–27 (1982).

346. William Grayson wrote from New York that: “Whether there is actually an Algerine War or not, is more than I can tell with certainty; the news comes authenticated from individuals in different parts; but we have no official accts. about the matter.” Letter from William Grayson to James Monroe (Nov. 28, 1785), in 23 *Letters of Delegates to Congress* 31, 32 (Paul H. Smith ed., 1995).

347. Extract of a Letter, from Richmond, Virginia, Dated Nov. 13, 1785, to a Gentleman in Baltimore, *Boston Gazette*, Dec. 12, 1785. The article is also cited in Peskin, *supra* note 338, at 297, 300.

For the Algerians being sent to Richmond, see 3 *Journals of the Council of the State of Virginia* 488–89 (Wilmer L. Hall ed., 1952); Letter from Joseph Hornsby to Gov. Patrick Henry (Nov. 12, 1785), in 4 *Calendar of Virginia State Papers 1785–1789*, at 67 (William P. Palmer ed., Richmond 1884). The arrival and reception of the “Algerians” has been briefly noted in one recent work, but without attention to its legal implications. Robert J. Allison, *The Crescent Obscured: The Legacy of the Barbary Wars* 3, 5–6 (2000).

C. Legislative Authorization

Just because the Algerians were outside the protection of the law, this was not to say that the executive could act outside the law. In other words, even when dealing with persons who had no legal rights, the executive had to act lawfully, and Governor Henry and his council therefore worried whether they needed legislative authorization.

As a preliminary matter, it should be noted that Virginia's governors and the members of the state's executive council tended to be very self-conscious about avoiding unlawful actions. Henry probably consulted Attorney General Edmund Randolph about the Algerians, and although any advice given by Randolph has not been found, his extant opinions reveal that he was very much aware of an attorney general's traditional duty to give legal opinions in accord with the law of the land. Attorneys general had a duty, modeled on that of judges, to resolve the questions that came before them in accord with the law, and Randolph was sufficiently conscious of this duty that he was apt to make a point of it whenever he had to give a disappointing opinion.³⁴⁸ More generally, the leadership of Virginia tended to display a studied attachment to law, and it is therefore no surprise that Governor Henry and his council gave serious thought to the possibility that they needed legislative authorization.³⁴⁹

Henry and the council had initially assumed that they already had legal authority, but within a few days they concluded that legislative authorization was advisable. Henry therefore wrote a letter to the Speaker of the House of Delegates, Benjamin Harrison:

348. This happened, for example, in a 1782 criminal case, *Commonwealth v. Caton*. When the defendants demanded their freedom on the ground that the pardon provision of a Virginia statute was unconstitutional, Randolph argued for the state that the statute was constitutional. Although he might be expected to have added that the judges lacked the capacity to hold the state's treason statute unconstitutional, he explained to the bench that, on this point, "you perceive that I argue in favor of the criminals," for "my office does not extinguish that respect, which I shall owe to the constitution, as long as it remains such." Edmund Randolph, Notes of Argument in *Commonwealth v. Lamb &c.*, Library of Congress, James Madison Papers, 91:104, as quoted in Hamburger, *Law and Judicial Duty*, supra note 3, at 491–92 & n.30.

Similarly, when in 1786 he had to give an opinion against a claim for salary by one of the judges who was a personal friend, Randolph explained that he was "acting under oath, & [was] bound to interpret the law according to fixed rules." Opinion of Edmund Randolph Respecting the Commencement of Tyler's Salary (on or after May 6, 1786), Library of Virginia, Auditor of Public Accounts, A.G.'s Opinions, RG 48, Box 138, as quoted in Hamburger, *Law and Judicial Duty*, supra note 3, at 320.

349. Sometimes a governor was more fastidious than was justified by law. For example, in 1790, Governor Beverley Randolph refused to sign patents conveying islands in the James River to their owners, and he justified his refusal on grounds equivalent to what is today considered the public trust doctrine. When he consulted Attorney General James Innes, however, he received an opinion that urged him to reconsider. Hamburger, *Law and Judicial Duty*, supra note 3, at 329 n.1 ("But, that you as the Governor of the State—are at liberty judicially to enquire into the propriety and illegality of such grants, I am greatly doubtful."). An attorney general had a duty to give advice in accord with the law of the land, and he could therefore be neither lax nor fastidious.

Certain persons from the Coast of Barbary are now in this City. There appears ground to suspect them of designs unfavorable to this Country— And upon considering the power of the Executive in relation to Characters falling under such suspicions, it seems to be a doubt whether the Enquiries necessary to establish Facts can be made under the Sanction of any existing Law, or whether after good Cause for apprehension appears, any Law warrants it —

In a matter where the public safety is concerned, it seems necessary that the Power possessed by the Executive should be expressly defined— And if it is the wish of the assembly that a Power to arrest dangerous Characters coming from abroad, should be vested in that Body, I should be very glad they would be pleased to signify it in the way which is most proper.³⁵⁰

Although this letter left much unsaid, it remains very revealing.

The first legal problem that troubled Governor Henry was how the executive could make inquiries about the possibly dangerous designs of foreign individuals if the executive lacked statutory authority. Henry had already ordered that the Algerians be brought to Richmond and had questioned them, but he still worried that, “upon considering the power of the Executive in relation to Characters falling under such suspicions, it seems to be a doubt whether the Enquiries necessary to establish Facts can be made under the Sanction of any existing Law.”³⁵¹ If the executive were to make inquiries among fellow Virginians, it could probably count on their voluntarily sharing information. The persons it needed to question, however, were the Algerians themselves, who were unlikely to be forthcoming without some pressure. The executive might therefore need legislative authorization to detain the Algerians for questioning. Indeed, it might need authorization for inquiries of a peculiarly difficult sort. Whereas state executives during the war with Britain had to hold and question English-speaking Anglo-Americans about their allegiance, the Virginia executive now needed to hold and question foreign-speaking Middle Easterners about their identity and intentions.

The second difficulty was that, even if there was reason to think that the Algerians were spying or laying the groundwork for an attack, the

350. Letter from Patrick Henry, Governor, to the Speaker of the House of Delegates (Nov. 17, 1785), Library of Virginia, House of Delegates, Office of the Speaker, Executive Communications, Box 3, Folder 86 (docketed: “Governors Lre respecting the Algerenes Refd to whole on Co.—17 Novr 1785”).

The council initially assumed it could deal with the Algerians under existing law: The Board being informed that a few days ago two men & one woman, supposed to be from Algiers or Tunis, were landed at Hampton whose Characters and appearance are very suspicious—It is advised that his Excellency write a Letter to the Magistrates of Eliza. City requesting that they carefully examine the said persons &, if good cause of suspicion appears, that they be dealt with as the Law directs.

3 Journals of the Council of the State of Virginia, *supra* note 347, at 487.

351. *Id.*

executive might need legislative authorization to take defensive measures, such as imprisoning them, let alone expelling them. As Henry explained, it was doubtful “whether after good Cause for apprehension appears, any Law warrants it.”³⁵²

D. A *Youngstown Type Problem*, But as to Persons Outside Protection

The underlying legal question that troubled Governor Henry and the council was whether the executive already had sufficient authority, directly from the state’s constitution, to take action against persons who were outside protection—or whether, in addition, the executive needed authority from the legislature. This sort of question is studied today in connection with *Youngstown Sheet & Tube Co. v. Sawyer*, but with a difference.³⁵³ Whereas *Youngstown* concerned persons within the protection of the law, the Algerian instance did not.

As to persons within protection, there was little doubt that the executive needed legislative authorization. In conventional eighteenth-century theory, there could be no civil constraint on a person’s natural liberty except by law—except, that is, by a standing rule that derived its obligation from the legislative power through the consent of the people. An executive, therefore, could not lawfully constrain the natural liberty of anyone within the protection of the law, unless by enforcing a law. But what about persons who were outside the protection of the law? Did the executive need legislative authorization to confine, question, and expel them?

It may be thought that a hint of an answer can be found in *Korematsu v. United States* and the other cases concerning the detention and removal of Japanese Americans during World War II.³⁵⁴ The executive removed from the West Coast and detained at least two classes of persons: American citizens of Japanese descent and Japanese citizens who were resident in America at the time of the attack on Pearl Harbor.³⁵⁵ The Japanese citizens had no right to the protection of the laws after Pearl Harbor, but the American citizens remained within such protection. Nonetheless, the executive lumped all these persons together and detained them in camps, without getting either direct legislative authorization or even a legislative suspension of habeas for its treatment of the

352. *Id.*

353. 343 U.S. 579 (1952).

354. *Korematsu v. United States*, 323 U.S. 214 (1944) (upholding exclusion order that applied even to U.S. citizens); *Ex parte Mitsuye Endo*, 323 U.S. 283 (1944) (holding that there was no statutory authority to detain a concededly loyal U.S. citizen). Of course, it should have been irrelevant whether Endo was loyal, for regardless of his sympathies, he had a right not to be held without a jury trial.

355. For an outline of the executive’s measures, see *Endo*, 323 U.S. at 285–87; *Hirabayashi v. United States*, 320 U.S. 81, 85–89 (1943); Ernst W. Puttkammer, *Alien Enemies and Alien Friends in the United States* 16 (1943).

American citizens.³⁵⁶ At least as to the Japanese citizens, however, the executive had legislative authorization under the 1798 Alien Enemies Act. As a result, the subsequent Japanese detention cases are not revealing about whether an executive needs legislative authorization to constrain persons who are outside the protection of the law.

A much closer case is *Youngstown*, in which President Truman, during the Korean War, seized steel plants from persons who were within the protection of the law.³⁵⁷ The president acted without legislative authorization, and the Supreme Court held the executive to have acted unconstitutionally. But what if an executive took action against persons who were outside the protection of the law? Did the executive need legislative authorization against them?

The English Crown and the executives of most American states evidently did not need legislative authorization to detain persons who were beyond protection. For example, the Crown had the prerogative to detain enemy aliens and seize their property without getting statutory authorization, and at least in detaining enemy aliens and others outside protection, the American states took the same approach. The seizure of enemy property came to be treated differently in America. But at least as to persons outside protection, the executive on its own account seemed to have a power of detention. Executive power was understood to include the authority to act for the nation, including in external matters.³⁵⁸ Accordingly, most state executives during the War of Independence detained, questioned, and expelled British enemy aliens without legislative authorization.³⁵⁹

Virginia and Maryland, however, took a different path. Their constitutions included provisions that fastidiously rejected any implication of

356. One of the more sobering observations made by Sharpe in his history of habeas corpus is that “[i]t was not until the twentieth century when the technique of delegated legislation was used that the executive was given the kind of emergency powers of detention reminiscent of those claimed by the Stuarts.” Sharpe, *supra* note 202, at 95–96.

357. *Youngstown*, 343 U.S. 579.

358. Michael D. Ramsey, *The Constitution’s Text in Foreign Affairs* 73 (2007) (“As in earlier periods, the ratifiers seem to have understood executive power, as a general term, to include foreign affairs power.”).

359. The implications for enemy aliens could also be considered part of a state executive’s authority as commander-in-chief. For example, the New Hampshire Constitution specified in (too much) detail:

The president of this state . . . shall be commander in chief . . . and shall have fully power by himself, or by any chief commander, or other officer, or officers . . . for the special defence, and safety of this state, to assemble in martial array, and put in warlike posture, the inhabitants thereof, and to lead and conduct them, and with them to encounter, expulse, repel, resist and pursue by force of arms . . . and also to kill, slay, destroy, if necessary, and conquer . . . every such person and persons as shall, at any time hereafter, in a hostile manner attempt or enterprize the destruction, invasion, detriment, or annoyance of this State

N.H. Const. pt. II (enacted 1784).

executive power from traditional royal prerogatives. The Virginia Constitution, for example, stated that the governor “shall, with the advice of a Council of State, exercise the executive powers of government, according to the laws of this Commonwealth; and shall not, under any pretence, exercise any power or prerogative, by virtue of any law, statute or custom of England.”³⁶⁰ As explained in a 1782 opinion by the President of the Virginia Court of Appeals, Edmund Pendleton, the state’s constitution “restrained the Governor from exercising any Prerogatives of the Crown under the laws & customs of England.”³⁶¹ In the context of this constitutional prohibition, could Henry act without legislation against persons who were outside protection? The constitution authorized him to exercise executive power “according to the laws of this Commonwealth,” and in other states a governor might assume that such a grant of executive power included the executive powers once exercised by the Crown. But the Virginia and Maryland constitutions barred any implication of executive power from English law, and a governor in these states might therefore need authorizing legislation.³⁶²

It is therefore surely no coincidence that Maryland and Virginia adopted such legislation.³⁶³ In Maryland, as has been seen, the legislature authorized the executive to detain, question, and return disaffected aliens from other states.³⁶⁴ Similarly, in Virginia, Governor Henry concluded that, even when imposing constraints on persons who were outside the protection of the law, he should first get legislative authorization. In his words, “if it is the wish of the assembly that a Power to arrest dangerous Characters coming from abroad, should be vested in that Body [the executive], I should be very glad they would be pleased to signify it in the way which is most proper.”³⁶⁵

Of course, the constitutional obstacle was far from clear, and the question was thus within what Justice Jackson in his *Youngstown* opinion called a “zone of twilight” or ambiguity about executive power.³⁶⁶ Contemporary scholars are apt to conclude that an executive can and should act in this sphere of uncertainty. In traditional legal analysis, however,

360. Va. Const. of 1776; see similar provision in Md. Const. of 1776, art. XXXIII.

361. Transcript of Edmund Pendleton’s Notes of his Opinion in *Commonwealth v. Caton*, Library of Congress, Force Papers, James McGuire Collection, Correspondence Folders, Ser. 7E, folio 8710, as quoted in Hamburger, *Law and Judicial Duty*, supra note 3, at 334.

362. For an analysis of Henry’s views on the executive’s need for legislative authority to take action against disloyal persons who were within the protection of the law, see Thomas Jefferson, *Bill to Attain Josiah Philips and Others (1778)*, in 2 *Papers of Thomas Jefferson*, supra note 112, at 189, 192–93.

363. Other states may have adopted authorizing legislation limiting their executives, but Maryland and Virginia needed such legislation to give power to their executives.

364. See supra text accompanying note 335.

365. Letter from Patrick Henry to the Speaker of the House of Delegates (Nov. 17, 1785), supra note 350.

366. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

matters that were genuinely in doubt, in the sense of equilibrium, were acknowledged to be without resolution, unless by resort to some other source of authority.³⁶⁷ Moreover, a particularly high standard of clarity might seem desirable when asserting the sort of powers that the English Crown had once claimed were required by necessity or public safety. For one reason or another, Governor Henry, unlike contemporary scholars, felt he could not rely on an uncertain or twilight realm of authority. Instead, he sought express authorization, explaining that “[i]n a matter where the public safety is concerned, it seems necessary that the Power possessed by the Executive should be expressly defined.”³⁶⁸

Henry’s expectation of expressly defined executive power appears to have been overstated. Henry may well have been correct to avoid acting where executive power was so unclear. But did the power have to be expressly defined? On this, he appears to have gone to an extreme.

At least, however, the Virginia and Maryland evidence shows when an executive perhaps needed legislative authorization and when it did not. These states had specific constitutional restrictions on the implication of executive power from English law, and the governors in these states may therefore have needed legislative authorization to detain, question, and expel persons who were outside the protection of the law. The constitutions of other states, however, did not confine executive power in this manner and thus left their executives to act against such persons without legislative authorization. The result was a sharp contrast: Although all executives in American jurisdictions needed authorization and suspension statutes to detain and remove individuals who were within protection, most executives did not require a statutory foundation to detain, remove, question, and expel persons who were outside protection.³⁶⁹

E. Legislative Authorization and Indemnity

Recognizing that the Virginia executive might need legislative authorization, the state’s General Assembly eventually adopted an authorization and indemnity statute. The act was prepared by a committee headed by James Madison, and its provisions offer a model of what a gov-

367. For example, Hale thought precedent was useful to resolve legal questions that were in doubt or equilibrium. See Hamburger, *Law and Judicial Duty*, *supra* note 3, at 230–31.

368. Letter from Patrick Henry to the Speaker of the House of Delegates (Nov. 17, 1785), *supra* note 350. An anxiety for express restrictions would be typical of Henry and many others who would become Anti-Federalists two years later in the dispute over ratification of the U.S. Constitution. That later dispute, however, concerned express constitutional limitations rather than express legislative authorization.

369. Along similar lines, although with a somewhat different use of the word “protection,” Henry Monaghan concludes that the executive power of the President of the United States includes a power “to protect the personnel, property, and instrumentalities of the United States.” Henry Monaghan, *The Protective Power of the Presidency*, 93 *Colum. L. Rev.* 1, 74 (1993).

ernment could lawfully do to prevent informal warfare by persons who were outside the protection of the law. It has already been observed how other American states responded to the entry of British subjects, who were subjects of a sovereign state at war with the United States. Now it will be seen that the same basic approach was also available against other sorts of aliens who might be planning or preparing for informal warfare.

The Virginia statute authorized the executive to hold, question, and expel persons subject to a hostile foreign entity, regardless of whether it was a state or some other power, and regardless of whether it was engaged in formal or informal warfare.

BE it enacted by the General Assembly, That it shall and may be lawful for the governor, with the advice of the council of state, to apprehend and secure, or cause to be apprehended and secured, or compelled to depart this commonwealth, all suspicious persons, being the subjects of any foreign power or state, who shall have made a declaration of war, or actually commenced hostilities against the said states, or from whom the United States in congress, shall apprehend hostile designs against the said states; provided information thereof shall have been previously received by the executive from congress: And that in all such cases, the governor, with the advice of the council of state, shall, and he is hereby empowered, to send for the person and papers of any foreigner within this state, in order to obtain such information as he may judge necessary. All sheriffs and jailers shall receive such suspicious persons whom, by warrant from the governor they shall be commanded to receive, and them in their prisons or custody detain, or transport out of the commonwealth, as by such warrant they may be commanded. And all others the good citizens of this commonwealth, shall be aiding and assisting in apprehending, securing or transporting any such suspicious person, when commanded by warrant or proclamation of the governor, or required by the sheriff or jailer to whose custody such suspicious persons may have been committed. Every person acting under authority aforesaid, shall be indemnified from all suits to be commenced or prosecuted for any action or thing done by virtue thereof, and may plead the general issue, and give this act in evidence: Saving always to the merchants of any foreign state, betwixt whom [and] the United States of America war shall have arisen, and to their families, agents, and servants, found in this commonwealth at the beginning of the war, the privileges allowed by law.³⁷⁰

370. An Act Giving Powers to the Governor and Council in Certain Cases (1785), in *12 The Statutes at Large, Being a Collection of All the Laws of Virginia*, supra note 320, at 47–48. Madison chaired the committee that considered the proposed bill, and he later explained to Jefferson:

This Act empowers the Executive to confine or send away suspicious aliens, on notice from Congress that their sovereigns have declared or commenced hostilities against U.S. or that the latter have declared War against such

This was a short statute, but if parsed in detail, it suggests much about what could be done to prepare against nonsovereign or otherwise informal warfare.

A key feature of the statute was its application to foreigners, whether subjects of states or of other powers. Although it is often said that Americans and their law have not previously struggled with nonstate antagonists, Virginia in 1785 had to deal with Middle Eastern visitors of unknown loyalties and intentions. It was assumed that they came from one or another of the Barbary States, and it might be conceded that the Barbary States were sovereign powers, but none of this by itself made clear whether these visitors were acting on behalf of a sovereign state or were acting more immediately under marauders or some other nonsovereign power. Whatever the answer, if they were subjects of a foreign state or other power at war with the United States, they were outside the protection of the law. The Virginia act therefore applied to "all suspicious persons" who were "the subjects of any [enemy] foreign power or state."³⁷¹ In this way, the statute recognized that not only the subjects of a foreign enemy sovereign, but also the subjects of other sorts of foreign enemy powers, were presumptively enemies and therefore without a right to the protection of the law. Of course, the distinction between a sovereign state and another sort of power could still matter for the law of na-

sovereigns. It was occasioned by the arrival of two or three Algerines here, who having no apparent object were suspected of an unfriendly one. The Executive caused them to be brought before them, but found them unarmed with power to proceed. These adventurers have since gone off.

Letter from James Madison to Thomas Jefferson (Jan. 22, 1786), in 9 *The Papers of Thomas Jefferson*, supra note 112, at 197. Not long after this statute was adopted, the House of Delegates also passed "An Act to Prevent Losses by Pirates, Enemies, and Others on the High Seas." *Journal of the House of Delegates of Virginia*, Oct. 18, 1785 to Jan. 21, 1786, at 131 (Jan. 7, 1786) (Richmond, John Dunlap & James Hayes 1786).

371. The words "foreign power" could refer to a sovereign state, but the word "power" could also have a broader connotation when recited in addition to a state. In fact, the word "power" was the standard term used in treaties when the drafters wanted to be inclusive—when they wanted to include not only sovereign states but also any confederation, commission, or other body that might not be recognized as sovereign. For example, the Second Barrier Treaty sought to protect against any opposition to the line of succession to the British throne, and it therefore referred to opposition by "any Foreign Power or State, or Person or Persons whatsoever." The Treaty of Guaranty for the Protestant Succession to the Crown of Great Britain art. II (Jan. 29, 1713), in Casimir Freschot, 1 (part 2) *The Complete History of the Treaty of Utrecht* 206 (London, A. Roper & S. Butler 1715). On similar assumptions about the need to be inclusive, such a locution could also find its way into oaths of allegiance—as when North Carolina required individuals to swear to defend the independent government of the state "against George the third, King of Great Britain and his successors, and the attempts of any other Person, Prince, power, state or Potentate, who by secret arts, treasons, Conspiracies or by open force shall attempt to subvert the same." *Account of Persons Who Took the State Oath 1778*, in 22 *The State Records of North Carolina*, supra note 229, at 168.

tions, but it was not a hurdle for purposes of determining who was without local allegiance and thus without protection.³⁷²

The statute also specified that it applied regardless of whether there had been a formal declaration of war. As already noted, there were worrisome reports in America during the fall of 1785 that Barbary corsairs had attacked American shipping, but there was no clear news of a declaration of war against the United States.³⁷³ Such ambiguity was hardly new in the history of warfare, and it had therefore long been recognized at common law that wars did not always wait for declarations. Indeed, it was understood that modern warfare threatened to render declarations of war obsolete.³⁷⁴ In common law terms, the existence of war could be either a “matter of record,” which was conclusive, or simply a “question of fact.”³⁷⁵

372. If taken literally, the Virginia statute applied not to the subjects of states or other powers at war with the United States, but more narrowly to an individual who was at war with the United States independently of his sovereign. Matthew Hale had already observed that, even if an individual's sovereign was amicable, he could independently engage in war and thus still be an enemy alien. See *supra* text accompanying note 128. Similarly, the Virginia statute could be understood to have focused on foreign individuals at war with the United States:

[I]t shall and may be lawful for the governor . . . to apprehend and secure . . . all suspicious persons, being the subjects of any foreign power or state, who shall have made a declaration of war, or actually commenced hostilities against the said states, or from whom the United States in congress, shall apprehend hostile designs against the said states

An Act Giving Powers to the Governor and Council in Certain Cases, *supra* note 370. This, however, is an improbable reading. Certainly, it is not how the Act was understood at the time. For example, see Madison's letter to Jefferson quoted in *supra* note 370 (“This Act empowers the Executive to confine or send away suspicious aliens, on notice from Congress that their sovereigns have declared or commenced hostilities against U.S. or that the latter have declared War against such sovereigns.”).

373. See *supra* text accompanying note 346.

374. Hale noted that “for the most part” the “antient solemnities are antiquated.” Hale, *Historia Placitorum*, *supra* note 83, at 162. In particular, “[a] war that is *non solemniter denuntiatum* . . . when two nations slip suddenly into a war without any solemnity” was the sort that “ordinarily happeneth among us.” *Id.* at 163. In such instances, there was “a real, tho not a solemn war.” *Id.*

375. *Id.* at 164. A proclamation or declaration of war was an act of record and was the most certain mode of determining the question, for at common law an act of record was conclusively binding. *Id.* For the significance of an act of record, see Hamburger, *Law and Judicial Duty*, *supra* note 3, at 49–50. In the absence of an act of record, however, war was a question of fact. In such circumstances, it “is purely a question of fact and triable by the jury.” Hale, *Historia Placitorum*, *supra* note 83, at 164; see also Hale, *Prerogatives*, *supra* note 70, at 128 (“Whether then it be *tempus belli* or not is a question of fact, the trial whereof shall be by a jury”). Citing Hale, Bacon's *Abridgment* explained:

A general war . . . is of two Kinds . . . 1. *Bellum solemniter denunciatum*. 2. *Bellum non solemniter denunciatum*. The first is, when War is solemnly declared or proclaimed by our King 2ndly, When a Nation slips suddenly into a War without any Solemnity . . . and hereupon a real though not a solemn War may and hath formerly arisen; and therefore to prove a Nation to be at Enmity with England, or to prove a Person to be an Alien Enemy, there is no Necessity of shewing any War proclaimed; but it may be averred, and so put upon the Trial of the Country whether there was a war or not.

It is therefore unsurprising that the Virginia legislature did not require the executive to wait for a declaration of war, but allowed it to act if a foreign state or power had “actually commenced hostilities” against the American states.³⁷⁶

Then, as now, moreover, a declaration of war was particularly improbable in informal warfare, especially the sort conducted by persons who viewed it as part of an almost timeless conflict. When John Adams and Thomas Jefferson met in 1786 with Tripoli’s ambassador to London, they asked the ambassador why the Barbary States made war “upon Nations who had done them no Injury.” The ambassador answered:

[I]t was founded on the Laws of their Prophet, that it was written in their Koran, that all nations who should not have acknowledged their authority were sinners, that it was their right and duty to make war upon them wherever they could be found, and to make slaves of all they could take as Prisoners, and that every Musselman who should be slain in battle was sure to go to Paradise.³⁷⁷

The Virginia legislature thus had better reason than it probably knew to assume that it could not expect a formal declaration of war.

In addition to allowing the executive to act after the commencement of actual hostilities, the Virginia statute authorized the executive to anticipate an attack. The statute explained that it would apply not merely when there was declaration of war or when there were actual hostilities, but even when the Continental Congress apprehended that a foreign power or state had “hostile designs.”³⁷⁸ The statute thereby allowed the executive to act preemptively, which meant that the executive in such circumstances could deny the protection of the law to aliens before it was certain that they were really enemies. In this regard, the statute went beyond the assumption that lawfully visiting aliens in amity were within a local allegiance and protection. Perhaps, however, the act was understood as a recognition that, once a foreign state or other power had taken the decision to attack, it could be viewed as already in a state of war. One way or another, this was a sobering vision of both the foreign threat and domestic power. It was not quite as disturbing, however, as it may initially seem, for the statute did not authorize the executive to do more to the Algerians than it might have done if they had simply been aliens in amity who came unlawfully.³⁷⁹

4 Bacon, *supra* note 340, at 175 (discussing “prerogative”).

376. An Act Giving Powers to the Governor and Council in Certain Cases, *supra* note 370.

377. Letter from John Adams & Thomas Jefferson to John Jay (Mar. 28, 1786), *in* 9 *The Papers of Thomas Jefferson*, *supra* note 112, at 357, 358.

378. An Act Giving Powers to the Governor and Council in Certain Cases, *supra* note 370, at 47–48.

379. The Crown had long had the power to detain, question, and expel aliens in amity, and American executives also enjoyed this power, although increasingly as limited by statute. In a state such as Virginia, moreover, the executive power could not be

In authorizing the executive to take measures against aliens before an attack, the Virginia statute had to avoid the risk that the executive of Virginia might too readily perceive a threat and thereby drag the United States into an unnecessary conflict. The statute therefore cautiously required not only that Congress apprehend the danger but also that this information be “previously received by the executive from congress.”³⁸⁰

Having thus determined the circumstances in which it would be applicable, the statute got to the heart of the matter: its authorization of executive action. It began by authorizing the governor, with the advice of his council, to apprehend and secure, or to expel, the “suspicious” foreigners—thus leaving the executive to take such measures against them at its discretion.³⁸¹ It then also authorized the governor and council “in all such cases . . . to send for the person and papers of any foreigner within this state, in order to obtain such information as he may judge necessary”—this being essential for ascertaining the nature of the threat.³⁸²

presumed from the example of the Crown, and legislation might therefore be advisable in the first place to establish the power.

380. An Act Giving Powers to the Governor and Council in Certain Cases, *supra* note 370. The requirement about information from Congress probably also applied to declarations of war and the commencement of actual hostilities—this being somewhat uncertain on account of the drafting.

Virginia’s approach to the problem has ever since remained on the statute books. A 1792 Virginia statute, which consolidated the enactments on executive power, restated the 1785 statute but rephrased it to require an apprehension of hostile designs by the President of the United States, thus bringing the statute in line with the relocation of executive power from the Continental Congress to the President. An Act for Reducing into One, the Several Acts and Parts of Acts Respecting the Powers and Duties of the Executive (1792), in *A Collection of All Such Acts of the General Assembly of Virginia, of a Public and Permanent Nature, as Are Now in Force* 65, 65 (Richmond, Augustine Davis 1794). This 1792 version of the Virginia statute was in turn discussed in the debates about the 1798 federal Alien Enemies Act. The Virginia Report of 1799–1800, *Touching the Alien and Seditious Laws* 89–90 (Richmond, J.W. Randolph 1850). The 1798 Alien Enemies Act similarly recognized that it was the President’s role to make a proclamation that an “invasion or predatory incursion” had been “perpetrated, attempted, or threatened.” An Act Respecting Alien Enemies, ch. 66, 1 Stat. 577 (1798).

381. In referring to “suspicious” persons, the statute recognized that the executive would often be dealing with foreigners of uncertain identity and intent, who might be suspected of planning harm, but whose aims would rarely be susceptible of proof, let alone the sort of evidence expected in a court of law. Mere suspicion was a subjective standard, which was open to abuse, and it was not enough to convict persons within protection, but it was more than enough to justify executive action against persons outside protection.

382. An Act Giving Powers to the Governor and Council in Certain Cases, *supra* note 370. Under the provision authorizing the executive to send for any foreigner and his papers, the executive could question and obtain the papers of foreigners who did *not* belong to a power or state at war with the United States, and the provision may thus seem to have allowed the executive to impinge on the constitutional rights of persons within the protection of the law. The Virginia Constitution, however, apparently did not protect anyone from such an intrusion. Its Declaration of Rights guaranteed that “in all capital or criminal prosecutions” a man cannot “be compelled to give evidence against himself,” and more generally that “no man be deprived of his liberty except by the law of the land or the judgement of his peers.” Va. Decl. of Rights of 1776, art. VIII. But it is not clear that this

The governor, even with the advice of his council, could not adequately deal with suspicious foreigners by himself, and the statute therefore also required assistance—both from officials and from the public. First, “[a]ll sheriffs and jailers shall receive such suspicious persons whom, by warrant from the governor they shall be commanded to receive, and them in their prisons or custody detain, or transport out of the commonwealth, as by such warrant they may be commanded.”³⁸³ Sheriffs and jailers were county officers, with strong county loyalties, and this provision was therefore advisable to ensure their cooperation with the executive. More broadly, “all others the good citizens of this commonwealth, shall be aiding and assisting in apprehending, securing or transporting any such suspicious person, when commanded by warrant or proclamation of the governor, or required by the sheriff or jailer to whose custody such suspicious persons may have been committed.”³⁸⁴

Let the cooperating officials and citizens fear that they might be held liable, the statute indemnified them: “Every person acting under the authority aforesaid, shall be indemnified from all suits to be commenced or prosecuted for any action or thing done by virtue thereof, and may plead the general issue, and give this act in evidence”³⁸⁵ It may be wondered why this provision was necessary if the executive would merely be detaining, questioning, and expelling persons who could not claim the protection of the law and who therefore could not bring any lawsuit. The executive, however, could not always know ahead of time, when initially detaining and questioning the Algerians or other foreigners, whether they would really turn out to be enemy aliens and thus outside the protection of the law. If the executive or those acting for it mistakenly detained persons who turned out to have entered the state with a local allegiance, then all those involved might find themselves in violation of the detainees’ constitutional rights and vulnerable to actions for damages. The indemnification provision was especially important for members of the public, for it was not certain that they could vindicate themselves in court by showing that they had relied on a facially lawful warrant or other official request. Regardless of the merits, moreover, neither officials nor members of the public could relish the prospect of having to defend themselves in court, even if against utterly baseless suits. An assurance of indemnification was therefore important at the very least

would bar the executive from summoning subjects of foreign powers for questioning, let alone demanding their papers. Similarly, although the Declaration prohibited general warrants, the executive warrants issued under the statute would presumably identify the persons and thus would not be general. *Id.* art. X.

383. An Act Giving Powers to the Governor and Council in Certain Cases, *supra* note 370.

384. *Id.*

385. *Id.* In the eighteenth century, especially in America, legal defenses that traditionally had to be pleaded were often allowed at trial under the general issue. Perhaps on this account, the statute made clear that persons claiming indemnification were to “plead the general issue, and give this act in evidence.” *Id.*

to reassure officials and members of the public who might otherwise hesitate to act.

A suspension of habeas, however, had no place in the Virginia statute. The emergency detention and removal statutes, which were examined in Part IV, had to suspend habeas corpus, for they applied to persons, such as the Pennsylvania Quakers, who were within the protection of the law. The Virginia statute, however, like the Maryland statute concerning entering British loyalists, constrained persons who were outside the protection of the law and who therefore could not claim any constitutional right. Consequently, the Virginia statute had no need to suspend habeas. Indeed, there was good reason for it to leave habeas in place, as an affidavit in support of a motion for habeas was the only clear mode of legal recourse for a person who was mistakenly detained.

F. *Epilogue*

As it happens, the statute was not the whole of the story, for the legislature moved slowly—so slowly that Governor Henry and his council felt obliged to act without legislative authorization. In mid-November, when Henry wrote to the legislature, he and his council had already detained the Algerians and asked them some initial questions, but Henry and his advisors delayed doing more than this in order to await word from the legislature. The legislature, however, committed the authorization bill to a committee, headed by James Madison, and like most legislative committees, it took its time. In early December, therefore, Henry gave up waiting for a statute. He and the council were worried about the potential danger, and they therefore issued orders for more detailed questioning of the Algerians and a search of their baggage. Perhaps the executive acted on the understanding that the legislature would soon pass the authorization statute; or perhaps the executive once again reconsidered its constitutional authority. Whatever its reasoning, the executive proceeded without further delay. As will be seen in Part VI, it was unable to reach any clear conclusion about the Algerians, and it therefore simply expelled them—leaving the legislature to adopt its statute at its own pace.

The experience of the Virginia executive illustrates the risks of a constitution that seemed to require the executive to wait for legislative authorization before taking measures against enemy aliens or other persons outside the protection of the law. In Virginia, where the legislature had not anticipated the threat, such a constitution placed the executive in the awkward position of having to delay action or possibly act unconstitutionally. Fortunately, most American constitutions, including the U.S. Constitution, were not so poorly drafted.

The more general lesson from the events in Virginia, though, is that an American executive did not need a suspension of habeas, let alone more elaborate emergency measures, to act against foreigners engaged in informal warfare or other persons who were outside the protection of the law. An executive had only a very narrow, temporary, emergency power

to detain and remove persons who were within protection, but it had a general, regular power to deal with persons outside protection, and it thus had the power to defend its society against external threats, even while it remained bound to preserve the rights of persons within the society. To be sure, the principle of protection did not resolve the full range of problems arising from informal warfare. Yet the principle at least reveals that Americans had a framework for addressing such problems lawfully. In particular, it suggests how a government could act to prevent what today would be called "terrorism," without sacrificing either safety or civil liberty.

VI. THE LAW OF NATIONS

The principle of protection facilitated the structural enforcement of international law and, more generally, international relations. The law of nations was not legally obligatory, except to the extent it was adopted within the law of the land, and it was therefore not ordinarily a legal limit, unless a government chose to bind itself. Nonetheless, the structural enforcement of international relations and law was often very effective, and one reason for this was the principle of protection.

Incidentally, the experience of the early American states presents a slightly different vision of the law of nations or international law than prevails today. These days, a growing range of this law is viewed as a continuously applicable legal constraint—sometimes because it is said to be *jus cogens*, sometimes because it is understood to guarantee human rights, and sometimes because it is enshrined in widely accepted conventions. To this extent, international law increasingly sets standards that nations are expected to meet without deviation. Alongside this vision of international law, however, there remains much of the older vision, in which international law was a standard that nations could meet and even hope to exceed, but which they could also abandon at their discretion. From this older perspective, much of which remains intact, the law of nations and its principle of protection mostly enabled structural enforcement—the sort of enforcement that was done by executives rather than judges.³⁸⁶ Of course, these two visions of international law are not entirely incompatible, but depending on the weight placed on one aspect or the other, there is at least potential for conflict.

386. For the continuing importance of structural enforcement, see Jack L. Goldsmith & Eric A. Posner, *The Limits of International Law* 26 (2005) [hereinafter Goldsmith & Posner, *Limits*] (arguing that customary international law "is best modeled as behavioral regularities that emerge when states pursue their interests"); Robert O. Keohane, *After Hegemony: Cooperation and Discord in the World Political Economy* 57–63 (1984) (discussing how international regimes cooperate in pursuit of rules and norms without judicial intervention). Obviously, the focus here is in on the law of nations in the sense of the law among and concerning nations, not commercial law and other matters that were described as the law of nations in the Roman sense—that is, in the sense of laws common to all nations.

At this stage of the inquiry, when the goal is merely to understand the structural approach, it is enough to note the possible tension. The more complicated question of whether the structural approach should still have a role in international law can be left until Part VII.³⁸⁷ In the meantime, this Part can focus on the historical point: the importance of the principle of protection as a means of facilitating the structural enforcement of international relations and law.

A. *Without Legal Obligation*

Why was the structural enforcement, and thus also the principle of protection, so central in late eighteenth-century America? One very basic reason is that the law of nations was not, on its own, legally obligatory or judicially enforceable.³⁸⁸

There has been considerable scholarly uncertainty as to whether the law of nations was legally binding in common law jurisdictions. Scholars generally recognize that many early American judges relied on the law of nations to understand a range of legal issues. Yet did the judges do so because the law of nations had any independent legal obligation or because aspects of it had been adopted as part of the law of the land? For example, whereas Harold Koh claims that international law was legally binding, Curtis Bradley and Jack Goldsmith question whether it had legal obligation outside domestic law.³⁸⁹ The latter argument is somewhat tentative, for it is based mostly on early nineteenth-century American judicial opinions, thus apparently leaving open the possibility that the need for domestic authorization did not become clear before the advent of modern positivism in the nineteenth century.³⁹⁰ In fact, an ideal of domestic

387. See *infra* Part VII.B.2.

388. Although this sort of question is often debated in terms of whether international law was really law, this focus does not get to the heart of the matter, which is the source of obligation for law. Once it is recognized that the obligation of the law in any land was conventionally understood in England and America to rest on the authority of the people of the land, it becomes apparent that international law could have obligation only to the extent it was established by or under their authority.

389. See Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 *Harv. L. Rev.* 815, 849–70 (1997) [hereinafter Bradley & Goldsmith, *Customary International Law*] (critiquing claim that customary international law is federal common law); Curtis A. Bradley & Jack L. Goldsmith, *Federal Courts and the Incorporation of International Law*, 111 *Harv. L. Rev.* 2260, 2265–66 (1998) (arguing that customary international law is not federal law except to extent adopted in statutes or treaties); cf. Harold Hongju Koh, *Is International Law Really State Law?*, 111 *Harv. L. Rev.* 1824, 1826–66 (1998) (disputing Bradley and Goldsmith). For an overview of the debate, see Ernest A. Young, *Sorting Out the Debate over Customary International Law*, 42 *Va. J. Int'l L.* 365 (2002). For a more in depth study of part of the history, see Anthony J. Bellia, Jr. & Bradford R. Clark, *The Federal Common Law of Nations*, 109 *Colum. L. Rev.* 1, 28–46, 92 (2009), who show that the Constitution's allocation of powers among the branches of the federal government was informed by the law of nations, which thus offered at least a presumptive understanding of such powers.

390. See Bradley & Goldsmith, *Customary International Law*, *supra* note 389, at 822–26.

legal authority had long prevailed in common law jurisdictions, and this meant that the law of nations was binding only to the extent it was incorporated within domestic law.³⁹¹

Already in England, it was a fundamental principle that the legal obligation of any rule depended on the obligation of the law of the land.³⁹² Even higher laws were understood to be legally binding in England only to the extent they were recognized by the common law. From this point of view, Chief Justice Edward Coke generalized that the “law of nature is part of the laws of England,”³⁹³ and Chief Justice Matthew Hale pronounced that “Christianity is parcel of the laws of England.”³⁹⁴ They obviously did not mean that the laws of nature and Christianity were legally binding in their entirety. Instead, their point was that aspects of these laws were legally enforceable, not independently, but as a part of the law of the land.

At a more mundane level, such an approach precluded independent obligation for any academic, international, or other “foreign” law. This position was asserted most emphatically as to canon and Roman civil law, including the elements that today are considered international law.³⁹⁵ For example, English law permitted the direct application of civil law in the Court of Admiralty to the extent maritime law had been “allowed by the lawes of the Realme,” but “it is most plain, That neither the Canon Law nor the Civil Law have any Obligation as Laws within this Kingdom . . . for the King of England does not recognize any Foreign Authority as superior or equal to him in this Kingdom.”³⁹⁶ Thus, the authority of these laws “is founded merely on their being admitted and received by us, which alone gives ‘em their Authoritative Essence, and qualifies their Obligation.”³⁹⁷ Chief Justice Holt was relatively open minded when he explained that “thô . . . some Use is made of the Civil Law . . . it is quoted not to be relyed upon as authority but only for Information and Illustrac[i]on to open and Explain the nature and reason of things.” Common lawyers could learn from such law, but by itself “the Civil Law never had force in England, Because nothing can give it

391. For the positivism based on natural law, see Hamburger, *Law and Judicial Duty*, *supra* note 3, at 43–44.

392. A more complete account of this question and the underlying assumptions is discussed in *id.* at 61–64.

393. See *Calvin’s Case*, (1608) 7 Co. Rep. 1, 5, 77 Eng. Rep. 377, 382 (Exch. Ch.).

394. See *Taylor’s Case*, (1676) 1 Vent. 293, 293, 86 Eng. Rep. 189, 189 (K.B.); see also Stuart Banner, *When Christianity Was Part of the Common Law*, 16 *Law & Hist. Rev.* 27, 28–29 (1998) (discussing case).

395. See Hamburger, *Law and Judicial Duty*, *supra* note 3, at 62–63 (“English lawyers were . . . particularly emphatic that the civil and canon laws could not have obligation in England . . .”).

396. Coke, *supra* note 70, at *51; Hale, *Common Law*, *supra* note 202, at 19–20, 28.

397. Hale, *Common Law*, *supra* note 202, at 20.

any force, but it's [sic] being received and [there being] an immemorial Usage thereupon."³⁹⁸

Already in England, this incorporation requirement could be understood to rest on constitutional foundations. In an important case in the mid-1690s, lawyers for the Crown cited a resolution of an international congress mentioned by the medieval treatise *Fleta*—so called because it had allegedly been written in the Fleet Prison. Holt acidly observed that the author of this volume understood “that Determination of the Christian Princes at the Congress . . . to be a Declarac[i]on of the Law of all Kingdoms and States and therefore[,] thō he were a Com[m]on Lawyer[,] he Uses it as an Authority in England.” In contrast, like almost all other seventeenth- and eighteenth-century common lawyers, Holt took the view that nothing had legal obligation in England, except under the law of the land. He even considered this a requirement established by the English Constitution, and he therefore said of the author of *Fleta*:

If he means that the Resolution should be Obligatory in England without any Sanction from the Law or Statutes of the Realm[,] that is contrary to the Fundamental Constitution of our Government and therefore can be no proof of this matter. If he means it as a Declaration of the Law[,] that will be as vain and as much against the Constitution as any other.³⁹⁹

The resolution of the international congress could not constitutionally be obligatory without the sanction of English law; nor could it constitutionally declare English law.

This sort of reasoning obviously placed great weight on the structural enforcement of international relations and international law. Before the structural implications can be pursued, however, it is necessary to linger on the reasoning about incorporation, for it arose from more profound assumptions than commonly understood.

The common law perspective drew its force from an underlying ideal of authority. This is not the place to dig deep into the common law notion of legal obligation, but as already hinted, it rested on ideals of law-making authority.⁴⁰⁰ English society and its law have long been relatively individualistic, and the English have therefore long been conscious of the

398. *Blackbourn v. Davis* (1701), in *Holt's Opinions*, British Library, Additional Ms. 35980 at fol. 26v (K.B.). In another case, when alluding to Roman law to suggest the reasoning underlying the common law, he carefully explained that “I do not quote this as an Authority; for if I should be so understood, it might raise an Accusation, that I presume to Judge the people of England by the rules of Civil Law.” *Lane v. Cotton & Frankland* (K.B. 1701), in *Holt's Opinions*, British Library, Additional Ms. 35981 at fol. 96r.

399. *R v. Horneby, Williamson, Snow, & Smith* (The Bankers Case) (Exch. Ch. 1695), in *Holt's Opinions*, British Library, Additional Ms. 35979 at fol. 36r-37v. For the meeting of kings, see 3 *Fleta* 12 (III.vi) (H.G. Richardson & G.O. Sayles trans. & eds., 1972). For further details of Holt's opinion and its context, see *Hamburger, Law and Judicial Duty*, supra note 3, at 212–13.

400. A more complete account of such ideas and their development can be found in *Hamburger, Law and Judicial Duty*, supra note 3, at 19–280.

ways in which their society and individuals within it might enjoy spheres of authority not recognized by the more academic and despotic legal traditions of the Continent.⁴⁰¹ With a keen sense of the threat from such traditions, the English (beginning as early as the Middle Ages) increasingly recognized that different nations had their own visions of justice, and that even individuals within each nation might reasonably have divergent views about what was right.⁴⁰² It was this recognition of human variety that led the English toward epistemological sophistication and toward the ideal that the obligation of human law had to be understood as resting on human authority—superficially, the authority of the ruler, but more fundamentally, the authority of the community or people. On this understanding, the common law, being a form of national custom, seemed binding because of the tacit consent of the people, and statutes seemed binding because of the express authority of the community of the realm meeting in Parliament.⁴⁰³ These two streams of popular authority appeared to establish the law of the land, which was the only law under which anything could be recognized as binding in the nation's courts. This became especially clear as a result of England's break with Rome and the establishment of the supremacy of the English monarch and his law. At least from that point onward, the law of England was not only the law of the land, but the supreme law of the land.⁴⁰⁴

Thus, far from being merely a result of nineteenth-century positivism, the need for domestic authorization of international law arose from ideals of authority that the English began to develop already in the late Middle Ages and that became dominant during and following the Reformation.⁴⁰⁵ Indeed, rather than resting narrowly on idiosyncracies of English history and character, this understanding of the authority of domestic law was an expression of the increasingly modernized character of society and the associated recognition of both national and individual authority.⁴⁰⁶

Americans pursued these assumptions about authority in their constitutions. The law of each land was understood to be the source of legal obligation there. Thus, as in England, the very notion of the law of the

401. See *id.* at 26–28, 63, 67.

402. See *id.* at 26–28.

403. See *id.* at 51–52, 90–92. There is a growing literature on the anti-democratic aspects of international law. See, e.g., Patrick M. McFadden, *Provincialism in United States Courts*, 81 *Cornell L. Rev.* 4, 37–38 (1995); John O. McGinnis & Ilya Somin, *Should International Law Be Part of Our Law?*, 59 *Stan. L. Rev.* 1175, 1193 (2007); Jed Rubenfeld, *Commentary, Unilateralism and Constitutionalism*, 79 *N.Y.U. L. Rev.* 1971, 2006 (2004). The point here, however, is simply that the law was binding on account of its authority and that incorporation was necessary if international law was to enjoy this authority and obligation.

404. See Hamburger, *Law and Judicial Duty*, *supra* note 3, at 59–64 and sources cited there.

405. *Id.* at 37–44.

406. *Id.* at 34, 68–69.

land was understood in opposition to all other laws, which were thus considered foreign—the only variation in America being the overlapping geography of state and federal systems of law.⁴⁰⁷ The people of the states and the United States reinforced the primacy of their domestic law when they established the laws of their jurisdictions through express constitutions, from which all law, statutory and customary, drew its obligation. The U.S. Constitution was particularly clear about this, for it expressly defined the supreme law of the land, meaning the supreme law of the United States, to consist of various types of law made under the authority of the Constitution.⁴⁰⁸ The Constitution thereby resolved any doubt about the force of federal law when it came in conflict with state law, but this is not all that it thereby did, for it also echoed the old common law emphasis on the supremacy of the law of the land.

Strengthening the supremacy of the law of the land was the office of a judge. Judges in common law systems had not only an office of judgment but also, more specifically, a duty to decide in accord with the law of the land.⁴⁰⁹ Judges therefore had to follow the law of the land, regardless of whether or not it conformed to the law of nations. The concepts of law and judging thus worked together to confine judges to the law of the land, thereby limiting the domestic effect of the law of nations or any other “foreign” law, except to the extent it had been incorporated.

As a result, although American judges frequently relied on the law of nations, it was understood that they could treat it as having the force of law only where domestic law gave it domestic obligation. For example, where an enactment, such as an alien claims act, directly referred to the law of nations, judges had to rely on the principles of the law of nations to understand whether or not a claim was permitted. Less overtly, where the common law incorporated doctrines, such as prize and admiralty, that could be understood as part of the law of nations, the judges had to turn to the law of nations to understand these areas of law.⁴¹⁰ Even where its

407. *Id.* A colonial clergyman summarized the standard common law approach when he said that although “many of the rules of the Roman civil law, are received and adopted by universal consent in England, and are obligatory upon the people,” the English accepted the obligation of such rules “not from the authority of the Roman Emperors that ordained them, but from their own act in receiving and adopting them.” Mather, *supra* note 48, at 42. Similarly, it was said that the authority of admiralty “is merely derivative, from the sufferance and permission of the Court of common law,” and “the Courts of common law maintain a constant controul over the Courts of civil law jurisdiction.” *Taxier v. Sweet*, 2 U.S. (2 Dall.) 81, 83 (Pa. 1776).

408. Bradford R. Clark, *The Procedural Safeguards of Federalism*, 83 *Notre Dame L. Rev.* 1681, 1711–12 (2008) [hereinafter Clark, *Procedural Safeguards*]; Bradford R. Clark, *The Supremacy Clause as a Constraint on Federal Power*, 71 *Geo. Wash. L. Rev.* 91, 121 (2003) [hereinafter Clark, *Supremacy Clause*].

409. See Hamburger, *Law and Judicial Duty*, *supra* note 3, at 103–47.

410. For example, the international character of commercial law was recognized in *Swift v. Tyson*, 41 U.S. (16 Pet.) 1, 18–19 (1842). For this treatment of commercial law as an aspect of the law of nations adopted within state law, see Bradford R. Clark, *Federal Common Law: A Structural Reinterpretation*, 144 *U. Pa. L. Rev.* 1245, 1282–83 (1996).

doctrines were not adopted, the law of nations was often essential for understanding ideas that appeared to have been borrowed from it or at least developed in a manner consistent with it. On such grounds, as shown by Anthony Bellia and Bradford Clark, the law of nations seemed informative about concepts of sovereignty, and judges therefore sometimes relied on the law of nations to understand the Constitution's presumptive allocation of powers among the branches of the federal government.⁴¹¹ But the law of nations could not independently be legally binding. Hence, the profound significance of structural modes of enforcement.

In fact, the strongest position in favor of international law was not that it had any independent obligation in England and America, let alone any obligation superior to a statute, but rather that it was incorporated in its entirety.⁴¹² Even this, if taken literally, was problematic, for English and American law at times departed from the law of nations.⁴¹³ Nonetheless, the notion that the law of nations was entirely part of the law of the

For the way in which already in England commercial law was understood as a sort of localized custom sanctioned by common law, see Bacon, *supra* note 340, at 583–85; Hamburger, *Law and Judicial Duty*, *supra* note 3, at 144, 342. Thus, even when Mansfield and other judges reasoned generally about commercial law and said it was part of the law of nations, they understood that they could apply it because it had been adopted as part of the law of the land. Hamburger, *Law and Judicial Duty*, *supra* note 3, at 141–47.

411. Bellia & Clark, *supra* note 389, at 92 (showing that Constitution's allocation of powers among branches of federal government was informed by law of nations, which thus offered at least presumptive understanding of such powers).

412. Mansfield had once claimed to recall Lord Talbot saying that "the law of nations, in its fullest extent was part of the law of England." *Triquet v. Bath*, (1764) 3 Burr. 1481, 97 Eng. Rep. 936, 937–38 (K.B.) (internal quotation marks omitted) (claiming to quote *Buvot v. Barbut*, (1736) Cases Temp. Hard. 283, 284, 25 Eng. Rep. 777, 778 (Ch.)). Yet the point about the "fullest extent" was at most only an echo of dicta from another judge. Indeed, it may have been merely an echo of what Mansfield assumed to be implicit in what the other judge had said. Certainly, the point about the "fullest extent" does not appear in the manuscript reports of *Buvot* that have been examined thus far. And in the printed report, the reporter did not attribute such words to Talbot, but rather speculated in a footnote that it was what "the Court seems to have determined." *Buvot*, Cases Temp. Hard. 283, 25 Eng. Rep. at 778.

In fact, it is probably a mistake to be very literal in reading Mansfield's argument in *Triquet*. He was a subtle judge, and he surely understood that if the point about the "fullest extent" were taken at face value, it would be incorrect. He thus had good reason to avoid making this assertion himself. Mansfield was deciding a question about the immunity of ambassadors, and regarding this, it is particularly clear that, as put by one scholar, what Mansfield attributed to Talbot was "all nonsense so far as the seventeenth and eighteenth centuries are concerned." E.R. Adair, *The Extraterritoriality of Ambassadors in the Sixteenth and Seventeenth Centuries* 88 (1929). For Adair's evidence, see *id.* at 237–43. In the end, therefore, it is difficult to avoid the conclusion that Mansfield was playing with overstatement for other purposes. Hamburger, *Law and Judicial Duty*, *supra* note 3, at 350 n.43. He needed an argument, and to this end, he was not above attributing an overgeneralization to a deceased predecessor.

413. For example, Adair observes how English law had not traditionally recognized the privileged status of ambassadors and other public ministers. Adair, *supra* note 412, at 237–43.

land appealed to some lawyers—perhaps because of its gratifying suggestion of the potential perfection of the common law.⁴¹⁴ At a more practical level, some American lawyers emphasized a complete incorporation of the law of nations as a means of building up a presumption in favor of the incorporation of the law of nations—as if they could thereby put the burden on legislatures to exclude objectionable aspects of the law of nations.⁴¹⁵

Yet the traditional presumption was that the law of nations was not obligatory as part of the law of the land, until it was incorporated by domestic law, and this was the path taken by the U.S. Constitution. The Constitution defined the supreme law of the land in terms of three types of domestic lawmaking authority, and it thereby excluded the law of nations, except where this was adopted in the Constitution, statutes, or treaties.⁴¹⁶ Moreover, the Constitution authorized Congress to “define and punish . . . Offences against the Law of Nations,” thus further revealing the Constitution’s assumption that Congress had to act before the law of nations could be binding.⁴¹⁷

414. Somewhat similarly, Jefferson and some other Americans claimed that natural rights were not sacrificed in the formation of civil society and its law. For such claims, see Hamburger, *Natural Rights*, supra note 20, at 958. Like the claim discussed in the text, this too, in its own context, was used to shift burdens of persuasion.

415. For example, in *Rutgers v. Waddington*, when New York Mayor James Duane strained to suggest that a rule in Vattel about occupied enemy property was part of the law of New York, he echoed Mansfield’s allusion to Talbot. Hamburger, *Law and Judicial Duty*, supra note 3, at 350 & n.43. Shortly afterward, when Chief Justice M’Kean of Pennsylvania explained the prosecution of Longchamps under the law of nations as adopted in the law of Pennsylvania, he took the short cut of echoing Mansfield—saying “the law of nations . . . in its full extent, is part of the law of this State, and is to be collected from the *practice* of different Nations, and the *authority* of *writers*.” *Respublica v. De Longchamps*, 1 U.S. (1 Dall.) 111, 116 (Pa. O. & T. 1784).

In *Rutgers*, Duane even suggested that the law of nations was a part of New York law, unless particular elements of it were very clearly and specifically excluded by the legislature—thus suggesting an especially strong or conclusive presumption of incorporation. Hamburger, *Law and Judicial Duty*, supra note 3, at 350 & n.43. In so doing, however, Duane made the mistake of taking Mansfield’s statement literally and of using Mansfield’s comment to suggest what the English judge had not—that it could be difficult for a statute to exclude the effect of the law of nations. Duane therefore faced the embarrassment of reading a newspaper report that Mansfield had responded to Duane—with “the greatest politeness”—that “the law of nations could never be pleaded against a law of the land.” *American Intelligence, Columbian Herald* (Charleston), June 17, 1785, at 3. For the context and Duane’s denial, see Hamburger, *Law and Judicial Duty*, supra note 3, at 351–52 & n.45. Duane’s misuse of the law of nations was widely condemned in New York, and the case settled for fear that the Supreme Court would reverse judgment. *Id.* at 532–33.

416. For the three types of federal lawmaking, see Clark, *Procedural Safeguards*, supra note 408, at 1711–12; Clark, *Supremacy Clause*, supra note 408, at 121.

417. U.S. Const. art. I, § 8, cl. 10. Not only in 1787, but also earlier in the 1780s, at both the state and the federal level, the presumption was that a legislature had to specify what offenses against the law of nations would be punishable at law. For example, in 1781, Congress and the states assumed that the states would have “to enact punishments against violators of the law of nations” or (as put in Congress’s transmission) the states would have

The states and the United States evidently could incorporate the law of nations within their own laws, and in such circumstances, they were legally bound to the law of nations. But they did not have to incorporate the law of nations. Accordingly, to the extent they obeyed the law of nations, they must have been responding to other mechanisms.

B. *Going Beyond Adherence to the Law of Nations*

Indeed, whatever led the American states to obey the law of nations must have been more than any legal obligation, for rather than be content merely to adhere to the law of nations, the American states often went further. It is recognized that the American states were careful to meet the standards of the law of nations. Yet, as illustrated here by Virginia, the American states tended to understand that the law of nations merely established a moral minimum, and they therefore at times self-consciously adopted more generous policies.

One of the areas in which the state of Virginia went beyond the law of nations was in its treatment of enemy merchants who remained in time of war. It will be recalled that the law of nations gave enemy alien merchants a grace period to withdraw from a state if the local sovereign declared war on their sovereign, and that the British Crown not only followed the law of nations in this regard but also sometimes went further by allowing foreign enemy merchants to stay with the protection of the law.⁴¹⁸ In a similar spirit, the Virginia statute adopted after the arrival of the Algerians concluded with a clause preserving the rights of foreign merchants in the state: "Saving always to the merchants of any foreign state, betwixt whom the United States of America war shall have arisen, and to their families, agents, and servants, found in this commonwealth at the beginning of the war, the privileges allowed by law."⁴¹⁹ This drew upon the grace period of the law of nations but, like the British approach, was more generous. Although it did not seem suitable for entering enemy aliens of dubious intent, such as the Algerians who arrived in

"to enact laws for punishing infractions of the law of nations." 21 Journals of the Continental Congress 1774-1789, at 1136 (Nov. 23, 1781) (Government Printing Office 1912); By the United States in Congress Assembled (Nov. 23, 1784), Massachusetts Historical Society, Robert Treat Paine Papers, Reel 18 (on file with the *Columbia Law Review*). In 1787, on account of the uncertainty of the law of nations, it was recognized that not only the punishments but also the very offenses would have to be spelled out, and the U.S. Constitution therefore carefully authorized Congress to "define and punish offences against the law of nations." U.S. Const. art. I, § 8, cl.10. Indeed, when Gouverneur Morris proposed this language, he explained that he did so because "the law of nations" was "often too vague and deficient to be a rule." 2 Records of the Federal Convention of 1787, at 614-15 (Max Farrand ed., 1937); see also Ramsey, *supra* note 358, at 346 (discussing Morris's suggestion).

418. See *supra* text accompanying notes 142-144.

419. An Act Giving Powers to the Governor and Council in Certain Cases, *supra* note 370.

1785, it suggests the attitude the Virginians were willing to take toward remaining enemy aliens, even if from the Barbary Coast.

As for enemy aliens of worrisome intent, the Virginia legislature gave them the benefit of the doubt in two ways that the law of nations did not. First, although persons engaging in war on their own or under a non-sovereign power could not claim the benefit of the law of nations, the Virginia statute did not treat such individuals differently from the subjects of a sovereign enemy power. Second, even if enemy aliens were acting on behalf of a sovereign power, they could be engaged in informal warfare. In this way, too, they could be unlawful combatants, who, under the law of nations, could be subjected to the harshest measures. The Virginia statute, however, authorized only detention, questioning, and expulsion. Virginia had no reason for severity against the Algerians or similar visitors who might come later. Therefore, neither the executive nor the legislature sought to do more than to prevent them from doing harm.

Just how far the Virginia executive went in treating the Algerians with respect is confirmed by how it actually handled them. The executive delayed searching their belongings, for although it felt the necessity of removing them to Richmond to ask some preliminary questions, it apparently hesitated to break into their possessions before it had a statute—not for fear of violating their constitutional rights (for they had none), but rather presumably out of a concern that the search might overstep the lawful authority of the executive. Once the council realized that it could not wait for legislative authorization, it arranged for two Virginians to interrogate the prisoners and search their baggage, but apparently with no coercion other than confinement.

As might be expected, the questioning was to no avail, except to raise further suspicions. Although the prisoners insisted that they were Moors, it seemed that they might be Algerians; they carried papers that were inconsistent with their stories; they were without weapons; only one of them had money, and little of that. They also had some papers written in Hebrew, which they said were to “admit them to places of worship,” but which the interrogators could not understand. In the end, the interrogators were “much dissatisfied with the appearance and account of these People,” but were “able to make no further discovery than what is above related.” The prisoners were also disappointed, for although they hoped to go to Philadelphia, they were given to understand that they would be heading back to Norfolk—this being the shortest route to the place whence they came.⁴²⁰

420. Letter from Wm. Foushee to Gov. Henry (Dec. 6, 1785), in 4 *Calendar of Virginia State Papers*, supra note 347, at 71. On December 5, 1785, Governor Henry “called the attention of the Council to the case of certain persons supposed to be natives of Algiers & who have been detained by order of the Governor from an apprehension that they might possibly have designs injurious to this Commonwealth.” The council advised a search of the visitors and their belongings:

Although the Virginia executive expelled the state's suspicious visitors, this only shifted the location of the problem. Shortly afterward, they turned up in Charleston, where they again provoked concern. This time, they responded to questions with aggression:

A disturbance happened this afternoon, between two men who are said to be Algerines, dressed in Asiatic habits, and who have travelled from Virginia here; one of them[,] on a question being asked, drew a dirk and made a pass at the person, which happily

The Board advise his Excellency to request One of the Civil Magistrates, attended by Colo. Meriwether, to search the baggage & persons of the said supposed Algerines and report to the Governor the result of such search. If any thing shall appear which may induce a suspicion that the enlargement of the above mentioned persons may be prejudicial to the community, The Board further advise that they be detained till the further order of the Executive, if otherwise, that they be sent to Hampton at the public expence & be furnished with a pass to go to Norfolk in order that they may procure a passage to their own country.

3 Journals of the Council of the State of Virginia, *supra* note 347, at 495. The next day, one of the interrogators wrote to Governor Henry:

Agreable to the request of your Excell'y and Hon'ble Board, I have this evening accompanied Colo. Meriwether in making full enquiry of the Persons and Baggage of the three Algerines or Moors. Find a number of Papers, which induce suspicion only from their being contradictory as to the names and Purposes which these People are called by and intention of pursuit. On being enterrogated on these points, they answer that these Papers being written in English, they cannot say what the contents are, or be accountable for the mistakes of those who may have written them. They deny being Algerines, but say they are Moors. No offensive or defensive weapons appear on them, or in their Baggage. One of them only was possessed of any money. The whole amount of his stock was sixteen Pounds two shillings and 1 1/2 d. Lest your Excellency may not have been apprised of one circumstance, I take the liberty of observing that they are in possession of a Receipt from the Capt. of the Douglass, for Thirty Pounds, the amount of Passage for these. They say this money was borrowed from a Jew in London. They have several papers which bear marks of authenticity, but being in Hebrew their contents are unknown. They say the Papers admit them to places of worship. This may be so, or they may be Letters of credit for any thing which I know to the contrary. Understanding that they were to go to Norfolk instead of Philadelphia, seem'd much distressed, and made many questions respecting this determination. Tho' I confess myself much dissatisfied with the appearance and account of these People, have been able to make no further discovery than what is above related.

Letter from Wm. Foushee to Gov. Patrick Henry, *supra*, at 71. Accordingly:

The Governor informed the board, that, from the report of Doctor Foushee, who was requested to search the persons & baggage of the people supposed to be Algerines, nothing suspicious appeared against them, and laid before Council an account of the expences of the said people, while detained by orders of the Executive, amounting to twenty two pounds five shillings—Whereupon—The Board advise that the auditors be directed to grant a Warrant on the Contingent Fund for the sum aforesaid payable to Colo. Meriwether, who is requested to settle & pay off the said account.

3 Journals of the Council of the State of Virginia, *supra* note 347, at 496.

missed him. They are since taken into custody, and will undergo an examination.⁴²¹

After imprisoning and questioning the Algerians, the South Carolina executive probably also expelled them. The details are elusive, but, like Virginia, South Carolina may well have sought safety in detention and deportation, while simultaneously avoiding harsh measures.

Revealingly, while Virginia confined and expelled the Algerians, it also urged cooperation. From a position of relative weakness and ignorance about the intentions of the Barbary States, Virginia, and more generally the United States, could make a range of different moves: on the one hand, negative moves toward safety, retaliation, and ultimately war; on the other hand, positive moves toward nonaggression, cautious cooperation, and perhaps even alliance. Accordingly, after seeking safety without harshness in November and December, the Virginia legislature in January instructed its delegates to Philadelphia “to move in Congress that treaties of amity may be immediately entered into between the United States and the several independent maritime States on the Mediterranean and Atlantic seas.”⁴²² As might be expected, the single threatening appearance of the Algerians was enough to provoke a retreat to safety, but not retaliation, let alone an armed response. After seeking safety, moreover, the state could still make clear that it preferred cooperation. These were among the measured responses that might be expected in the structural mode of interaction encouraged by the law of nations and its principle of protection.

C. *Protection and Structural Enforcement*

The events in Virginia illustrate how the principle of protection contributed to the structural enforcement of international relations and law. These days, there is an increasing focus on international law as a judicially enforceable legal restriction.⁴²³ In the traditional model of international law, however, the emphasis was on structural enforcement—the sort of enforcement that was primarily in the hands of executives. Although the law of nations could be judicially enforced (at least as to individuals) where it was adopted within the law of a state, it seemed more significant for establishing a structural model of international relations.⁴²⁴ In this context, the principle of protection was essential.

421. Extract of a Letter from a Gentleman at the Wateree, Dated March 19, Norwich-Packet, Apr. 20, 1786, at 2; see also Peskin, *supra* note 338, at 300 (quoting letter).

422. Journal of the House of Delegates of Virginia, *supra* note 370, at 153 (Jan. 21, 1786).

423. For a discussion of this as to the aspects of international law that were traditionally enforced only by military tribunals, see Robert Chesney & Jack Goldsmith, *Terrorism and the Convergence of Criminal and Military Detention Models*, 60 *Stan. L. Rev.* 1079, 1081, 1109–11 (2008).

424. Although this point differs from the rational choice analysis of Jack Goldsmith and Eric Posner, it is consistent with it. Goldsmith & Posner, *Limits*, *supra* note 386, at 7–10.

States could move up or down a scale of responses to other states or powers, and the principle of protection allowed a state to move downward, at least in relation to individuals.⁴²⁵ As already seen in Virginia, for example, when the state felt threatened by the entry of the Algerians, it took defensive measures as permitted by the law of nations and its principle of protection. But it did not at this stage need to pursue retaliation against the prisoners or military force against the Barbary States, and, indeed, it soon urged Congress to seek cooperation and even friendship.

This sort of structural enforcement, on the foundation established by the law of nations and the principle of protection, was particularly important as to prisoners of war. Today, the U.S. Supreme Court suggests that at least some of the rights of such prisoners under international law may, perhaps, be judicially enforceable by the ordinary courts of law.⁴²⁶ Prisoners of war, however, cannot be said to owe allegiance and thus are almost by definition outside the protection of the law—a conclusion that preserves their rights as well as the power of the United States to protect its captured soldiers. In the eighteenth century, prisoners of war lacked judicial enforcement of their rights under the law of nations. Nonetheless, the American states tended to treat British prisoners of war with considerable dignity, in accord with the law of nations, and even above such standards, knowing that they could always, if necessary, resort to a tougher approach.⁴²⁷ They did so because they wanted such treatment

425. This dynamic was long recognized by both the law of nations and the common law. For example, Magna Carta contained a provision about “such merchants as are of the land at war with us,” which explained that:

[I]f such are found in our land at the beginning of the war, they shall be detained, without injury to their bodies or goods, until information be received by us, or by our chief justiciar, how the merchants of our land found in the land at war with us are treated; and if our men are safe there, the others shall be safe in our land.

Magna Carta, ch. 41 (William Sharp McKechnie trans., MacMillan 1905) (1215) (In some issues of Magna Carta, this was chapter 30). Already in England it was said that prohibited aliens could have such a license.

For an American example, see Thomas Jefferson, A Bill Concerning Aliens, Report of the Committee of Revisors Appointed by the General Assembly of Virginia in MDCCLXXVI (Chap. LVI) 42 (Richmond, Dixon & Holt 1784) (providing for treatment of enemy merchants and other enemy aliens in same manner as Americans were treated by the enemy).

426. *Hamdan v. Rumsfeld*, 548 U.S. 557, 631–32 (2006) (holding Hamdan was entitled to protections of Common Article 3 of Geneva Conventions).

427. The ordinary instructions to military officers during the War of Independence apparently assumed treatment of prisoners in accord with the law of nations.

No less than today, instructions had to be made particularly explicit for private persons who joined the battle—as when Congress instructed commanders of private ships (acting under commissions or letters of marque) not to “torture” their prisoners. Instruction number six to the commanders of private ships or vessels was:

If you or any of your officers or crew shall, in cold blood, kill or maim, or by torture or otherwise, cruelly, inhumanly, and contrary to the common usage and the practice of civilized nations in war, treat any person or persons surprized in the ship or vessel you shall take, the offender shall be severely punished.

for their own men in the hands of the enemy. Equally significant, the American states could afford to adhere to the law of nations because the states were confident that, if the enemy abused their prisoners, they enjoyed a right to reciprocate under the law of nations. In this sense, the principle of protection was important not only for allowing states to move down the scale of relations, but also upward.

In other words, the principle of protection gave states the confidence that they could meet and even exceed the requirements of the law of nations, without losing their ability to retreat to harsher measures.⁴²⁸ In particular, Virginia could afford to treat the Algerians in accord with the law of nations (not to mention ordinary decency) because it knew that the law of nations, including the principle of protection, allowed it to take a tougher approach if this turned out to be necessary. For example, if the Algerians were scouting American cities for an informal attack, or if they were aiding a non-sovereign enemy power, then the American states did not even owe them the protection of the law of nations, let alone the protection of the laws of the American states. The law of nations and its principle of protection thus made clear that Virginia could always fall back to a position from which it could vigorously protect itself, and this left it with the confidence to adopt a very moderate posture—one more generous than was clearly required by the law of nations.⁴²⁹

Of course, the structural model was not enough, on its own, to ensure cooperation, for it worked only when nations left no doubt that uncooperative conduct and, in particular, injurious conduct would be reciprocated in kind. Americans, for example, already had rather wishful expectations for peace, trade, and mutually respectful relations, and when they committed themselves to act on such expectations without making clear their willingness to respond to injury, they invited other nations to treat them with contempt. For example, during the War of Independence, when Britain kept its American prisoners in “loathsome” conditions, the United States anxiously insisted on civilized conduct, believing that “our moderation may ever lead them into the practice of humanity.”⁴³⁰ Even when Americans retaliated, they did so only rather spasmodically, without adequate information and without coordination

Extracts from the Journals of Congress, Relative to the Capture and Condemnation of Prizes, and the Fitting Out Privateers; Together with the Rules and Regulations of the Navy, and Instructions to the Commanders of Private Ships of War 44 (Philadelphia, John Dunlap 1776).

428. For the relevant game theory, see Lisa Bernstein, *Merchant Law in a Merchant Court: Rethinking the Code’s Search for Immanent Business Norms*, 144 U. Pa. L. Rev. 1765, 1787–92 (1996).

429. Although, during the War of Independence, the states attempted to make citizenship seem attractive to American colonists who persisted in their British allegiance, Virginia did not offer this opportunity to the Algerians.

430. *Order of Virginia Council Placing Henry Hamilton and Others in Irons* (1779), in 2 *The Papers of Thomas Jefferson*, supra note 112, at 292, 294.

among the states.⁴³¹ Looking back, they had to wonder whether it was effective policy to have “long and vainly endeavoured to introduce an emulation in kindness,” for the British recognized that there would be no penalty and therefore made no haste to reform their treatment of prisoners.⁴³²

This was the sort of miscommunication that could end up requiring Americans eventually to resort to more extreme measures. As already seen, Virginia responded to hostilities from the Barbary States by urging Congress to seek a treaty of peace. It was widely understood that the Barbary States were engaged in a form of extortion, and the United States sought to conciliate them with large payments.⁴³³ Not surprisingly, therefore, the United States soon found itself treated contemptuously, and it eventually had to move sharply down the scale to the point of pursuing dramatic military action.⁴³⁴ The structural model of international rela-

431. The slow and uncoordinated efforts may be observed in the very late, reluctant decision of Massachusetts (more in response to families than as a matter of policy) to impose British-style treatment on British prisoners. See Act for Retaliating upon the Enemy (1781), Oct. 1780 Session, Ch. XXIII, in *Acts and Laws of the Commonwealth of Massachusetts* 44 (Boston, Benjamin Eads 1781) (finding it necessary to invoke “the Law of Retaliation . . . in order to compel the enemy to use their Prisoners in a Manner conformable to the Dictates of Humanity and the Law of Nations”).

This sort of statute stood in contrast to some earlier instances in which the legislature had requested the executive council to retaliate in response to particular injustices. See, for example, Resolve Requesting the Council to Retaliate upon a British Officer, of Equal Rank with Capt. David Ropes Until Said Capt. Ropes Is Liberated and Exchanged (1779), in 21 *Acts and Resolves, Public and Private, of the Province of Massachusetts Bay* 184 (1922); Resolve Requesting the Council to Retaliate upon the Surgeon of the British Sloop of War (Lately Captured by the Dean and Boston Frigates) for the Ill Treatment of Dr. John Quin, Late Surgeon of the Privateer Sullivan, Now Prisoner at Halifax (1779), in 21 *Acts and Resolves, Public and Private, of the Province of Massachusetts Bay*, supra, at 184.

When retaliation was more prompt and systematic, it could work—the key being to take predictable, credible, firm measures in a manner designed to reduce rather than inflame the conflict. For example, when a British Captain, Richard Lippincott, hanged an American prisoner, Washington demanded the surrender of Lippincott, and failing that, ordered the execution of a British prisoner of the same rank, Charles Asgill. Although the British did not turn over Lippincott, an accommodation was reached: Congress released Asgill, and the British restrained themselves in other ways. Edwin G. Burrows, *Forgotten Patriots: The Untold Story of American Prisoners During the Revolutionary War 181–83* (2008).

432. Order of Virginia Council Placing Henry Hamilton and Others in Irons, supra note 430, at 294.

433. Initially, in 1786, Congress could not raise the money. Peskin, supra note 338, at 306; Wilson, supra note 345, at 127. For later attempts to pay ransom, see C.M. Kortepeter, *The United States Encounters the Middle East: The North African Emirates and the U.S. Navy (1783–1830)*, *Revue D’Histoire Maghrebine* 301, 305–07 (1983); Wilson, supra note 345, at 128. The latter argues that it was not until Algiers had seized over one hundred Americans in 1793 “that the public began to respond energetically to the crisis” and that this “prompted the government to act more expeditiously on the matter.” *Id.* at 140–41.

434. Kortepeter, supra note 433, at 307–09. For the sense of insult felt by Americans, see Martha Elena Rojas, “Insults Unpunished”: Barbary Captives, American Slaves, and the Negotiation of Liberty, in *Early American Studies* 159, 160 (2003).

tions had its advantages, but it was apt to work more spasmodically than smoothly when a democratically inclined republic, being reluctant to confront unpleasant realities, relied on overly optimistic assumptions about other powers. At least, however, when Americans vigorously pursued the structural model of enforcement, it was generally effective in inducing peaceful relations.

The principle of protection was thus an essential part of how the law of nations facilitated reciprocal conduct. The law of nations generally allowed nations to retaliate for violations of this law. In addition, the principle of protection contributed to this structural enforcement, for although it was part of the law of nations, it was also part of the laws of particular nations. In this capacity, it made clear that states could deny the protection of their laws to enemy aliens. Indeed, it revealed that states could not give such protection to prisoners of war. Thus, not only the law of nations but also the principle of protection left room for each nation and, in particular, its executive to participate in the structural enforcement of international relations and law.

VII. THE CONTINUED VALUE OF THE PRINCIPLE OF PROTECTION

The principle of protection, far from being of merely historical interest, remains a valuable solution to a wide range of contemporary problems. At the very least, the principle addresses these problems in a manner advantageous for nations and persons within their protection. But this is not all. In addition, it leaves room for mechanisms that limit the dangers for persons outside protection.

Of course, not all traditional principles solve contemporary problems. And few principles, old or new, solve any problem completely. Sometimes, however, a past ideal continues to offer a valuable model, and this is true of the principle of protection.

A. *Legal Strategies*

It has been seen how the principle of protection clarifies the legal strategies available to government, but does it offer a desirable understanding of governmental authority? An initial answer can be found in the clarity and breadth of authority that the principle of protection demarcates both for individuals and for government.

Of course, there are apt to be concerns about any attempt to draw a sharp line of authority—in this instance, a boundary between the rights of persons within protection and the power of government over persons outside it. Clear-cut distinctions are not always evident in life, and in law they may therefore seem overstated, unjust, and thus in need of qualification. Certainly, if the complexity of life, with its refined shades of difference, should be directly reflected in law, then what are needed are loose standards, balancing tests, and multifactor evaluations. From this per-

spective, the very existence of a boundary as clear-cut as that of protection is apt to seem disturbing.

It is necessary, however, to distinguish between substantive rules of justice and rules demarcating spheres of authority. Undoubtedly, most substantive rules of justice must be complex and can rarely be clear. At the same time, there must also be rules demarcating different spheres of authority, and if these rules are to be of much use, they must delineate the different realms of authority with clarity and breadth.

The freedom of an individual and the power of a government are valuable precisely because they are spheres of authority—spheres in which there is a substantial degree of freedom or discretion, either for the individual to choose her own path in life, or for the government to select its policies. These realms of authority need to be kept distinct, so that the individual and the government can each respond to events freely, even imaginatively, without interfering with the authority belonging to the other. For the individual, her authority is her civil liberty, within which she can hope to find happiness. For the executive, its authority is its constitutional power, within which it must hope to be able to secure the nation.

These spheres of authority, both powers and rights, have the greatest value when they are sufficiently clear and broad. If individuals are uncertain about the scope of their civil rights, they cannot exercise their liberty without much expense and perhaps without government permission, thus rendering their liberty vulnerable. And, of course, if their rights are not broad enough, their liberty can scarcely be satisfying. Thus, only if the authority of individuals is clearly and expansively delineated are they really apt to enjoy it as a sort of freedom.

By the same token, if the executive is to have much success in defending the nation, it needs a sphere of authority that is at least clearly delineated. In other words, the executive needs a realm of discretionary power in which it can be confident about the scope of its lawful power without worrying about judicial second guessing. In contemporary scholarship, advantages are seen in all sorts of ambiguities, including the possibility that the executive can enjoy an uncertain, twilight zone of authority in the space between constitutional authorization and legislative authorization. The executive, however, needs to be able to observe a danger, decide upon a response, and act, without waiting for a lawsuit or a judicial decision—let alone for appeals to higher courts.⁴³⁵ The executive, moreover, cannot afford the delegitimizing effect of doubts about the lawfulness of its conduct, and it therefore needs a sharply demarcated realm in which it clearly has a right to act. Otherwise, unnecessary

435. In military argot, it needs to act inside the enemy's OODA Loop—this being a decisionmaking model initially formulated for fighter pilots, who must Observe, Orient, Decide, and Act.

doubts, even at the edges, will end up undermining the popular support the government needs in a crisis.

Clarity, though, is not enough, for like individuals, the executive also needs a sufficiently broad sphere of authority—a scope of lawful authority that extends to all that it might reasonably need to do. If it is too confined, the executive will predictably feel the necessity of acting outside its lawful authority, thus undermining the ideal that government power can and should be exercised under law.⁴³⁶

An executive's choice of how to respond to serious danger is almost always difficult, and it almost always requires the executive to select among a range of unhappy possibilities. In retrospect these will turn out to have been good or bad, but the executive needs to make its choices promptly, with limited information, and sometimes even minimal chance of success. In such circumstances, the executive, let alone the legislature, needs a broad sphere of authority or power to protect the nation without unnecessary impediments. Perhaps, if the United States inhabited another world, one that was entirely orderly, the executive could conduct war in accord with the judiciary's choices. In this world, however, one that is often chaotic, the executive needs to make decisions promptly and on its own, and it needs a broad enough authority to make successful decisions within the confines of law.⁴³⁷

436. As James Madison observed to Jefferson about the drafting of the U.S. Bill of Rights, it was essential that it not limit federal power where the government might need it in an emergency:

Supposing a bill of rights to be proper . . . I am inclined to think that absolute restrictions in cases that are doubtful, or where emergencies may overrule them, ought to be avoided. The restrictions however strongly marked on paper will never be regarded when opposed to the decided sense of the public, and after repeated violations in extraordinary cases they will lose even their ordinary efficacy.

Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), *in* 11 *The Papers of James Madison* 299 (1978).

437. Incidentally, one of the most distinguished of English chief justices, Sir John Holt, opined that the English constitution necessarily gave the king a power he could misuse—this being the nature of a power that was left to executive discretion or wisdom. As Holt explained, “[n]o human Constitution can be so exactly Framed but there may be some Inconvenience.” Under the English constitution, “the King is Invested with Great Powers and large Prerogatives which the Law doth Suppose he will Use and exert in Wisdom and Justice for the Benefit of his Subjects,” and therefore “[i]t’s no Argument to Say he hath them not because they may be abused.” The case concerned the king’s ability to alienate Crown revenues, and Holt therefore elaborated that “the Disabling of the King from Alienating the Crown Revenues is Repugnant to and Inconsistent with the Constitution of the Government and must produce many Mischiefs and Inconveniences,” for “in every Government there ought to be a Constant and Standing Power to defend and Secure the State agt. all Accidents”—to which he added by way of explanation, “I mean such [power] as is legal, for a natural Strength may be wanting, but that is accidental and is not the fault of the Constitution.” *R v. Horneby, Williamson, Snow, & Smith (The Bankers Case)* (Exch. Ch. 1695), *in* Holt’s *Opinions*, British Library, Additional Ms. 35979, at fol. 29r–30r; see also Hamburger, *Law and Judicial Duty*, *supra* note 3, at 212–15.

It may be objected that the principle of protection leaves the government such a breadth of clear authority that it is free to do unspeakable things to persons outside protection, but it must be kept in mind that protection is merely a preliminary principle. No one principle can do all things. Just as a garden gate would not be expected to serve as a flower pot, so too a principle that determines who is within a legal system cannot be expected to determine other questions, such as the rights that will flourish within the system or the power exerted over persons outside it. For example, although the principle of protection leaves many persons outside the gate and thus without rights under American law, it is entirely compatible with a wide range of other mechanisms that restrain the government in relation to such individuals. These mechanisms include familiar legal measures, such as statutes and treaties restricting executive officers in accord with international law and even higher standards. Protection is thus merely an initial question, not the end of the matter.

This initial principle, however, is essential. As already noted, it gives the government the clarity and breadth of authority it needs to defend its society. In addition, as also already noted, it gives the government the confidence it needs to deal with persons outside allegiance in a manner both safe and generous. Under the principle of protection, the government has the freedom to act charitably toward prisoners of war and others outside protection, while still reserving the power to act harshly should this become necessary. As seen in Part VI, this dual capacity in dealing with persons outside protection, to act with generosity or severity, as the government sees fit, allows the government to take the risk of generous conduct, thereby encouraging reciprocal cooperation from other nations or powers. The demarcation of government authority along a relatively clear and broad boundary of allegiance and protection is thus essential—essential both for domestic safety and for much of what little is civilized in international relations.

Of course, the authority outlined by the principle is not perfectly clear.⁴³⁸ And, of course, there may be occasions when the authority is too confined. On the whole, however, the principle has the advantage of demarcating clear and broad spheres of authority for both government and individuals.

B. *Domain*

Another problem for which the principle of protection is relevant is that of domain—in particular, the domain of the law over persons. In a multinational world, how far does the law of any one nation extend? Geographically, writs and other legal process have been seen to reach to the edges of the nation's sovereignty. But as to which persons? The principle

The questions of clarity and breadth also matter for political accountability, but this need not be pursued here.

438. See *supra* notes 16–17.

of protection offers a solution to this aspect of domain—a solution that is valuable in both a domestic and an international context.

1. *Domain and Consent.* — Rather than rely on the brute force of “control,” the principle of protection rests on assumptions about consent. It thereby solves the problem of domain in a manner that is both idealistic and practicable.

The principle of protection confines the domain of national law to persons who can at least be presumed to have submitted to allegiance. Although in contemporary legal positivism, law gets reduced to the rules coercively imposed by a sovereign, law was traditionally understood to have a consensually-derived moral obligation.⁴³⁹ From this perspective, no individual could have any civil or sovereign power or authority over anyone else without his consent. It therefore seemed evident that government had to have the consent of its people, who gave it their allegiance in exchange for its protection, including the protection of the laws.⁴⁴⁰

Of course, the moral theories that were understood to justify this vision of consent and protection are open to debate, and the sort of consent it assumed was often little more than a presumed consent.⁴⁴¹ Nonetheless, the consensual foundation of this vision and its principle of protection has a number of advantages. Most immediately, it explains why a nation’s law binds persons who owe allegiance and why the nation must give them protection. Moreover, rather than bind and protect individuals on account of their race, religion, national origin, or any other arbitrary measure, the consensual character of the principle of protection cuts through such distinctions. Above all, the consensual nature of the principle of protection avoids the imposition of law as mere force. Although the presumption of consent to allegiance, in exchange for protection, is sometimes apt to seem strained, it at least avoids the danger of reducing law to mere coercion.

This understanding of the domain of each nation’s law, as based on the consent of its people or society, has the further advantage of generally not allowing the protection and obligation of its law to extend outside that society. As to protection, this means that persons who do not owe allegiance cannot claim rights under domestic law. As to obligation, it means that the government and its courts cannot impose domestic law on persons outside allegiance. Today, some statutes and judicial opinions suggest that the courts of the United States can apply the law of the United States to protect and even constrain persons who owe the country no allegiance and who are thus outside the protection and obligation of its laws.⁴⁴² Although there are some benefits in thus extending its law to

439. Hamburger, *Law and Judicial Duty*, supra note 3, at 58; see generally *id.* at 43–44.

440. See supra notes 37–40 and accompanying text.

441. See supra note 51 and accompanying text.

442. See Parrish, supra note 4, 856–69 (arguing that extraterritorial jurisdiction has risks for United States and for international law); Raustiala, supra note 4, at 2506 (arguing

such persons, it is doubtful whether they outweigh the risks of imperialistically imposing American law on other peoples, let alone the risk of giving credence to such bullying ventures, which are already being reciprocated against the United States.⁴⁴³

This is not the place to weigh the competing considerations in detail, but it is worth noting the most salient costs of the limited domain implied by the principle of protection. From an international perspective, the principle of protection limits the use of American law as a national foundation for international justice. In particular, it would require foreigners to come within the nation's allegiance before asserting rights in American courts, and would limit them to bringing actions against other persons within the nation's allegiance. Within these parameters, however, the principle of protection would not pose an obstacle.

From a more national point of view, the principle has the cost of diminishing the capacity of the United States to impose its criminal law on foreigners.⁴⁴⁴ For example, in the case of a Frenchman in Thailand who initiates a criminal conspiracy that will end up with the sale of drugs in the United States, the U.S. would sometimes have difficulty prosecuting him.⁴⁴⁵ The "effects" test would reveal that a crime had been committed under American law, but, depending on the facts, the Frenchman might be outside American allegiance. In such circumstances, even if he were brought into the United States or its sovereign territory through an exercise of foreign or American force—that is, through regular or extraordinary rendition—he would remain outside American allegiance and thus outside the obligation of American law and the jurisdiction of its courts.⁴⁴⁶ Of course, if he voluntarily came within the sovereign territory of the United States, or if he had earlier come and had left behind property or family within the protection of its laws, he could be understood to have accepted a local allegiance and thus to have brought himself within the obligation of the law of the United States. Although this may not seem a sufficiently broad acknowledgement of the reach of American law, the principle of protection does not limit the United States from exercising jurisdiction over foreigners as much as may be supposed.⁴⁴⁷ Moreo-

against idea of "territoriality," by which "[t]he physical location of an individual determines the legal rules applicable and the legal rights that individual possesses").

443. For some doubts along these lines, see Parrish, *supra* note 4, at 841–56.

444. Of course, what today seems a cost was once a matter of principle. As observed in the early twentieth century, "[t]he United States has of all countries been the most consistent in its opposition to the doctrine of extraterritorial jurisdiction over foreigners." Philip Quincy Wright, *The Enforcement of International Law Through Municipal Law in the United States* 39 (W.S. Hein & Co. 2003) (1916).

445. This paragraph focuses on criminal prosecutions because this is the area in which the principle of protection has the most serious costs for the United States. There may also be some costs for civil actions, but not to the same degree.

446. Of course, it would a different matter if he were a Frenchman who committed his offense while within American allegiance and then fled to Thailand.

447. Consider, for example, a securities law case such as *Itoba Ltd. v. Lep Group PLC*, 54 F.3d 118, 120–22 (2d Cir. 1995). In its effort to create a market for its stock in the

ver, the United States has ample opportunity, by economic and political means, to persuade foreign individuals and companies to come within the reach of its law and to persuade foreign nations to apply their criminal laws for the benefit of the United States.⁴⁴⁸ It must be conceded, however, that the principle of protection would to some degree limit the power of the United States to impose its criminal law on foreigners, at least to the extent they are not within allegiance.

The larger question, however, is whether the United States can afford to legitimize an imperialistic use of law that undermines ideals of consent. This is desirable for neither the United States nor other nations. Much that is called justice, even international justice, can turn out to be imperialistic coercion when enforced by a strong nation, and it is therefore one of the advantages of the principle of protection that it limits an expansive use of domestic law. Put another way, expansive jurisdiction can have costs as well as benefits, and the inconveniences of confined jurisdiction are more easily manageable than the dangers of overly broad jurisdiction. From a short-term perspective, the international imposition of a strong nation's law may seem relatively harmless and potentially valuable. From a longer perspective, though, the legitimization of this sort of imperialism is worrisome, for it cannot be assumed that only the United States or some other relatively enlightened nation will exert such power. Ultimately, therefore, the interests of the United States and most other nations are aligned with the ideals of consent and protection and their constraints on the domain of national law.

The limited domain of law has the further benefit of diminishing the likelihood of conflict. If the United States uses its law to constrain or protect persons who have not even presumptively consented to allegiance, and if judges enforce it as to such persons, then the law is likely to become the source of unnecessary international tensions. As already noted, the United States has ample opportunity, by political means, to persuade other nations to apply their laws for the benefit of the United States. But if it extends the domain of its law outside the realm of alle-

United States, *Lep* placed some of its shares with an American depository and filed forms with the S.E.C. The court held that this was enough under the effects test to bring *Lep* within the court's jurisdiction. Yet the court could perhaps have relied on the old principle of protection. By placing property (its shares) within the United States and perhaps even merely by filing with the S.E.C., *Lep* may have brought itself within the protection of the law of the United States, and thereby subjected itself to the obligation of such law.

448. Resort to a political remedy was the traditional solution—even when the United States was not particularly powerful. Justice James Iredell explained:

When any individual . . . of any nation, has cause of complaint against another nation, or any individual of it, not immediately amenable to the authority of his own, he may complain to that power in his own nation, which is entrusted with the sovereignty of it as to foreign negotiations, and he will be entitled to all the redress which the nature of his case requires, and the si[tu]ation of his own country will enable him to obtain.

Ware v. Hylton, 3 U.S. (3 Dall.) 199, 259 (1796).

giance, whether to impose constraints or offer protection, it will inevitably interfere with the relationship of allegiance and protection enjoyed by other peoples as to their own governments, thus provoking resentment, if not worse. In contrast, the principle of protection confines the domain of law in a way that largely avoids this risk.

Even where there is no risk of conflict, the limited domain of law delineated by the principle of protection has advantages abroad, for it leaves room for other nations to make their own choices about their governance and liberty. Although the diversity of laws among nations can be an obstacle to shared ideals of liberty, the freedom of different societies to make their own choices permits a sort of specialization that maximizes liberty. Each people has its own preferences as to law and rights, and if each people is to have the satisfaction of its own choices, there must be not only physical boundaries between nations but also legal boundaries, which prevent any one nation from imposing its laws on the peoples of other nations. This is not to say that nations should ignore more universalistic claims, whether about government or about liberty, but if different peoples are to maximize their choices, they must have a freedom to choose when to follow universalistic ideals and when to follow their narrower customs and preferences. The principle of protection leaves them this freedom by confining the domain of law to persons who owe allegiance.

2. *Domain and Structural Enforcement.* — The limited domain of the law as to persons, as demarcated by the principle of protection, is also valuable because of its role in facilitating the structural enforcement of international law and, more generally, international relations. The traditional role of the principle of protection in this structural enforcement has already been observed, and this now can be evaluated in the context of contemporary international law.⁴⁴⁹ Even though aspects of international law are these days said to be judicially enforceable, structural enforcement mechanisms, including those permitted by the principle of protection, remain very significant.

Domestically, structural mechanisms are of crucial importance, perhaps especially for the preservation of individual rights. Few nations are more dependent than the United States on legally-defined rights and their judicial enforcement to limit government and protect individual liberty. At the same time, few nations have more self-consciously relied on structural mechanisms. At the institutional level, such structures are evident in the balances of power among the different parts of government, whether vertically between the federal government and the states or horizontally among the different branches of each government. At the social level, such structures are particularly pervasive and consequential, as famously observed by James Madison in *Federalist Number 10*.

449. For the structural enforcement of international relations, see *supra* Part VI.

If structural mechanisms are so profoundly important for the preservation of rights in the domestic realm, it should be no surprise that they are even more central in the international realm, where judicial mechanisms are less reliable.⁴⁵⁰ Obviously, the judicial enforcement of international law has a long way to go if it is to be very effective, let alone in the context of large-scale wars. Indeed, if any entity were eventually to develop the coercive power to enforce judgments against nations, it itself would pose a danger. Accordingly, the structural enforcement mechanisms, ranging from denying protection to engaging in war, should be considered valuable means of enforcing international law and, more generally, international relations.

The reality is that structural enforcement remains essential, for when push comes to shove in a perilous world, nations have little else to rely upon. This mechanism obviously does not offer refined substantive rules of justice that are continuously obligatory and judicially enforceable, but that is precisely what makes it work. In Hobbesian circumstances, in which there is no common sovereign, what ultimately limits the misconduct of nations is the clear and broad authority of other nations to respond in kind, as permitted by the law of nations, including its principle of protection. Nations such as the United States are subject to enough internal constraints that they are apt to recoil from doing much that the principle of protection permits them to do. Nonetheless, their power to do what the principle permits can sometimes discourage barbarism against their soldiers and other subjects. Thus, what the principle allows the United States to do is all the less likely to be necessary precisely because the principle so clearly permits it.

The principle of protection is thus valuable for its solution to the problem of domain—in particular, the domain of law over persons. At the very least, the consensual foundation of the principle delineates the boundaries of national law in a manner that limits oppression at home and the imperial imposition of law abroad. In addition, by limiting the law's domain in a way that leaves room for nations to engage in retaliation against enemy aliens, the principle of protection facilitates a practicable, structural mechanism for enforcing international relations and law.

450. In fact, Madison and his generation drew their understanding of domestic balances of power from the international context, in which it had long been understood that, both within nations and among them, a balance of power was necessary for the preservation of liberty. For example, Jonathan Swift wrote that "it will be an eternal Rule in Politicks among every free People, that there is a Balance of Power to be carefully held by every State with it self, as well as among several States with each other." Jonathan Swift, *A Discourse of the Contests and Dissensions Between the Nobles and the Commons in Athens and Rome* 5 (London 1701).

C. *Avoiding the Tension Between Safety and Civil Liberty*

Perhaps the most important advantage of the principle of protection is its capacity to avoid the tension between safety and civil liberty. The principle is essential if members of a society are to enjoy both of these ends of government.

1. *The Tension Between Safety and Civil Liberty.* — The tension between safety and civil liberty should be of profound concern, for in times of danger, when the tension seems particularly great, most governments conclude that they must deny some civil rights, even to their citizens. It is precisely in such times, however, when fears for safety overcome attachments to liberty, that the value of the principle of protection becomes particularly clear, for in most instances it avoids the necessity of sacrificing either safety or liberty.

In response to terrorism, many commentators, including lawyers and judges, have hinted that civil rights must sometimes give way to security. Although it is difficult to measure such sentiments, a hint of how widespread they are can be found in the suggestion that “the Constitution is not a suicide pact.”⁴⁵¹ To be sure, it is not, but for different reasons than usually assumed. Far from being a pragmatic excuse for denying constitutional rights to persons who are within the protection of the law, the notion that the Constitution is not a suicide pact should be a reminder that the Constitution, through the principle of protection, can be understood in a way that secures both safety and civil liberty.

When the executive forgets the principle of protection, it predictably undermines freedom. It will be seen in Part VIII that when the executive ignored the principle of protection in World War II, it interned not only Japanese citizens but also American citizens of Japanese descent.⁴⁵² Similarly today, the executive branch of the United States has lumped together persons within protection and persons outside it under the label of “enemy combatants.”⁴⁵³ On this basis, it has sought to try all of them in the same manner—under military commissions—thus denying the protection of the law to individuals who are owed such protection. This would be unnecessary if the executive understood the principle of protection. Having forgotten this principle, however, the executive assumes that safety and civil liberty are ultimately incompatible and that government inevitably must sometimes sacrifice civil liberty.

The Supreme Court has shared the executive’s assumption of incompatibility, but whereas the executive has concluded that it must ultimately ensure safety, the Court apparently assumes that, even if at the cost of safety, it ultimately must guarantee liberty. For example, in *Boumediene v. Bush*, the Court extended the right of habeas corpus to all captured per-

451. See, e.g., Richard Posner, *Not a Suicide Pact: The Constitution in a Time of National Emergency* 1, 31–33 (2006).

452. See *infra* text Part VIII.E.2.

453. See, e.g., *Hamdi v. Rumsfeld*, 542 U.S. 507, 509 (2004).

sons in places under American “control.”⁴⁵⁴ Indeed, the Court has left the executive under the impression that it can and perhaps must give criminal trials to prisoners of war.⁴⁵⁵ In these ways, the Court leaves the impression that security must sometimes be sacrificed for constitutional rights.

In forgetting the principle of protection, the Court has actually undermined not only safety, but also liberty. Most strikingly, when the Supreme Court in *Hamdi* accepts the executive practice of lumping together all “enemy combatants,” it concludes that an enemy combatant, even if a citizen, does not have a right to the full extent of due process.⁴⁵⁶ The phrase “citizen enemy combatants” is, in fact, an oxymoron, for it assumes that a citizen can also be an enemy in a foreign war. It is, moreover, a dangerous oxymoron, for in breaking down the old distinction between persons who owe allegiance and those who do not, it justifies the conclusion that a person within protection, even a citizen, can be denied judicial process and treated as an enemy. The Court has thus achieved the worst of both worlds. On the one hand, it allows habeas and possibly criminal trials for persons who are outside the protection of the law; on the other hand, it denies criminal due process to persons who are within such protection.

The principle of protection avoids these risks for safety and civil liberty. On the one hand, the principle requires the government, including both the executive and the judiciary, to recognize the civil rights of persons who are within protection. For example, it requires that the executive either release a captured citizen such as Hamdi or provide him with the full due process of law by trying him in an Article III court. On the other hand, the principle allows the executive, without judicial intrusion, to defend the nation against persons who cannot be presumed to have submitted to allegiance. For example, the principle allows the executive to imprison such persons, either within the United States or outside it, without giving them access to lawyers or any rights under American law—not even habeas corpus. In such ways, the government enjoys the discretionary power it needs to achieve safety from persons who are particularly apt to pose a serious threat, but it is barred from using safety or necessity as an excuse for diminishing the civil rights of persons within the society. Safety and civil liberty can thus usually be compatible, if founded on the principle of protection.

2. *Broadened Access and Narrowed Liberty.* — The way in which the principle of protection preserves civil liberties becomes especially clear when one considers how access to civil liberties can affect the extent of such liberties. An initial hint of this point has already appeared above,

454. *Boumediene v. Bush*, 128 S. Ct. 2229, 2262 (2008).

455. See *id.* at 2266 (stating that “privilege of habeas corpus entitles the prisoner to meaningful opportunity to demonstrate that he is being held” erroneously); *United States v. Noriega* 808 F. Supp. 791 (S.D. Fla. 1992).

456. *Hamdi*, 542 U.S. at 533–34.

but it deserves further attention.⁴⁵⁷ Put simply, broadened access to a right can often lead to a narrowed definition of the right, and it is therefore essential that the principle of protection reserve civil liberties for persons within the society.

The potential for an inverse relationship between the substance of a right and access to it can run in two directions. From one direction, as the substance of a right is expanded in response to individualistic demands, there can eventually be pressure to reduce access—a dynamic that has been observed in First Amendment doctrine.⁴⁵⁸ Another version of the problem, which is evident as to habeas, occurs in response to egalitarian demands for wider access to liberty. From this direction, as access is increased, there can sometimes be pressures for diminished substance.⁴⁵⁹ Of course, the pressures for contraction, whether for reducing substance or access, do not affect all rights all the time. But the pressures for contraction are very common, because they arise from the practical costs of demands for expansion.

The mechanism is not complicated. Judges can extend liberty in the direction of either access or substance. When they enlarge a right along one of these dimensions, they tend to deal with any costs by diminishing the right along the other dimension. Legislators could find other ways of minimizing the costs of expanded substance or access, but in the context of litigation, in which judges must focus on a particular right and how it is to be understood, they tend, when they adjust for costs, to remain within the scope of the right being litigated. For example, when judges expand the substance of a right, they usually must overcome any costs by cutting

457. For the hint, see *supra* text accompanying note 456.

458. Philip Hamburger, *Getting Permission*, 101 *Nw. U. L. Rev.* 405, 414 (2007) (showing that when judges expanded definition of freedom of the press, they subjected this right to compelling government interest tests and undermined the central and previously unqualified freedom from licensing of the press); Philip Hamburger, *More Is Less*, 90 *Va. L. Rev.* 835, 836–37 (2004) (showing that when Supreme Court expanded definition of free exercise of religion to include a right of exemption, Court concluded that a compelling government interest can justify substantial infringement of free exercise). Similarly, after the courts enlarged the scope of what could be examined on habeas, they introduced requirements about exhaustion of other remedies—thus accommodating their expansion of the right’s definition by cutting back on access.

459. For example, when the Supreme Court extended the Sixth Amendment jury right to defendants in state prosecutions, it ended up diminishing the right to a jury. Indeed, because the notion of a jury cuts across the Sixth and Seventh Amendments, the Court altered the right in both criminal and civil cases. The right to a jury in both criminal and civil cases has traditionally and emphatically been a right to a trial by twelve persons. See *Patton v. United States*, 281 U.S. 276, 292 (1930) (“A constitutional jury means twelve men as though that number had been specifically named . . .”). Today, however, after access to the Sixth Amendment criminal jury right has been expanded, the right to a jury, whether in criminal cases under the Sixth Amendment or in civil cases under the Seventh Amendment, is merely a right to a trial by half a jury. See *Colgrove v. Battin*, 413 U.S. 149, 160 (1973) (upholding six person federal civil jury); *Williams v. Florida*, 399 U.S. 78, 103 (1970) (upholding six person state criminal jury).

back on access, and when they expand access to a right, they usually must overcome any costs by cutting back on the right itself.

In this manner, when the Supreme Court assumes that foreigners abroad and even prisoners of war have access to American legal rights and process, it almost inevitably diminishes the substance of such rights. Thus, to go back to *Hamdi*, when the Court assumed that “enemy combatants” have a right to judicial process, it decided that even if they are captured citizens, they need not be given the familiar process of a criminal trial.⁴⁶⁰ Ordinarily, the court would be aghast at the thought that any citizen could be denied criminal due process. But it is simply impracticable for the executive to provide full due process to every prisoner of war. Therefore, once the Court came to believe that even captured enemy combatants had access to due process, it had to diminish what due process meant.

The effect is not unlike the addition of water to scotch. This ensures that there is enough to go around for everyone, but it satisfies no one. In the familiar lines:

If everybody is somebody,
Then nobody is anybody.⁴⁶¹

To be a citizen of the United States, or even merely to be a visiting alien, was once the basis for enjoying the rights delineated by the laws of the United States. Similarly, other peoples in their own lands had their own distinctive rights under their own laws. Now, however, there are suggestions that aliens who owe no allegiance to the United States—indeed, aliens who are its enemies and are even prisoners of war—have the protection of the law of the United States, including the process of its courts.⁴⁶² This approach seems generous in expanding access to American rights, but it leaves such liberty so diluted as to be scarcely worth drinking.

The principle of protection avoids this danger of diminished rights by avoiding overly expansive access. The reality is that a line demarcating access to American law has to be drawn somewhere, and this means that some persons will be within protection and others will not. A narrowly republican vision of society would confine legal rights merely to citizens. A much broader vision, from the perspective of a citizen of the world, would give American legal rights to all persons, regardless of allegiance. The principle of protection stands between these extremes, for it acknowledges protection for citizens, and even for aliens with local alle-

460. *Hamdi*, 542 U.S. at 533–34.

461. In the sing-song version of Gilbert and Sullivan:

When every one is somebodee,
Then no one’s anybody!

Gilbert & Sullivan, *The Gondoliers*, in *The Complete Plays of Gilbert and Sullivan* 521, 565 (Random House, n.d.).

462. See *supra* note 336; see also Chesney & Goldsmith, *supra* note 423, at 1132 (“Many commentators continue to argue . . . in favor of a strict criminal approach . . .”).

giance, but it generally denies protection to persons who owe no allegiance. It thus takes a broad view of who can claim legal rights, without going so far in expanding access as to require that the substance of such rights be curtailed.

3. *Preventive Restraint.* — A further aspect of how the principle of protection reconciles safety and civil liberty can be observed in the way that the principle allows a narrow range of preventive restraint. It permits the executive to prevent harms by physically restraining persons outside protection, without undermining the right of individuals within protection to be at liberty until they commit a crime and are found guilty.

In liberal societies, and especially in common law jurisdictions, the criminal law tends to draw a sharp distinction between persons who are presumed innocent and those who are found guilty. It thereby bars the imposition of criminal penalties on the basis of mere suspicion. Indeed, it ensures the freedom of individuals until a crime has been committed, and it further ensures that individuals cannot be locked up for long, unless they are found guilty through the processes of law. This is obviously of great importance for individual liberty.

At the same time, by allowing the government to confine individuals only after they have committed an offense, the criminal law creates risks for national security.⁴⁶³ Although this limitation on preemptive detention protects individuals from government, it also stands in the way of efforts to protect against serious threats, for it largely bars the government from physically confining individuals, even if they are profoundly dangerous, until after harm has occurred.⁴⁶⁴ The limitation on preemptive detention is thus not only a source of freedom but also potentially a source of peril.

The principle of protection is what allows the society to enjoy this freedom while avoiding much of the hazard, for it allows the executive to use preventive detention against persons who are outside protection. Enemy soldiers, spies, and saboteurs who come during wartime need to be captured before they act, not merely punished afterward. They need to be restrained, moreover, without giving them an opportunity to expose information or present enemy propaganda in court. It is therefore essential that such persons be subject to detention without being able to claim habeas or other protection of the law—a law to which they do not submit. If they had a right not to be detained except under the criminal law and

463. Matthew C. Waxman, *Administrative Detention of Terrorists: Why Detain, and Detain Whom?*, 3 *J. Nat'l Security L. & Pol'y* 1, 11 (2009) (“[F]ighting terrorism requires stopping suspects before they act; and criminal justice is deliberately tilted in favor of defendants so that few if any innocents will be punished . . .”).

464. Of course, there are exceptions, including some denials of bail, civil commitments, and prosecutions—especially prosecutions for conspiracy, attempts, possession offenses, and vagrancy and other precursor offenses (which are said to precede more serious crimes). For the use of prosecutions for possession offenses in this manner, see generally Samuel Bray, *Power Rules*, 110 *Colum. L. Rev.* (forthcoming May 2010).

its processes, the government would be crippled in its efforts to stop them and protect the country.

At the same time, by allowing the executive to act preemptively in such circumstances, the principle of protection more generally preserves the freedom from preventive detention. If the executive feels obliged to act through the criminal law to imprison persons who do not owe allegiance, it will have such difficulty preventing harm to the United States that it will soon be tempted to break down the sharp distinction between the free and the guilty. Even the judges will feel obliged to acquiesce—this being evident, as noted above, from the Supreme Court's decision authorizing the United States to hold and try Hamdi, a citizen, without the benefit of a regular criminal trial.⁴⁶⁵

Thus, for reasons of both safety and civil liberty, executives must sometimes be able, lawfully, to avoid the mechanisms of the criminal law and to confine individuals on the basis of mere suspicion. In emergencies, this may be necessary as to persons within protection, as recognized by the constitutional provisions on the suspension of habeas. As to persons outside protection, preventive detention and other measures are more regularly necessary. It is therefore fortunate that, under the principle of protection, the executive can act outside the criminal law and its processes against persons who do not owe allegiance. The executive can thereby prevent serious harms without feeling the need to erode the distinction between the free and the guilty.

4. *Unauthorized Aliens*. — One of the ways that the principle of protection allows the executive to prevent harm is through the executive's power to exclude and expel unauthorized aliens. The status of unauthorized aliens is notoriously puzzling. For some purposes they have extensive civil rights, but for other purposes they do not. The principle of protection explains this otherwise disturbing incongruity and does so in a way that, once again, preserves safety and civil liberty—indeed, even for persons who would not otherwise have any civil rights.

Unauthorized aliens simultaneously have rights and do not. For example, foreigners who are present in the United States without permission and thus illegally are said to enjoy Fourteenth Amendment equal protection and Fifth Amendment due process.⁴⁶⁶ At the same time, when the government of the United States bars, detains, questions, or expels such foreigners on account of their illegal status, it is said to be

465. *Hamdi*, 542 U.S. at 533–34 (2004).

466. *Plyler v. Doe*, 457 U.S. 202, 215 (1982) (holding unauthorized immigrants “may claim the benefit of the Fourteenth Amendment’s guarantee of equal protection”); *Mathews v. Diaz*, 426 U.S. 67, 77 (1976) (“The Fifth Amendment, as well as the Fourteenth Amendment, protects every [alien] from deprivation of life, liberty, or property without due process of law.”).

under only limited equal-protection and due-process restrictions.⁴⁶⁷ On the face of the matter, this is puzzling, for the Fifth and Fourteenth Amendments do not explain why they apply to unauthorized aliens within the country but not so much at its borders.

An explanation can be found in the notion of a tacit license of protection. It will be recalled that lawfully visiting aliens in amity had a right to protection and that enemy aliens needed an express license to enjoy protection. Between these categories, however, there was space for a tacit or implied license of protection.

One can thus discern a tacit license for unauthorized aliens. There were hints already in England that unlawfully visiting aliens could have a tacit or implied license of protection.⁴⁶⁸ Certainly, in America, this notion offers the least implausible explanation of the Supreme Court's opinion, in *Matthews v. Diaz*, that unauthorized aliens enjoy the Fifth Amendment's guarantee of due process, and its holding, in *Plyler v. Doe*, that they enjoy the Fourteenth Amendment's guarantee of equal protection of the laws.⁴⁶⁹ The Court in these cases does not explain the puzzling reality that unauthorized aliens are accorded constitutional rights while the federal government allows them to stay, but only truncated rights when it bars, detains, questions, and expels them.⁴⁷⁰ The conventional answers rarely go further than to suggest that this is all the process that is due, or that the federal government has a plenary power over immigration.⁴⁷¹ The more persuasive explanation would seem to be that the government tacitly grants unauthorized aliens some basic protection of the law, including Fifth Amendment due process and Fourteenth Amendment equal protection, as long as the government acquiesces in their remaining within the United States. It cannot be presumed that the United States grants such aliens the protection of the law for purposes of its attempts to bar their entry or to expel them, but while it allows them to stay, it apparently allows them a substantial degree of protection. The principle of protection thus explains a distinction that has long seemed incoherent.

467. *Zadvydas v. Davis*, 533 U.S. 678, 689 (2001) (construing statute to allow United States to hold dangerous illegally-present alien for a reasonably necessary period, but not indefinitely).

468. See the discussion of Jews in *supra* note 119.

469. *Plyler*, 457 U.S. at 215; *Matthews*, 426 U.S. at 77.

470. See *supra* notes 466–467 and accompanying text.

471. *Plyler*, 457 U.S. at 225; *Matthews*, 426 U.S. at 79–80. In *Verdugo*, the Court began to wrestle with these questions, but having failed to consider the principle of protection, the Court concluded that aliens “receive constitutional protections when they have come within the territory of the United States and developed substantial connections with this country.” *United States v. Verdugo-Urquidez*, 494 U.S. 259, 271 (1990). Recognizing that its conclusion could not generally be true, it added that “lawful but involuntary” presence in the United States “is not of the sort to indicate any substantial connection with our country” for constitutional purposes. *Id.*

Of course, the notion of a tacit license of protection for unauthorized aliens implies some limitations. For example, as already hinted, it is difficult to assume a tacit license of protection for unauthorized aliens when the government bars their entry or seeks their exit. Another example concerns persons whose character and loyalties would ordinarily be a barrier to their lawful entry. The United States would not ordinarily permit entry for a drug dealer, for an advocate of religious warfare, for a backer of an organization supportive of informal conflict against the United States or nations in amity with it, or for anyone who is unwilling to obey the laws of the United States. Thus, even if there is a tacit license of protection for unauthorized aliens, it cannot be assumed that the government has tacitly granted any such protection to persons who are lawless in other ways. The government could do so expressly, but it probably cannot be presumed to have done so tacitly.

Whatever the limitations on tacit license, it is a very appealing response to the status of unauthorized aliens, for it simultaneously preserves the interests of the United States and extends a generous share of its legal protection to foreigners—even to those who would otherwise not have any right to be in the country or to enjoy any civil rights. The executive often needs a summary power to bar and expel persons who come without permission, for they may have dangerous tendencies, attachments, or designs—including those of a sort that cannot easily be proved in court, let alone without exposing secrets. At the same time, most unauthorized visitors have a moral claim to be treated with decency and even to be accorded some protection of the law, which can be done by either express or tacit license.

As might be expected, the federal government's power to expel unauthorized aliens, with only limited judicial process, is an essential foundation for its generosity toward them. If the government feared that it could not withdraw the protection it gives to unauthorized immigrants, it would not be likely to grant them protection. Having a freedom, however, to avoid giving them the full protection of the law for purposes of entry and expulsion, the government can view the mass entrance of unauthorized immigrants with equanimity and even satisfaction.⁴⁷²

5. *Sovereignty and Civil Liberty.* — The American preservation of civil rights for persons within protection is all the more remarkable because it is so unusual. In many countries, including most Continental nations, sovereignty has been idealized as an emergency or otherwise necessary power, which allows states to act above law in violation of the civil rights of their own subjects. In England and especially America, however, a distinctively lawful vision of sovereignty has prevailed—a vision in which government power must be exercised under law, thus protecting the civil

472. To understand this point, consider the otherwise strange disparity that the United States has a power to bar and expel unauthorized immigrants and yet also has a remarkably open policy—so much so that it has allowed more than 10,000,000 unauthorized aliens to enter the country.

rights of persons subject to the government. Thus, whereas Continental ideals of lawless sovereignty have tended to endanger persons both within and outside allegiance, American ideals of lawful sovereignty have tended to protect at least the persons within allegiance.

The notion of a sovereign power that can reach above the sovereign's laws has a disturbing history.⁴⁷³ This ideal of absolute power was elaborated by early academic commentators on the Roman civil law, and it remains familiar today from the writings of Continental political theorists, ranging from the learned scholar Jean Bodin to the less learned Nazi apologist Carl Schmitt.⁴⁷⁴ In this ideal, as classically espoused by Bodin, the distinctive characteristic of sovereignty is a power of the government to impose its will not merely through and under law, but also outside and above law.⁴⁷⁵ Although it was usually said that the sovereign should exercise this power only in instances of necessity, the sovereign was understood to be the judge of the necessity, thus leaving the sovereign with much freedom to act independently of law—in particular, to deny civil rights to persons under his protection. Such ideas, as evident from Continental history, have been profoundly dangerous.

A very different understanding of sovereignty, however, prevailed among some English Whigs and among early Americans.⁴⁷⁶ John Locke, for example, expected the people to establish their government, including the legislative power, entirely under law and, moreover, as a means of preserving their liberty.⁴⁷⁷ Americans later took this approach when they rejected Parliament's claims of absolute power.⁴⁷⁸ They then used their constitutions to establish all three branches of their governments under law, thus making clear that in America sovereign power was not absolute.⁴⁷⁹ Sovereignty was thus tamed. Claims of sovereign power above

473. Hamburger, *Law and Judicial Duty*, supra note 3, at 65–68.

474. Jean Bodin, *The Six Books of a Commonweale* 73, 84, 88, 92 (Kenneth D. McRae ed., 1962) (reprinting 1606 translation); Carl Schmitt, *Politische Theologie. Vier Kapital zur Lehre von der Souveränität* 11 (Duncker & Humbolt 1934).

475. Bodin, supra note 474, at 73, 84, 88, 92. For an explanation of the two elements of Bodin's theory, see Hamburger, *Law and Judicial Duty*, supra note 3, at 67 & n.89.

476. Hamburger, *Law and Judicial Duty*, supra note 3, at 85–86, 97–98, 202–12, 292–93, 463–64.

477. Locke, supra note 19, bk. II, ch. XI, § 136, at 358–59.

478. For example, James Iredell explained about the formation of the North Carolina Constitution:

We were not ignorant of the theory, of the necessity of the Legislature being absolute in all cases, because it was the great ground of the British Pretensions. But . . . [w]hen we were at liberty to form a Government as we thought best, without regard to that or any theoretical principle we did not approve of, we decisively gave our sentiments against it . . .

James Iredell, *To the Public*, N.C. Gazette (Newbern) (Aug. 17, 1786), reprinted in 3 *The Papers of James Iredell 1784–1789*, at 227, 227–28 (Donna Kelly & Lang Baradell eds., 2003).

479. Hamburger, *Law and Judicial Duty*, supra note 3, at 463–64.

law were rejected, and sovereignty was established in America as a merely lawful power—indeed, as the foundation of civil liberty.

Hence, the contrasting approaches to emergencies and claims of necessity on the Continent and in America. In the tradition of Bodin and Schmitt, persons both within and outside protection are subject to being coerced by lawless state power. Americans, however, tended to assume that all persons within allegiance had a right to the law's protection, which could not be denied, whether on account of an emergency or any other necessity. Of course, there could be claims of emergency, but they had to satisfy the suspension power and thus were brought within the law.⁴⁸⁰ Similarly, more general claims of government necessity had to get through the lawful channel of the Necessary and Proper Clause.⁴⁸¹ Even as to persons outside protection, there had to be lawful governance, for although such persons lacked rights under the law, American governments could take only lawful action against them. Thus, in contrast to the Continental tradition of lawless sovereign power, Americans embraced a vision of sovereign law.

Put in slightly different terms, Americans followed Locke rather than Hobbes. The Lockean ideal of sovereignty within a nation should not blind anyone to the Hobbesian character of the exterior world. There is great danger in confusing these different realms—a danger for both safety abroad and liberty at home. The principle of protection is therefore profoundly valuable, for it keeps these realms apart—largely taking questions of legal rights out of Hobbesian considerations of foreign policy, and generally preventing Hobbesian power from intruding on domestic liberty.

D. *Minimizing Severity for Persons Outside Protection*

Although the principle of protection is valuable for persons who are within the protection of the United States, there is reason to be concerned for persons who are outside such protection. Put another way, it is not only domestic safety and civil liberty that matter, and it is therefore necessary to consider the implications of protection for persons outside the protection of the United States. At first glance, the principle may seem a threat to their safety and freedom. On closer examination, however, it becomes apparent that the principle of protection does not relieve the government of its legal and moral duties, let alone its structural interests.

Although the point has been made before, it cannot be overemphasized that although the principle of protection leaves some foreigners outside the protection of the law, the executive remains constrained by law in its dealings with them. In eighteenth-century Virginia, for example, Governor Henry and his council felt obliged to adhere to the law

480. U.S. Const. art. I, § 9, cl. 2.

481. *Id.* art. I, § 8, cl. 18.

when confining, questioning, and expelling the Algerians. These days, prisoners of war provide a particularly clear illustration. Such prisoners owe no local allegiance, and they therefore should not be understood to have legal rights against executive officials. At the same time, such officials remain bound by the law of the United States, including its constitution and any relevant statutes and treaties—not least, those that adopt international law. These legal limitations, moreover, are enforceable, even if not by the prisoners, for the government itself can in various ways impose them on executive officials.

In addition to these legal restraints, the government is also subject to other limitations, which are often far more significant. The structural enforcement of international relations and the consequent incentives to refrain from severity have already been discussed in Part VI. Even more important, perhaps, is domestic opinion about morals or decency, which has obviously been of great significance in recent years.

For one reason or another, notwithstanding that prisoners of war have lacked the protection of the law, the United States has tended to treat its foreign prisoners of war far more generously than its enemies have treated their prisoners.⁴⁸² It is therefore difficult to conclude that prisoners of war taken by the United States are at any particularly severe or distinctive risk on account of their being outside the protection of the law.

In sum, the principle of protection is not merely of historical authority, for it continues to be advantageous in several important ways. First, the principle demarcates the government's legal authority or strategies in a way that gives the government the clarity and breadth of authority it needs against persons who do not owe it allegiance. Simultaneously, with the same clarity and breadth, it bars the government from denying the protection of the law to persons who owe it allegiance. Second, in revealing the domain of the nation's law, the principle recognizes that the obligation of the law rests on consent. The principle thereby avoids the narrow positivism through which the domestic imposition of law is understood to be mere state coercion. By the same token, it bars imperialistic application of the law abroad, thus avoiding the danger that the law and its adjudication in the courts will become a source of international tensions. Indeed, by confining the domain of the law, the principle facilitates the structural enforcement of international law and, more generally, international relations. Third, and perhaps most profoundly, the principle is an essential mechanism for reconciling safety and civil liberty. Fi-

482. Consider the following question: When was the last major war in which the United States could generally rely upon its enemies to treat its captured military personnel in accord with the laws of war or otherwise with decency? Not in Iraq. Not in Vietnam or Korea. Nor in World War II in the Pacific theater. One thus probably has to go back to World War I. Indeed, this may have been the *only* major war in which the United States has generally been able to expect that its enemies will treat its military personnel in a lawful and civilized manner.

nally, although the principle is thereby advantageous for persons within protection, this does not mean it is oppressive as to persons who are outside protection. On the contrary, while it does not acknowledge legal rights in persons who do not owe allegiance, it still leaves room for a range of other mechanisms, legal and structural, that constrain government from exercising undue severity.

VIII. CONTEMPORARY APPLICATIONS

Part VIII closes this Article by examining the application of the principle of protection in contemporary circumstances. Notwithstanding that the principle has been largely forgotten, there is good reason to consider, as a sort of experiment, how the principle would apply if it were once again understood and appreciated. In the end, it will be seen that, although recent Supreme Court decisions have failed to recognize the principle, they have not actually displaced it. The goal here, however, is not to reconcile the principle with contemporary doctrine, but rather to sketch out the principle's potential implications.

In thinking about the contemporary application of the principle of protection, it should be kept in mind that protection is only a gatekeeping principle. It demarcates spheres of authority, whether government power or individual rights, and it therefore does not so much entail specific policies, desirable or undesirable, as lay out a framework in which the government can formulate its policies. The principle thereby opens up opportunities for fresh thinking about terrorism policy. The principle, however, provides only a framework, and precisely because it leaves much room for legislative and executive action, it cannot be taken as the last word on what the government may lawfully do, let alone what it should do.

A. *The Principle's General Application*

How would the principle of protection apply, at a very general level, to the legal doctrines and problems that have become so salient in the "war on terror"?

1. *Allegiance and Protection.* — It has been seen that the reciprocal relationship between allegiance and protection determines who has both the obligation and the protection of the law. Those who have at least presumptively accepted an offer of protection owe allegiance. They are therefore bound by the law. Others are not. Similarly, those who at least presumptively owe allegiance are owed protection, including the protection of the law. They therefore have rights under the law. Others do not.

The principle of protection thus assures domestic rights to all members of the society, including those who are aliens. It ultimately distinguishes not between citizens and foreigners, nor between combatants and noncombatants, but between persons within the society and persons outside it.

2. *Is the Principle of Protection Binding as Law?* — Is the principle of protection, including the reciprocal notion of allegiance, binding as law? Or is it merely a matter of theory? The answer to this question rests on whether the principle is part of the law of the land.

There are several ways by which the principle of protection finds its way into the law. On occasion, the law of the land expressly mentions the law of nations and thereby includes the limitations inherent in its principle of protection—the most obvious examples being the Alien Tort Claims Act and the Constitution's provision for laws punishing offenses against the law of nations.⁴⁸³ More generally, like the early state constitutions, the U.S. Constitution appears to have been adopted on the assumption that allegiance and protection are reciprocal. Structurally, as has been seen, the people of the United States adopted their constitution and established the laws of the United States for themselves and their land. Textually, the Constitution made this clear in its preamble and in its phrase about the "Law of the Land." The reciprocal relationship of allegiance and protection is therefore important for understanding the domain of the Constitution and the other laws of the United States. For example, when the Constitution was adopted and the first Congress adopted the Judiciary Act, it was understood that prisoners of war and other persons outside allegiance generally could not have the protection of the law, whether a right to habeas or any other legal right.

3. *Limited Domain.* — Two limitations on the law's domain have been observed here—one geographic, the other personal. As has been observed in connection with writs of habeas, sovereign territory places a geographic limit on the imposition of the law's coercive force, including its writs and other legal process. More centrally in a study of protection, it has been seen that the reciprocal relationship of allegiance and protection brings many persons within the realm of the law, both for obligation and for rights, but leaves others outside this sphere.

4. *Citizenship and Territory.* — Both citizenship and territory matter for the domain of the law. Obviously, sovereign territory is most directly determinative for the law's geographic domain—that is, for the outer reach of the law's writs, process, and other coercion. But what about the domain of the law as to persons—in other words, as to legal obligation and rights? This is measured by allegiance and protection, and these, in turn, are calculated largely in terms of a combination of citizenship and territory.

To understand this joint significance of citizenship and territory within the principle of protection, one can start with citizens, who have the strongest claim to protection, and then move out toward persons with ever-weaker claims. Citizens owe allegiance and have a right to protection. Aliens in amity who enter the United States with permission, and thus lawfully, also have a right to protection, although not to the same

483. See *supra* note 272 and accompanying text.

substantive rights as citizens. Aliens in amity who come unlawfully within the United States, or who come lawfully or unlawfully into its sovereign territory, can be granted some local protection by license, even apparently by tacit license. Enemy aliens cannot be assumed to have been tacitly offered a license of protection, but the United States can expressly license them to remain or to come with allegiance and some protection. Prisoners of war, however, by their nature, owe no allegiance to the United States. Thus, regardless of where they are held, they are not entitled to the protection of the law. Although this may seem harsh, it is to some degree a matter of respect for them and their sovereign, including their relationship of allegiance and protection with their sovereign. In short, the domain of the law as to persons rests on their allegiance and protection, which rests in turn on citizenship and territory.

5. *When Protection Is Mandatory, Optional, or Barred.* — The reciprocal character of allegiance and protection gives rise to layered claims of protection, which define the legal options available to government.

A mandatory protection belongs both to citizens and to lawfully visiting foreigners, and it is strongest in citizens. Citizens of the United States, for example, have a right to its protection. This means that the United States cannot lawfully use military law to punish a citizen who adheres to an enemy (although there are exceptions where the individual is a member of the U.S. military or is a civilian in an area under martial law).⁴⁸⁴ A more contingent right to protection is that of foreigners in amity who have entered the United States lawfully and thus in a manner that presumptively reveals a “local” or temporary allegiance. They have a right to the same protection as citizens, even if not the same substantive rights. Their right to local protection ends when there is a war and they become alien enemies. At that point, they have a grace period to depart if the local sovereign initiated the war, but that is all that they have a right to enjoy.

Other protection is optional. For example, the United States can, by license, extend a partial protection to unauthorized aliens. The United States would ordinarily be expected to grant this license only expressly, for it is difficult to presume a tacit offer of allegiance and protection for persons who enter a country in violation of its laws. Nonetheless, in some instances, as has been seen, it is possible to discern a tacit license allowing a partial protection for unauthorized aliens.

During wartime, the United States can choose to grant a partial protection to enemy aliens. Here, the license must be express, for an enemy alien cannot be presumed to owe a local allegiance to the United States

484. The principle of protection thus calls into doubt the holding in *Ex parte Quirin* that a treasonous citizen can be an enemy and punishable by a military commission. 317 U.S. 1, 37–38 (1942) (“Citizens who associate themselves with the military arm of the enemy government, and with its aid, guidance and direction enter this country bent on hostile acts, are enemy belligerents . . .”).

or to have been offered a local protection.⁴⁸⁵ It has been seen that there are some limits on when a government has the option to grant protection to enemy aliens, but an optional grant is at least possible as to enemy aliens who were already present in the country at the time war broke out and even as to those who subsequently enter the country—as long as they are not in open hostility and are not already prisoners of war.⁴⁸⁶

A final category of protection is that which is barred. Put generally, foreigners who owe no allegiance cannot enjoy protection. This precludes protection for enemy aliens who have no express offer of protection, or who cannot be presumed to have accepted it. It also means that prisoners of war, whose status is incompatible with allegiance, are outside the protection of the laws. As for foreigners in amity, they cannot acquire a local allegiance and protection if they remain abroad.

6. *When Obligation Is Barred.* — Not only the protection of the law but also the obligation of law is sometimes barred. If law depends on consent, then obligation and jurisdiction can be derived only from the consent of the persons who are constrained. For example, a foreigner who has remained outside the United States cannot be presumed to have given it allegiance or to have accepted its protection, and without such consent, he cannot be considered within either protection or allegiance. Thus, at least according to the traditional theory, he cannot be considered to be bound by the law of the United States, and he cannot be made a defendant in one of its courts.

The law could be imposed on such persons as a matter of mere force, but how can law oblige a person who has not at least presumptively consented, and how can a court consider a person to be in violation of a law that does not oblige him? Similarly, how can a court consider itself to have jurisdiction over a person who has not at least presumptively entered the society and submitted to its sovereign?⁴⁸⁷

7. *Can the United States Depart from the Principle of Protection?* — Could Congress bar visiting aliens in amity from enforcing any rights in the courts, thus denying the protection of the law to persons within a local allegiance? Or could it allow prisoners of war to enjoy rights in court, thus extending the protection of the law to persons outside allegiance?

If the principle of protection were merely optional, then perhaps Congress or even the executive could do these things. The principle, however, was traditionally understood to be founded in the law of nations and even in nature, and of particular significance here, it was an assumption taken for granted in the adoption of the U.S. Constitution. Of course, the question of whether the political branches can depart from

485. See *supra* text accompanying notes 190–192.

486. See *supra* text accompanying notes 180–183. In addition to the limitations already discussed, it should be noted that any protection that is merely by license is surely revocable at any time.

487. For the “jurisdiction” of the law as an allusion to the law’s geographic domain, see Hamburger, *Law and Judicial Duty*, *supra* note 3, at 59–64.

the principle of protection raises a host of complex concerns, but because the principle was such a basic assumption of the Constitution, it is not clear how, either unilaterally or by treaty, the United States can escape it.

B. *Application to Persons Outside Protection, Particularly Those Engaged in Informal Warfare*

To understand the application of the principle in more detail, it is now necessary to examine its application to persons outside protection. In particular, how does the principle apply to foreign terrorists?

In considering this question, it must be emphasized, once again, that the principle of protection is merely a means of allocating authority, which leaves more refined questions of justice to other mechanisms, legal and political. The principle necessarily leaves the executive and the legislature a broad freedom to shape national policy, and it therefore cannot be expected to guarantee that the government will use its power justly, let alone prudently.

1. *Informal Warfare.* — How do terrorists fit into this analysis? The word “terrorist” is not informative about the legal issues, and therefore the question must be rephrased: How does this analysis apply to informal warfare?

If a foreigner engages in informal warfare against the United States (whether on his own or under some sovereign or nonsovereign power) must the United States give him any protection? If he is an alien within American allegiance, he has the obligation and protection of American law and cannot be punished, except by a regular trial for treason or some other offense. If he is not within allegiance, he has no right to protection, whether the protection of the government or of the law. He is, indeed, engaged in a mode of war that would traditionally deprive him of even the protection of the law of nations.

But what if he is a subject of a foreign sovereign state in amity with the United States and he joins or aids a nonsovereign enemy power (perhaps with the tacit consent of his sovereign and perhaps not)? For example, what if he is a Saudi member of al Qaeda captured in Iraq or while unlawfully present in the United States? Considered merely as a Saudi, he is a foreigner in amity. If, however, he takes up arms against the United States or otherwise joins or aids al Qaeda, then he is in a state of war with the United States, and this is enough to resolve the legal question. Being at war with the United States—regardless of whether privately, under a sovereign state, or with a nonsovereign power—he cannot be understood to have given allegiance to the United States, and he therefore does not have any right to protection. Moreover, if he is captured, it does not matter where he is held. Regardless of location, he is a prisoner of war, whose status is incompatible with any allegiance or protection.

This still leaves open the fate of sleepers—persons who become lawful residents or even citizens on false representations of allegiance while attached to a sovereign or other power that anticipates employing them in informal war against the United States. To be concrete, imagine that a spy, saboteur, or terrorist prepared for informal warfare comes to the United States before the outbreak of war and becomes a citizen. If he is considered as a citizen, he can be tried for treason or any other relevant offense. But if he is an enemy, who came under cover of owing allegiance, but with an intent or readiness to participate in informal war against the United States, then he can surely also be treated as an enemy, who is outside any relationship of allegiance or protection. The reality of the matter is that he does not owe allegiance and should therefore probably at best receive a military trial, after legal proceedings stripping him of his citizenship. But it will usually be difficult to prove that he is not a citizen, and the government can accept his false submission as sufficient grounds to impose its laws on him.

2. *Degrees of Protection and Rights Protected, Including the Equal Protection Problem.* — Both the protection of the law and the rights protected under law can vary among different classes of individuals. Underlying these variations is the distinction between the protection at stake here and the protection secured by the Fourteenth Amendment.

The right to the protection that comes with allegiance does not seem to vary among those with a right to such protection. For example, there being but one type of citizen, there is only one degree of protection for citizens, regardless of whether they are natural-born or naturalized.⁴⁸⁸

488. There is some eighteenth-century evidence of different levels of citizenship—not merely the inequality of different classes of subjects or citizens, but a self-conscious differentiation of classes of citizenship. Something like this was already apparent in England in the distinction between denizens and naturalized subjects. More directly, South Carolina, for example, allowed “free white persons” (excluding alien enemies and others) to become citizens, but allowed political rights only to those who were naturalized by the General Assembly. An Act to Confer Certain Rights and Privileges on Aliens, and For Repealing the Acts Therein Mentioned (1786), reprinted in 4 *The Statutes at Large of South Carolina*, supra note 67, at 746–47.

A skepticism about layers of citizenship, however, can be discerned in a 1785 advisory opinion by the justices of the Massachusetts Supreme Judicial Court on a statute penalizing returning Tories. The justices observed that “all mankind are either *Subjects* or *Aliens*; there can be no medium.” To be sure, a state could limit the substantive rights of a naturalized citizen. Even this, however, apparently had to be done expressly:

[A]n Act of Naturalization may admit an Alien to certain privileges, and exclude him from others; he may be naturalized under some particular disabilities: But if no such proviso is made, no condition expressly annexed to the privilege granted: *ex vi termini* a Person naturalized, is a free citizen to all intents Constructions & purposes.

Opinion of Justices of the Supreme Judicial Court on an Article of the Confederation (June 22, 1785), supra note 339. For further details, see Hamburger, *Law and Judicial Duty*, supra note 3, at 597–600.

Whatever the eighteenth-century law, the Fourteenth Amendment in 1868 appears to have recognized only one category of citizenship, as defined in that amendment. This

Even as to lawfully visiting aliens in amity who temporarily owe allegiance, there appears to be no variation in the degree of protection.⁴⁸⁹ A lesser degree of protection, however, seems possible and even necessary at times of entry and exit for aliens in amity who are present unlawfully but are tacitly allowed to enjoy protection—and for enemy aliens who are allowed to remain or enter with protection. Such aliens have no right to protection. Instead, they enjoy their protection merely by license, and this license, whether tacit or express, is apparently by its nature always partial.

It may be doubted whether one can really distinguish between limitations on protection and limitations on the rights protected, but there was at least a theoretical difference. For example, although there is only one level of protection for citizens, this is hardly to say that the rights of citizens cannot vary. Similarly, when aliens in amity come to the United States lawfully, they have the same right to protection as citizens, but they can be denied some rights that are available to citizens, such as the right to vote.⁴⁹⁰ Even when a citizen of one state in the Union visits another state in the Union, he does not have the full range of local rights, notwithstanding that he has the protection that comes with a local allegiance—this being the problem addressed by Article IV's Privileges and Immunities Clause.⁴⁹¹

Although the denial of the protection of the law to foreigners who do not have a right to it may appear to conflict with the Equal Protection Clause, it actually does not, for protection arises in different ways—initially as a gatekeeper and then as a measure of rights within the law. In its initial role, protection comes up as a question of who owes allegiance and is thus owed protection. Only after a person is conceded to enjoy protection is there the second question as to whether a state has denied him the equal protection guaranteed by the Fourteenth Amendment. For exam-

suggests that there can be only a single type of protection for citizens. U.S. Const. amend. XIV, § 1. In addition, of course, the Fourteenth Amendment bars some distinctions as to some rights held by individuals.

489. Vattel wrote that “[s]ince the lord of the territory may, whenever he thinks proper, forbid its being entered, he has no doubt a power to annex what conditions he pleases to the permission to enter.” Vattel, *supra* note 51, bk. II, ch. VIII, § 100, at 172 (citation omitted). This would seem, however, to have been a comment on the rights protected rather than the right of protection. Indeed, Vattel shortly afterward emphasized that as soon as a sovereign admits foreigners, “he engages to protect them as his own subjects.” *Id.* bk. II, ch. VIII, § 104, at 173.

490. Blackstone observed that “allegiance . . . is the duty of all the king’s subjects,” but “[t]heir rights are . . . distinguishable . . . natural-born subjects having a greater variety of rights.” As for aliens, “their rights are much more circumscribed, being acquired by residence here, and lost whenever they remove.” 1 Blackstone, *supra* note 36, at *371. Similarly, Vattel wrote that foreign inhabitants enjoy a grant of “protection, though they do not participate in all the rights of citizens. They enjoy only the advantages which the law or custom gives them.” Vattel, *supra* note 51, bk. I, ch. XIX, § 213, at 102; see also *id.* bk. II, ch. IX, § 114, at 177.

491. U.S. Const. art. IV, § 2.

ple, an unauthorized alien need not be accorded protection, but if he is given protection, one of the rights he may be allowed is the Fourteenth Amendment's equal protection of the laws. He thus can be denied the gatekeeper sort of protection, and because this is preliminary to legal rights, including Fourteenth Amendment rights, this denial of protection is not a denial of the equal protection of the laws.

3. *Legislative Authorization.* — Does an executive, when dealing with persons who are outside protection, need legislative authorization? It is not a question of individual rights, for such persons have no rights under the law. Yet just because they are outside the protection of the law does not mean that the executive can act outside its legal authority in proceeding against them. It can treat them as beyond the law, but the government itself must remain within the law. The question, then, centers on executive authority.

The conventional answers go to extremes—at one end, claiming that the executive needs legislative authorization to impose any constraints on anyone; at the other end, claiming that the executive needs no legislative authorization in foreign policy and, indeed, cannot be limited by the legislature in this sphere. The U.S. Constitution, however, apparently avoids these extremities. The executive has no general war or foreign policy power enumerated in the Constitution, but the executive is the branch that acts for the United States. Moreover, as traditionally understood on both sides of the Atlantic, executive power by its nature includes a power to act for the nation in relation to persons who are outside the protection of the law.⁴⁹² English monarchs, for example, had been able to license and to bar or exclude foreigners without statutory authorization, and most state executives apparently also enjoyed a presumption of this general executive power.⁴⁹³

Two early state constitutions appear to have shifted this presumption of power. It has been seen that the Maryland and Virginia constitutions authorized executive power, but then barred any implication of executive power from the example of English royal prerogatives or powers.⁴⁹⁴ It is

492. More broadly, executive power was traditionally understood to be a power to act for the nation in external as well internal matters. See Ramsey, *supra* note 358, at 52–73.

493. The power of a sovereign to bar or expel foreigners was acknowledged by the law of nations to be inherent in sovereignty. Vattel, *supra* note 51, bk. II, ch. VII, § 94, at 170; *id.* bk. II, ch. VIII, § 100, at 172 (“The Sovereign may forbid the entrance of his territory either to foreigners in general, or in particular cases, or to certain persons, or for certain particular purposes, according as he may think it advantageous to the State.”). Along similar lines, in English law, the Crown generally allowed aliens in amity to enter but could bar or expel them independently of statute. Joseph Chitty, *A Treatise on the Law of the Prerogatives of the Crown and the Relative Duties and Rights of the Subject* 48–49 (London, Butterworth & Son 1820) (“Alien friends may lawfully come into the country without any license or protection [in the sense of a special grant of protection] from the Crown . . . though it seems that the Crown, even at common law, and by the law of nations . . . possesses a right to order them out of the country, or prevent them from coming into it, whenever his Majesty thinks proper.”).

494. See *supra* text accompanying notes 360–362.

not clear whether these prohibitions really deprived the Maryland and Virginia executives of their authority to detain, question, and expel foreign visitors who were outside the protection of the law, let alone their authority to seize and search their belongings. As seen from Patrick Henry's letter to the Virginia legislature, however, the question was sufficiently in doubt that legislative authorization seemed desirable, and in both Maryland and Virginia, authorizing legislation was adopted.⁴⁹⁵

In other American states, however, there were no constitutional barriers to drawing conclusions from English royal prerogatives. In such jurisdictions, it was apparently unnecessary for legislatures to provide their executives with authorization to hold or expel persons who were outside protection. Thus, whereas in Maryland and Virginia, a constitutional barrier created a presumption against executive authority over persons outside protection, in the other states, the absence of any such barrier left the old presumption of executive authority in place. Accordingly, the role of legislation was not the same in all jurisdictions. In Maryland and Virginia, authorizing legislation may have been necessary to overcome the presumption against executive authorization, but in most jurisdictions, such little authorizing legislation as was adopted was primarily valuable for shaping and limiting the executive authority that was already presumed.

The U.S. Constitution did not follow the Maryland and Virginia constitutions in repudiating the implications of power from English prerogatives. It therefore appears that the executive of the United States did not need legislative authorization to constrain persons who were outside the protection of the law.⁴⁹⁶ By the same token, however, as illustrated by the 1798 Alien Enemies Act, Congress could limit the executive's treatment of such persons.⁴⁹⁷

4. *Indemnification.* — Whether or not legislative authorization is necessary, an executive may need an indemnification statute. Under the principle of protection, an executive official or member of the public can act against persons who are outside protection without worrying about being sued for damages. The executive, however, cannot always know ahead of time who is within protection and who is not. Therefore, even when an executive official acts with care, there is always a risk that he will mistakenly detain a person who is, in fact, within the protection of the law. The risk of mistake is especially great for members of the public who assist the executive. It thus is apparent that at least some indemnification

495. See *supra* text accompanying notes 335, 364, 370

496. Somewhat similarly, see Monaghan, *supra* note 369, at 73–74 (discussing executive detention of Japanese Americans during World War II and Lincoln's wartime arrests during Civil War). Of course, the Constitution modified executive power in its grant of power to Congress to make a uniform rule of naturalization. U.S. Const. art. I, § 8.

497. See *supra* text accompanying notes 234–242.

is necessary if officials and members of the public are to act with confidence in doing their duty.

5. *Detention, Questioning, and Expulsion.* — Exactly what sort of action can an executive take against persons who are beyond the protection of the law? At the very least, the executive can detain and question such persons without trial, and if it wishes, it can also expel them. Indeed, because such persons have no legal rights, an executive will often have the authority to do much more than merely detain, question, and expel them.

But this is not to say that it should ordinarily do more, for much that is lawful is not prudent or moral. Moreover, although the principle of protection leaves persons who are outside protection without legal rights, the executive will typically be constrained by law in its dealings with them. For example, Congress can pass statutes, and the Senate can ratify treaties, imposing limits based on international law. Thus, even when individuals are outside protection, the government is not above the law.

6. *Identifying Who Is an Enemy.* — When dealing with persons who are subjects of a foreign sovereign in amity, how should the executive determine who is an enemy? In a war with a foreign sovereign, its subjects are presumed to adhere to it and are thus presumed to be enemy aliens.⁴⁹⁸ Even in a war with a foreign nonsovereign power in hostility to the United States, its subjects, members, or adherents are presumptively enemies—this being the approach apparently taken in the 1785 Virginia statute.⁴⁹⁹ But what of persons not attached to an enemy state or other power? As seen from Matthew Hale's analysis, they too can be enemies, but only if they are actually in hostility.⁵⁰⁰ Ordinarily, it will be clear enough whether an individual is, either presumptively or actually, in a state of war with the United States. For some captured individuals, however, this question may be in doubt. To the extent the government has committed itself by treaty to resolve their status through a hearing, it must give them such a proceeding, whether in a military or, perhaps, an administrative tribunal.

C. *Application to Persons Within Protection*

It is now necessary to consider how the principle of protection applies to persons within protection. Whereas persons outside protection are subject to the regular power of the executive, persons within protection can be subject to a lawful emergency power during a suspension of habeas corpus.

1. *Temporary Detention and Removal of Persons Within Protection.* — Although the focus here is on persons who are outside protection, it is important, at least by way of contrast, to note that an executive can take

498. See *supra* text accompanying note 127.

499. See *supra* Part V.E.

500. See *supra* text accompanying notes 128–130.

limited, temporary, emergency action against persons who are within protection. In particular, it can temporarily detain them and, if it sees fit, can also temporarily remove them, at least within the country. To do this constitutionally, however, the executive needs legislative authorization and a legislative suspension of habeas. Although, for the federal government, the suspension of habeas is limited to cases of rebellion or invasion, for some state governments, other grounds are possible, including epidemics.

The main point, however, is the contrast. Whereas persons within protection have legal rights, including habeas, persons outside protection do not. The former can be detained and removed only temporarily, and only with a constitutionally authorized suspension of their right to habeas. The latter, however, can be more permanently confined, removed, questioned, and expelled. Indeed, the principle of protection leaves an executive free to treat persons who are outside protection as it deems best, limited only by law and by the executive's appreciation of other considerations, such as structural restraints and domestic ideals.

2. *Habeas Corpus*. — The Supreme Court suggested in *Boumediene* that the historical evidence about access to habeas corpus is unclear.⁵⁰¹ In fact, the basic limitations on the right to the writ are clear, and they rest upon two aspects of domain.

First, there is no access to the writ of habeas corpus for individuals who are outside the protection of the law. This was English law; it was also American law. Whether the recent Supreme Court decision in *Boumediene* really changed the law, or even could do so, must await the discussion of precedent in Part VIII.F below.

Second, even if a prisoner is among the persons who can claim a right to habeas, the writ cannot run outside sovereign territory. The English judges could not issue a writ outside English sovereign territory, and this was why the English Habeas Corpus Act had to forbid the imprisonment of subjects overseas. Similarly, in the United States, the writ is confined to the states and sovereign territory of the United States, and as in England, if the legislature fears foreign imprisonment, it can easily enough prohibit and penalize this.

3. *Pre-Habeas Proceedings and the Remedy for Classification Errors*. — The danger that the executive will have discretionary control to classify persons as beyond protection may initially seem an insuperable problem. On account of pre-habeas proceedings, however, the difficulty is not as serious as sometimes suggested.

The procedure should by now be familiar. If an individual is mistakenly detained on the ground that he is beyond protection, he cannot make any legal claim in court. Nonetheless, a friend of the prisoner, usually a lawyer, can make a motion on his behalf for a writ of habeas and

501. *Boumediene v. Bush*, 128 S. Ct. 2229, 2251 (2008) ("Recent scholarship points to the inherent shortcomings in the historical record.")

can simultaneously submit an affidavit showing that the prisoner is actually within the protection of the law. Such an affidavit, for example, can aver that the prisoner is a citizen or that he has a local allegiance unbroken by a state of war.⁵⁰² One way or another, the judges must decide favorably about the prisoner's status before they can grant the writ.⁵⁰³

The pre-habeas proceedings thus solve the classification problem, at least for persons held within sovereign territory. On the one hand, such proceedings prevent the executive from having the last word on classification decisions. On the other hand, they preserve the principle of protection, and they thus spare the executive any claims of legal right by persons outside protection.

The pre-habeas proceedings, however, still leave open a range of other classification problems. For example, if persons are imprisoned outside sovereign territory and are thereby beyond the reach of the courts, how can they make use of pre-habeas proceedings to challenge the executive's conclusion that they are outside the protection of the law? Similarly, if the United States makes commitments to other nations about its treatment of captured individuals of various classifications, the pre-habeas proceedings can be of little use for such persons if they are outside allegiance and protection. Although they may be able to get their status reviewed in such proceedings to determine whether they are really outside allegiance and protection, they cannot thereby get review of more refined questions about their classification, let alone get writs of habeas.

For persons outside protection who need reconsideration of the more detailed classification problems, the solution lies in the power of the United States to establish proceedings outside of Article III courts—in military or, perhaps, administrative tribunals. Such proceedings are also the solution for persons within protection who are held outside sovereign territory. In other words, pre-habeas proceedings are a solution for only one of the classification problems: that concerning whether a prisoner is within allegiance and protection. And even for this, it is not always effective.

502. Aspects of this sort of pre-habeas procedure have survived in the form of an application for leave to file a petition for a writ of habeas corpus—this being the procedure followed in *In re Yamashita*, 327 U.S. 1 (1946).

Incidentally, although *Yamashita* illustrates the survival of something like the traditional pre-habeas procedure, it also shows that the survival has not been very complete. The Court in this case denied writs of habeas largely on the merits of the question about the jurisdiction of the military courts. The judges, in other words, collapsed the distinctions between different decisions: the initial decision about status on the application for leave to file, the decision as to whether a prisoner within allegiance should get the writ, and the decision about releasing or remanding the prisoner on the return of the writ. The last of these is the time for resolution of the prisoner's claim about jurisdiction, but in *Yamashita* it was resolved on the application to file.

503. See *supra* Part III.C.2.

D. *Application to Prisoners of War*

How does the principle of protection apply to prisoners of war? Aspects of this question have already been discussed, but it is worth focusing on some points. Put simply, prisoners of war have rights, and it is important for the United States to recognize this, but whether such prisoners themselves can have or enforce rights under the law of the land is another matter, for they are not within its protection.

1. *No Protection of the Law for Prisoners of War.* — It has been seen that from the perspective of the principle of protection, a prisoner of war cannot be understood to owe allegiance to the United States and therefore cannot have the protection of its law.⁵⁰⁴ Eighteenth-century judges emphatically denied the protection of the law to prisoners of war, apparently on the assumption that, almost by definition, their status precluded their having any local allegiance and the corresponding protection. Similarly, today, it is not evident how a prisoner of war can be understood to owe a local allegiance and thus have the protection of the law of the land.

This approach to the rights of prisoners of war is limited in a range of ways, as already discussed. A person within allegiance, although held as a prisoner of war, cannot be considered to be really such a prisoner, and he can therefore obtain the protection of the law after he establishes his status in pre-habeas proceedings. For example, even a captured enemy alien, if he earlier accepted an express offer of protection, must be considered within protection and not a prisoner of war. Similarly, a prisoner released on parole is no longer held as a prisoner of war and can therefore enjoy some protection of the law. More generally, though, prisoners of war are outside the protection of the law.

Of course, international law has long differentiated civilians and combatants, and even various sorts of combatants. For purposes of allegiance and protection, however, such distinctions are relevant only to the extent they illuminate who is within or without allegiance and protection; and even for these purposes, such distinctions are often unrevealing. For example, a *civilian* enemy alien is ordinarily without protection, and if he becomes a prisoner of war, he cannot even have protection by license. Being beyond protection, he cannot get habeas or other legal rights, procedural or substantive—not even against serious mistreatment. To be sure, civilians and different types of combatants have a range of different rights under international law, and they should usually be able to secure them. But if they are outside allegiance and protection, they must enforce such rights through military law or some other process outside the civilian court system.

Even when Congress recognizes rights in such persons, this does not necessarily mean it is giving them protection—that it is giving them rights under the law of the land that they can enforce in Article III courts. Early American governments carefully adhered to the law of nations, including

504. See *supra* Part III.C.2.

the laws of war. Yet rather than understand a prisoner of war to be within the protection of the regular law of the land or the jurisdiction of its courts, they left him to military law and military courts. Similarly, today, a prisoner may have rights under international law, and Congress may have recognized such rights, but this is not to say that it would or even could allow him to enforce these rights in an Article III court.

All of this further suggests the significance of the distinction, already noted, between the rights of prisoners of war under the law of the land and the limits imposed by such law on executive authority. When Congress restricts the authority of the executive, whether generally, or specifically regarding captured enemies, this does not mean prisoners of war have rights at law against the executive for any mistreatment. The executive can be constrained by law in its dealings with prisoners of war, but if prisoners are outside the protection of the law, they cannot bring claims in court, other than a military court, for any abuse.

2. *No Obligation of Law for Prisoners of War.* — Captured foreign enemies are prisoners of war, and they are not only beyond the law's protection but are also beyond its obligation. Not owing allegiance to the nation that holds them, they cannot be considered bound by its law or subject to its courts.

To be sure, the United States these days often captures foreign individuals in foreign lands and expects to try them, whether they are foreigners in amity or foreigners who have become enemies. The latter range from Noriega to members of al Qaeda. The government's assumption is that it can lawfully try them in Article III courts, as if mere force can bring them within the obligation of the nation's law.⁵⁰⁵ Obligation, however, arises from consent, which cannot be attributed to such defendants. They are not citizens of the United States and have not voluntarily entered the country as aliens in amity; nor have they otherwise presumptively given allegiance. What is more, captured enemy aliens are prisoners of war, and as such, they have a status incompatible with allegiance to the United States. It is therefore unclear how proceedings against them in Article III courts can be justified.

3. *Military Law.* — Although prisoners of war have no obligation under the law of the land, they are subject to military law. Military law is the set of rules governing the military, and as to them it has the obligation of the law of the land.⁵⁰⁶ As to prisoners of war, however, military

505. There are also questions about prudence and the separation of powers. When the United States seizes foreigners in amity in a foreign land who owe no obligation under the law of the United States, and when it then attempts to try them, its actions could be considered acts of war. Although the executive may feel confident enough to take such risks, it is doubtful whether the judiciary should do so.

506. Regardless of whether called "military" or "martial" law, the law applicable to the military had two aspects. As applied to civilians, martial law seemed to be a matter of necessity and thus a power exercised above law. For example, in one of his writings, Hale said that martial law was "in truth and reality . . . not a law, but something indulged, rather than allowed, as a law." Hale, *Common Law*, supra note 202, at 42. As applied to the

law is merely coercive. This application of regularized, non-arbitrary coercion, however, is one of the roles of military law and its courts, which can therefore offer substantial justice to prisoners of war.

Because military law stands in contrast to the law applicable to civilians, it is not an ordinary part of the law of the land. For example, a prisoner of war may be subject to the laws of war, as enforced by military law—he may even thereby have access to considerable process—but the ways in which military law mimics the process of civilian law does not make military law a part of civilian law or a lesser version of it. On the contrary, it is essential for the preservation of freedom that military law be understood as distinct from the regular, civilian aspect of the law of the land. Just how dangerous it can be to blur the distinction can be observed in *Hamdi*, where the Supreme Court left a citizen to languish under military control with only a military trial, as if this were a diminutive but acceptable version of a criminal trial.⁵⁰⁷

Although the application of military law to citizens who are not members of the military is apt to deprive them of their legal rights, this is not true of the use of military law against prisoners of war. On the contrary, this use of military law is a recognition of their rights, or at least the rights of their sovereign, for they have not submitted to the United States and its laws. They have undertaken war against the United States, and their relation to the United States is thus the very opposite of allegiance. In these circumstances, they stand outside any obligations or rights under the law of the land and, instead, enjoy rights under the laws of war and of nations, as enforced in military tribunals.

Incidentally, military law can apply either geographically or personally, and this may yet be significant in connection with terrorism. This law can apply geographically—for example, to a military base or, more broadly, during war, to a battle zone or other contested or captured re-

military, however, “martial law jurisdiction . . . is nothing but the power of executing some law by which usage or express provision is made or introduced for the well-ordering of the army and those that have relation to the same.” Hale, *Prerogatives*, supra note 70, at 119. On this understanding, it “reacheth only to those that are a part of the army,” and when it reaches “those that are enemies . . . it is rather *jus belli* than martial law.” *Id.* at 121. Put another way, it was the part of the law of the land that governed the military, even if it was merely force as applied to persons or things under the military’s control. Such is the approach adopted by the U.S. Constitution when it gives Congress the power to make rules for the government and regulation of the land and naval forces. U.S. Const. art. I, § 8.

Lest there be confusion, it should be noted that the terminology has been elaborated, even if not necessarily improved. Traditional writers distinguished the applications of martial law or, as they sometimes described it, military law. Not content with different applications of a single law, modern writers tend to distinguish between the “martial law” imposed of necessity and the “military” law that regulates the armed forces. For the latter tendency, see, e.g., Sharpe, supra note 202, at 111 and the sources cited there.

507. *Hamdi v. Rumsfeld*, 542 U.S. 507, 533, 535 (2004) (“Proceedings may be tailored to alleviate their uncommon potential to burden the Executive at a time of ongoing military conflict.”).

gion.⁵⁰⁸ In addition, military law can apply to persons according to their status—for example, to military personnel. A more interesting aspect of this personal application of military law is that the executive can apply such law to enemy aliens, whether they are outside the country or within it.⁵⁰⁹ Thus, whether armed or unarmed, whether engaged in formal or informal warfare, and whether spies and saboteurs or more harmless bystanders, enemy aliens can be subjected to military law. As already observed, the subject of an enemy power, sovereign or not, has no right to the protection of the law. Through military law, however, the United States can deal with such persons in a regular manner, in conformity with such policies as it chooses, whether adopted through treaties adopting international law or otherwise.

4. *The Duration Problem.* — The principle of protection does not directly solve the problem of how long prisoners of war should be held. Persons within protection can be detained only temporarily, for a period

508. Although the application of military law to civilians during an occupation can be distinguished as martial law, it remains an application of military law. Such was the traditional understanding of what was ambidextrously called martial or military law. Although one can simply distinguish different applications of a single law, many modern writers distinguish between the “martial” law imposed of necessity and the “military” law that regulates the armed forces. See *supra* note 506.

The application of military law to entire states is most familiar to Americans from the Civil War, and this requires some explanation. Ordinarily, military law was not applicable domestically, but to the extent a domestic disturbance stood in the way of judicial responses, or took on the character of a rebellion or war against the sovereign, martial law could be applicable. Putting this in international terms, Vattel explained:

[W]hen a nation becomes divided into two parties absolutely independent, and no longer acknowledging a common superior, the state is dissolved, and the war between the two parties stands on the same ground, in every respect, as a public war between two different nations. . . . The obligation to observe the common laws of war toward each other is therefore absolute

Vattel, *supra* note 51, bk. III, ch. XVIII, § 295, at 427. Of course, in the American Civil War, the North was reluctant to concede that the nation was dissolved, but there were also the more mundane and specific justifications for the domestic application of military law: to do justice and suppress the enemy.

In countries torn by intestine commotions . . . all forms of lawless violence are common, and, in the absence of military rule, would go unrestrained. Hence, to secure peaceful possession of such territories, some form of government must of necessity be established, whereby these crimes can be prevented or punished. Firm possession of a conquered province can be held only by establishing a government which shall control the inhabitants thereof.

William Whiting, *Military Government of Hostile Territory in Time of War* 12 (Boston, John L. Shorey 1864). For more on the domestic application of military law, see *infra* note 517 and accompanying text.

509. In connection with another matter, Matthew Hale wrote:

[T]empus belli is diversified according to the circumstances which it concerns. It may be tempus belli in respect of one thing and not another. . . . It may be tempus belli in reference to those that are in arms . . . not to one that is a neuter or intermeddles not. It may be tempus belli over the face of the kingdom, or it may be tempus belli in one place and not in another.

Hale, *Prerogatives*, *supra* note 70, at 128.

roughly connected to the length of the emergency, whether an invasion, rebellion, or epidemic, as specified by the relevant constitutional provision on the suspension of habeas. Persons outside protection, however, are another matter. As to them, the principle of protection allows governments to take measures, such as expulsion, that could be more permanent. Even in a conflict that could continue indefinitely, the principle leaves governments free to detain prisoners of war for the duration of the conflict. This is fortunate, because it diminishes the incentives for a government not to take prisoners, and because it gives the government a means of inducing the enemy to treat its prisoners with decency. Of course, this is not to say that a government necessarily should detain prisoners of war for the full length of the conflict, and at least in formal conflicts, there are often opportunities to exchange prisoners. But any decision to release a prisoner of war is apt to be complex and is not predetermined by the principle of protection.

Although the principle of protection does not limit the time of detention, it at least reveals that, if some sort of hearing is employed to settle the length of a prisoner's detention, then this should be done outside regular legal proceedings. Prisoners of war are outside protection and allegiance. Therefore, if they are to have any hearings, they must get these from the military or some other part of the executive.

E. *Application to Specific Measures*

What is the application of the principle of protection to the specific measures sometimes taken against prisoners and others—whether they are within protection or outside it? Overall, as might be expected, although the principle assures persons within protection of their rights, it also leaves room for some limited, emergency measures against them. At the same time, although it bars persons outside protection from claiming legal rights, it does not stand in the way of other limits on the executive, including legal limits imposed by legislation or treaty.

1. *Seizure of Property, Including Papers.* — In addition to detaining, questioning, and expelling persons who are outside the protection of the law, an executive can also search for and seize their property, whether their real estate or their personal goods, including their papers, without the due process of law. For example, it has been observed how, in Virginia, the executive searched the baggage of the Algerians, and although it ended up having to act without waiting for legislative authorization, it faced no impediment in the rights of the Algerians, for they were enemy aliens and thus clearly outside the state's protection.⁵¹⁰ Not having determined them to be particularly dangerous, the state apparently returned their papers and other belongings. The state, however, could

510. See *supra* note 420 and accompanying text.

have retained this property.⁵¹¹ As with individuals who are outside protection, so too with their property, governments need and enjoy a lawful power beyond what is apt in any one instance, and it should therefore be no surprise that what is lawful is not always prudent or just.

Yet, even in an emergency, an executive cannot constitutionally seize the papers or other property of persons who are within the protection of the law, except as permitted by its constitution. Within its enumerated powers, the U.S. Congress can authorize the seizure of property for public use, if it provides just compensation, but it has no power of the sort it has for habeas that would allow it to suspend the right of the people to be secure in their papers from unreasonable searches and seizures.⁵¹²

2. *Travel Restrictions, Exclusion Zones, and Detention Centers.* — It is difficult to discuss travel restrictions, exclusion zones, and detention centers without considering how these measures were employed against Japanese Americans in World War II. The misuse of such measures, however, is all the more reason to examine them, if only to reach a better understanding of what went wrong and to separate the wheat from the chaff.

As to persons without a right to protection, an executive has much discretion. For example, in accordance with the procedures established by the 1798 Alien Enemies Act, the executive of the United States has on several occasions ordered enemy aliens to register, to remove from the coast to specified places in the interior, or to leave the country—as has been seen in the treatment of British aliens during the War of 1812. This is not to say such measures are usually wise or desirable, for they tend to have deeply painful consequences, but they may sometimes be prudent.⁵¹³

511. For the common law on the seizure of enemy property within England and of friendly ships and goods sent to supply the enemy, see, e.g., Hale, *Prerogatives*, supra note 70, at 120–21.

512. U.S. Const. amends. IV V. It will be recalled that the Pennsylvania executive sought the papers of various Quakers, probably in violation of the state's constitution. Although the legislature subsequently gave the executive authorization for the seizure of papers, there was no ground to believe that there could be a suspension of the right of the people "to hold themselves, their houses, papers, and possessions free from search and seizure." Pa. Const. of 1776, Decl. of Rights art. X.

513. A poignant and sobering illustration of the moral complexity of such confinement comes from Britain during World War II. Many German refugees, including many Jews, settled in Britain before the outbreak of hostilities. Although they despised the Nazi regime, they were enemy aliens and were therefore seen as a potential threat—in part because of the danger of an invasion, but also for more general reasons of counter-intelligence. Many Jewish refugees, especially able-bodied men, were therefore deported to camps, sometimes in the British Isles, but sometimes as far away as Australia. As a result, some never saw their families again, and many deeply resented the experience for the rest of their lives. The invasion never materialized, and in any case, the Jews would not have been very likely to aid the Nazis. However, one of Britain's great accomplishments during the war was to identify and either neutralize or turn German spies in Britain. As put by Masterman in his report at the end of the war, "by means of the double agent system *we* actively ran and controlled the German espionage system in this country." John C. Masterman, *The Double-Cross System in the War of 1939 to 1945*, at 3 (1972). This was of importance not

Moreover, unless the United States licenses enemy aliens to enjoy protection, its actions against them are not subject to legal claims by such aliens. For example, the 1798 Alien Enemies Act licensed enemy aliens to remain in the country under restrictions, but otherwise with the protection of the law, and it thereby evidently allowed enemy aliens some access to the courts, including habeas.⁵¹⁴ In these circumstances, when Charles Lockington was imprisoned in 1813 for refusing to comply with a removal order, he was able to get writs of habeas, as these seemed to be part of the judicial process he was licensed to enjoy by statute. Yet the 1798 Act allowed the executive to take all sorts of actions against enemy aliens, including detention, removal, and expulsion, without having to give the aliens judicial process. The judges therefore unanimously and emphatically upheld the removal order and refused any judicial examination of its substance.⁵¹⁵

Even with respect to persons within the protection of the law, the measures at stake here—travel restrictions, exclusion zones, and detention centers—can be lawful. These actions are sometimes possible at the federal level in response to invasion and rebellion, and at the state level

only for dealing with the threat of German invasion, but also, later, for facilitating the D-Day landings. *Id.* at 149, 155. It is questionable whether the Allies could have prevailed at D-Day if German spies had managed to report credible details of the true landing plans. In these circumstances, although there was little justification for the indiscriminate detention of so many persons who were deeply unsympathetic to Germany, and although it is at least possible that the British could have controlled enemy agents without the internment, it is nonetheless difficult to conclude that the detention in its entirety was necessarily a mistake. On the contrary, aspects of the detention were part of the excessive caution that may or may not have been essential for winning the war.

For an example of how Axis intelligence agencies could make use of the Jewish flight to Britain and how they could hope to have their agents evade internment, note the case of a female Austrian agent, “Gelatine,” actually Friedl Gartner, who had been married to a Jew and came to Britain in 1938. The British turned her and in 1941 introduced her to German intelligence. National Archives [of the United Kingdom], file KV 2/1275-1280. That the Germans sought to make use of her Austrian Jewish connections is apparent from an inquiry they sent her late in the war: “In which part of London is the Uranium Research Institute, in charge of Professor Lise Meitner, a Jewish emigrant . . . ?” *Masterman*, *supra*, at 176. (Meitner was the Austrian Jewish physicist who first identified nuclear fission, thus prompting the race to build nuclear weapons.) Although the German use of Gelatine to get access to nuclear secrets was inept, it suggests how enemy aliens excluded from the detention program could become a risk. Few enemy alien women in Britain would have willingly assisted the Nazis, but there is reason to believe that some such women, unlike Gelatine, had unofficial access to English nuclear secrets, not to mention the personnel at Bletchley Park.

514. See *supra* Part III.C.3.

515. *Lockington’s Case*, *Bright* (N.P.) 269 (Pa. 1813), in 5 Am. L.J. 92, 98, 100 (1814); *Lockington v. Smith*, 15 F. Cas. 758 (C.C.D. Pa. 1813) (No. 8,448), in 5 Am. L.J. 301, 314, 319, 320–23, 325 (1814).

In another case, in which Thomas Williams was imprisoned for failing to remove from the coast, Chief Justice Marshall released Williams, but only because the government persistently failed to give this British subject any instruction as to where he was to go. This was, therefore, merely a case in which the executive clearly failed to act within its authority. See text accompanying *supra* note 245.

for other reasons, such as epidemics, as long as there is at least authorization and a suspension of habeas from the legislature. In addition, if there is a military conflict within or at the edges of a state, it is not obviously unconstitutional for the executive to control passage into or from enemy lines, or even for the legislature to authorize passport controls for travel within the state.⁵¹⁶ Nor is it obviously unconstitutional in such circumstances for the military to order civilians away from the enemy lines, as this is an application of martial law in a war zone.⁵¹⁷

516. During the War of Independence, for example, New Jersey imposed passport controls on travel within its lines, and tellingly, because this measure applied to persons within the protection of the law, it was accompanied by judicial process and limitations on official misconduct:

That it shall and may be lawful for any Officer of this State, civil or military, in the Presence of two or more Witnesses, in a publick Manner to examine all Travellers whatsoever, and for all Innholders publickly to examine all such as may put up at their Houses, and for all Ferry-men and Drivers of publick Stages to examine all Passengers who may offer or desire a Passage, and to detain and carry before some Justice of the Peace of the County all such Person or Persons who, upon such an Examination, shall not produce a Commission, Certificate or Pass, authorizing them to pass as aforesaid.

The justice was to examine them and hear evidence, and although he was to discharge those who were not spies, he was to have suspicious persons returned to their homes or, if from out of state, expelled at their expense. An Act to Prevent Persons from Passing Through this State Without Proper Passports (1779), in *Acts of the Council and General Assembly of the State of New-Jersey*, supra note 96, at 84–86.

In contrast, incidentally, anyone crossing enemy lines who was “legally convicted on Indictment” was to pay an enormous fine. An Act for Preventing an Illicit Trade and Intercourse Between the Subjects of this State and the Enemy (1782), in *Acts of the Council and General Assembly of the State of New-Jersey*, supra note 96, at 287. Tellingly, though, it was only the fine for travel across enemy lines that required legislative action. A few weeks before, Governor Livingston (after consulting General Washington) issued orders “to permit no persons to go into the Enemy’s lines from this State or to come into it from thence but by way of Elizabeth Town.” Letter from William Livingston to Elisha Boudinot (May 18, 1779), in 3 *The Papers of William Livingston* 91 (Rutgers Univ. Press 1986).

517. Outside the immediate battle zone, however, a state’s application of military law to its own subjects in its own territory was probably another matter. For example, in May 1779, in Monmouth County, New Jersey, “military ‘orders were issued for those who lived near the Lines to remove their Goods,’” but these orders were almost certainly issued for abusive reasons—not merely to reduce trading with the enemy, but to facilitate the seizure of the goods by rapacious officers and their men. See Hamburger, *Law and Judicial Duty*, supra note 3, at 412. Revealingly, when the New Jersey legislature, less than a month later, authorized the removal of persons “suspected of disaffection” away from the lines, it required judicial process, including a jury. An Act for the Removal of Criminals for Their More Safe Custody; and for Other Purposes Therein Mentioned (1779), in *Acts of the Council and General Assembly of the State of New-Jersey*, supra note 96, at 96, 98. (Incidentally, although the statute required only a six man jury, this cannot be taken as an indication of what was lawful, for the state’s Supreme Court held six person juries unconstitutional the next year in *Holmes v. Walton*. See Hamburger, *Law and Judicial Duty*, supra note 3, at 407–22.) In short, removal, if based on authorization and a suspension of habeas, could be lawful, and in narrow circumstances removal could perhaps be done

What then was unlawful about the exclusion and detention of Japanese Americans in World War II? The usual answer is that it violated due process and equal protection. There was, however, a more fundamental and immediate constitutional problem, which usually gets ignored.

Most basically, the government failed to distinguish between persons who were within protection from those who were not. From the moment Japan began its attack on Pearl Harbor, Japanese citizens, including those in America, were outside the protection of the law. Therefore, subject to the restrictions in the 1798 Alien Enemies Act, the executive could require those who were on the West Coast to remove to designated points in the interior. American citizens of Japanese descent, however, remained entirely within the protection of the law. As seen in Part IV, an executive could lawfully detain and remove persons who were within protection if it got legislative authorization and a legislative suspension of habeas corpus. Yet the suspension of habeas was possible under the U.S. Constitution only in cases of rebellion or invasion, neither of which was a realistic scenario in 1941. Not paying attention to this obstacle, the executive of the United States removed and detained *American citizens* of Japanese descent without even attempting to get a suspension of habeas, and it thereby violated their rights. The law recognizes that detention and removal is sometimes necessary, but it distinguishes between persons within protection and persons outside it.

3. *Torture and Other Harsh Methods of Interrogation.* — By now it should be obvious enough that the principle of protection is merely a gatekeeper, which bars prisoners of war and others outside protection from claiming legal rights or being subjected to the law. The principle thus neither prevents the executive from using severity nor precludes the legislature from establishing limits on executive severity. For example, already in the War of Independence, the Continental Congress used its military regulations to bar torture.⁵¹⁸ Similarly today, Congress can more generally adopt rules against objectionable methods, including rules that enforce international law. Perhaps even more importantly, as already noted, the executive is constrained by a range of other considerations, including domestic ideals and the structural enforcement of international relations and international law.

Having considered how the principle of protection would apply in contemporary circumstances, Part VIII must now shift gears. In particular, it must consider another aspect of the question: whether recent cases have put an end to the principle's practical significance. Even if the prin-

simply through military law. Otherwise, persons who were within the protection of the law had a right to judicial process, even if they were disaffected.

Of course, military law could be imposed on contested or enemy territory without such restrictions. For the application of military law during the Civil War, see *supra* note 508.

518. See *supra* note 427.

ciple is advantageous, has precedent deprived it of its continuing applicability?

F. *Not Barred by Precedent*

Has the principle of protection been barred by precedent? The application of the principle as detailed above may be plausible in theory, but what about in reality, in the U.S. Supreme Court? Some of the Court's recent decisions, *Hamdi* and *Boumediene*, appear incompatible with the principle of protection and may therefore prompt skepticism about the principle's contemporary application.⁵¹⁹ The Court, however, has never repudiated the principle of protection, and its recent decisions cannot be taken to have settled the issue.

It will be recalled that the principle of protection was fundamental. It was widely discussed and understood at the time of the founding, and its reciprocal relationship to allegiance seemed inherent in the formation of free governments and their constitutions.⁵²⁰ From this perspective, all free peoples in their constitutions established their governments on the principle of protection. Certainly, Americans seem to have assumed the principle when they adopted their constitutions, and the principle was thus implicit in what their constitutions made explicit.

As might be expected, early federal judges regularly relied on the principle of protection and its reciprocal relation to allegiance. It has already been seen how the reciprocal relation of allegiance and protection informed eighteenth-century judicial decisions on treason, habeas, and alien claims. In addition, the relationship of allegiance and protection was a regular theme in nineteenth-century cases.⁵²¹ This principle

519. *Boumediene v. Bush*, 128 S. Ct. 2229 (2008); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

520. See *supra* Part I.

521. In cases that depended on the nationality of individuals during the Revolution, early nineteenth-century courts harked back to Revolutionary-era discussions of allegiance and protection. For example, in 1830, in *Inglis v. Trustees of Sailor's Snug Harbor*, the U.S. Supreme Court concluded that Inglis was not within protection, explaining that he "was not . . . abiding in the state and owing protection to the laws of the same. He was within the British lines, and under the protection of the British army, manifesting a full determination to continue a British subject." 28 U.S. 99, 125 (1830); see also the argument of Justice Johnson in *Shanks v. Dupont*, 28 U.S. 242, 261–63 (1830) (Johnson, J., dissenting from holding that Shanks had become a British subject and she thus enjoyed rights under the 1783 peace treaty with Britain).

More generally, see *Minor v. Happersett*, 88 U.S. 162 (1874), which held that state constitutions and laws that allow suffrage only for men are not necessarily void. The Court noted that:

The very idea of a political community, such as a nation is, implies an association of persons for the promotion of their general welfare. Each one of the persons associated becomes a member of the nation formed by the association. He owes it an allegiance and is entitled to its protection. Allegiance and protection are, in this connection, reciprocal obligations. The one is a compensation for the other; allegiance for protection and protection for allegiance.

Id. at 165–66.

has even remained familiar in the twentieth century.⁵²² Although today judges only dimly recall the principle, many still follow the patterns of thought laid down by their predecessors who more self-consciously understood this founding ideal.

Against this background, judges do not face a simple question about the best possible rule on aliens, enemies, habeas, or anything else examined here. Rather, they confront a different sort of question. Should they, or even can they, displace one of the most basic American legal assumptions—an assumption that underlies all American law, including the Constitution? Should they, or can they, displace a principle that undergirds the society itself, its vision of consensual government, and its capacity to defend itself? If the judges are to reject so foundational an assumption, what is the appropriate way for them to do this? And have they acted in such a way?

As it happens, far from rejecting the principle of protection, the judges have not even addressed it. Although it may be imagined that the principle of protection was repudiated in the recent detainee decisions, such as *Hamdi* and, in particular, *Boumediene*, the issue of protection does not appear to have been raised by the lawyers or the judges in these cases.⁵²³ The lawyers did not bring the issue to the Court's attention, and the judges apparently did not notice the omission.

Among the circumstances that left the judges unaware of this issue was the speed of the proceedings. In *Boumediene*, the case in which the Court most clearly reached a holding incompatible with the principle of protection, the Court granted certiorari without adhering to its traditional "practice of requiring the exhaustion of available remedies."⁵²⁴ The Court thus reached a decision without the benefit of the usual range

Early nineteenth-century judges even recognized the most refined implications of the principle of protection. It will be recalled that if, at the outbreak of a war between two nations, a subject of one had a license to reside in the other with protection, he nonetheless could not be understood to have accepted the protection, and so would be treated as an enemy, if he was "in open hostility." Following this reasoning, John Marshall explained that if such an alien with an "acquired domicile" in an enemy nation were to "engage in open hostilities," he "would be considered and treated as an enemy." *The Venus*, 12 U.S. 253, 280 (1814) (holding that property of U.S. citizen domiciled in foreign enemy country can be captured and held as prize even if shipped prior to knowledge of war).

522. Speaking for the U.S. Supreme Court, Justice Jackson noted the "universally recognized reciprocal duties of protection by the state and of allegiance and support by the citizen." *Miller Bros. Co. v. Maryland*, 347 U.S. 340, 345 (1954) (holding that when inhabitants of Maryland purchased goods in Delaware from Delaware corporation, Maryland could not shift the burden of paying their use tax to the Delaware corporation).

523. *Boumediene*, 128 S. Ct. 2229; *Hamdi*, 542 U.S. 507. To be sure, the word "protection" appeared in the briefs and opinions, but without clear reference to the principle of protection discussed here.

524. *Boumediene*, 128 S. Ct. at 2280 (Roberts, C.J., dissenting) (quoting *Boumediene v. Bush*, 549 U.S. 1328, 1329 (2007) (Stevens & Kennedy, JJ., respecting denial of cert.) (citation omitted)).

of argumentation and decisions below—without the ordinary time and opportunity for scholars to weigh in with articles (perhaps such as this one) or for lawyers to prepare extensively researched briefs.⁵²⁵

This is unfortunate when one recalls the importance of the principle of protection and the dramatic character of the Court's departure from it. Protection is an assumption about the fundamental relation of society to government. Accordingly, a judicial rejection of the principle of protection would alter the very boundaries of the society, the domain of its law, and their relation to each other. In particular, the U.S. Constitution rests on the assumption that the obligation of the law arises from an underlying consent and that the government owes protection to the persons who can be presumed to have consented to allegiance. It is difficult to think of a much more fundamental premise of the United States and its constitution. A successful judicial modification of the principle of protection would therefore go far beyond the familiar sort of judicial adjustment of a particular constitutional rule. It thus cannot be assumed that the Court intended to change the principle of protection or even that it could change it—especially in a case in which the lawyers did not raise the issue and the judges did not address it.

In the end, those who would depart from the principle bear a heavy burden of persuasion—a burden they have not even attempted to carry. Few constitutional assumptions are more basic, and few are more important. Few constitutional assumptions, however, have slipped by with so little attention.

CONCLUSION

The principle of protection is one of the most basic assumptions underlying the U.S. Constitution. It is a gatekeeper principle, which determines who is within the obligation and protection of the nation's law, and who is not.

Contrary to what is commonly believed, early Americans were not unfamiliar with the threat of terrorism and other informal warfare. Early American executives, moreover, were not confounded by such warfare, for they seem to have understood that, with the principle of protection, they could respond both lawfully and effectively. Two American states in the founding era are known to have encountered potentially dangerous Middle Easterners on American soil, and at least one of these states (and probably the other) dealt with its visitors by recognizing that they were outside the protection of the law.

Of course, one could always wish for more evidence. The evidence, however, is of the sort one would expect regarding a principle that was so

525. According to Justice Breyer, writing when the Court in 2007 denied certiorari in *Boumediene*, “[n]or will further percolation of the question presented offer elucidation as to . . . the threshold question whether petitioners have a right to habeas.” *Boumediene*, 549 U.S. at 1332 (Breyer, J., dissenting from denial of cert.).

well established as to be largely taken for granted. English and American lawyers repeatedly recited the principle; they frequently explained its application but usually did not bother; and they sorted out a wide range of questions in a manner consistent with the principle—most notably, in controversies about treason, disaffection, oaths, habeas corpus, prisoners of war, enemy aliens, and alien claims. Considered as a whole, the evidence is powerful.

Today, although the principle of protection is scarcely remembered, it remains important for understanding the use of law in response to terrorism and other threats. The principle is not a freestanding constitutional requirement, but it was taken for granted in the adoption of American constitutions, and it is thus essential for understanding their meaning. In particular, it reveals much about the limited reach of the law, including much about the limited jurisdiction of the courts. Persons within allegiance are within the protection and obligation of the law. They have rights under the law, and the executive can punish them only through prosecutions for breach of the law. In contrast, persons outside allegiance are outside protection. They have no legal rights, and not being obliged by the law, they cannot be prosecuted under it.

In closing, it is worth recalling the value of the principle of protection. At the very least, protection is the historic foundation of American governments—the principle on which the people of each state and the United States consented to their constitutions, exchanging their allegiance for protection and especially the protection of the law. More generally, even today, the principle has profound functional significance, for it provides a paradigm for understanding a wide range of otherwise intractable problems.

At a doctrinal level, the principal can explain much that otherwise seems unclear and inconsistent in the law applicable to terrorism. It shows, most centrally, why foreign terrorists generally do not have legal rights or obligation. It also reveals the boundaries of habeas, the obstacles to claims of rights by prisoners of war, the power of the United States over enemy aliens, the limits on jurisdiction over foreigners and foreign lands, and the rights of unauthorized aliens. More generally, the principle provides a framework for understanding government's traditional legal authority or available strategies. In the war against the United States by al Qaeda and similar organizations, there has been much confusion about when the government should rely upon law and when it should not—for example, when the executive may or may not preventively detain individuals, when it may or may not prosecute them, and when the judges may or may not grant habeas. The principle of protection sorts out these problems with considerable clarity, revealing when the use of law is mandatory, optional, or barred.

The principle also discloses much about the domain of the law. In a multinational world, there must be a limit somewhere to the reach of the law of the United States, and it must be a limit that can apply equally to

the laws of all nations. In this regard, the law is subject to at least two limitations: that the coercion of the law, including habeas and other legal process, is confined to sovereign territory, and that the obligation and protection of the law are confined to persons within allegiance. These limitations on the law's domain stand in sharp contrast to some contemporary visions of "extraterritoriality," in which the law has so open-ended a reach as to have no clear boundary—let alone a border consistent with ideals of consent or the practicalities of how nations defend themselves and their diverse choices.⁵²⁶ Perhaps one day, the diversity and conflict among nations will come to an end. In the meantime a line must be drawn somewhere, delimiting not only the physical borders of nations but also the outer edges of their laws. The principle of protection, joined by that of sovereign territory, does much to draw this line with a combination of idealism and practicability, generosity and prudence.

Last, but not least, the principle offers a way out of the conflict between safety and civil liberty. It must be hoped that nations can secure their safety without threatening their own liberty, but even in the best of times, the conflict between these goals always lurks not far below the surface. Accordingly, the preeminent advantage of the principle of protection is that it can largely reconcile safety and civil liberty. Whereas the current legal regime leaves the federal government struggling to develop policies on terrorism that are both effective and lawful, the principle of protection lays out a foundation for the government to deal vigorously with threats while fully respecting civil liberties.

To be precise, it does this by demarcating both much power and sharp limits on power. It leaves the executive and the legislature great freedom in dealing with persons outside protection, thereby allowing the government to choose, revise, and continually adjust its policies. The principle thus allows the government to mount an agile and sophisticated defense against external threats. At the same time, the principle also confines the government as to persons within protection, emphatically barring it from whittling away their civil rights. In such ways, as illustrated by terrorism, the principle of protection is a profoundly valuable foundation for a society that seeks to preserve itself from danger without undermining its liberty.

Of course, it would be a mistake to attribute too much to the principle. It is merely a gatekeeper, and it therefore leaves many questions for resolution by other principles and rules of law. For example, although the principle offers the protection of the law to citizens and aliens within allegiance, it does not thereby guarantee them any particular substantive rights. Similarly, although the principle leaves prisoners of war and others outside allegiance without legal obligation or rights, it does not excuse executive officers from their legal duties, whether under constitu-

526. For an illustration of this sort of open-ended vision, see *supra* note 15. For the risks inherent in the word "extraterritorial," see *supra* note 1.

tions, statutes, or treaties (including those that incorporate international law). In short, the principle provides only an initial framework, which demarcates access to legal rights and limits the government's legal strategies, but which leaves the substance of rights and policy to be determined in other ways. It therefore cannot be expected to provide a rich account of justice. Even merely as a threshold principle, however, it is essential, for in reconciling safety and civil liberty, it makes the rule of law practicable.