2009

A Convenient Constitution? Extraterritoriality After *Boumediene*

Christina Duffy Ponsa-Kraus
cponsa@law.columbia.edu

A CONVENIENT CONSTITUTION? EXTRATERRITORIALITY AFTER *BOUMEDIENE*

*Christina Duffy Burnett**

Questions concerning the extraterritorial applicability of the Constitution have come to the fore during the "war on terror." In Boumediene v. Bush, *the Supreme Court held that noncitizens detained in Guantánamo have the right to challenge their detention in federal court. To reach this conclusion, the Court used the "impracticable and anomalous" test, also known as the "functional" approach because of its reliance on pragmatic or consequentialist considerations. The test first appeared in a concurring opinion over fifty years ago; in* Boumediene, *it garnered the votes of a majority.*

This Article argues that the Boumediene *Court was right to hold habeas rights applicable in Guantánamo, but wrong to endorse the "impracticable and anomalous" test. The test rests on a view of the Constitution abroad that overemphasizes the difference between the foreign and the domestic, improperly relegating constitutional guarantees abroad to a far more uncertain status than they have at home. Although the opinions developing the test pay lip service to the idea that the Constitution has force outside the United States, they undermine that proposition by determining whether constitutional guarantees apply extraterritorially based on pragmatic grounds alone—that is, by asking whether it would be "impracticable" and/or "anomalous" to apply them. In response, this Article argues that courts dealing with questions of constitutional extraterritoriality should distinguish between two questions: that of* whether *a constitutional guarantee applies in a given circumstance, and that of* how *an applicable guarantee may be enforced. Pragmatic factors come into play at the second stage.*

Illustrating the point by comparing the cases on constitutional extraterritoriality to those on Fourteenth Amendment incorporation, this Article argues that courts addressing questions of constitutional extraterritoriality should look to the Fourteenth Amendment cases for guidance on the distinction between the "whether" and "how" questions. Only when consequentialist concerns enter the analysis at the proper stage will governmental action abroad be adequately restrained.

* Associate Professor of Law, Columbia University. I am grateful to D. Graham Burnett, Ariela Dubler, Jamal Greene, Gillian Metzger, Henry Monaghan, Trevor Morrison, Gerald Neuman, Kal Raustiala, James Schulz, Matthew Waxman, and John Witt for their feedback; to Lauren Ernst for her excellent research assistance; to Bartholomew Sparrow for his scholarly generosity; and to Emily Rossi and the staff at the *Columbia Law Review* for their superb editorial work.

INTRODUCTION

The Supreme Court's decision in *Boumediene v. Bush* granting constitutional habeas rights to persons being held by the United States in Guantánamo Bay adopted a moderate and reasonable account of the extraterritorial applicability of the Constitution—or so it seems at first glance.[1] Eschewing the dissenters' bright-line formalism, according to which the absence of titular or de jure U.S. sovereignty over Guantánamo would translate directly into the absence of constitutional rights for noncitizens there (and implicitly rejecting the view that the Constitution applies in full always and everywhere), the majority in *Boumediene* endorsed a "functional" approach toward matters of constitutional extraterritoriality.[2] After concluding that what matters for purposes of determining Guantánamo's status is not the apparent absence of de jure U.S. sovereignty over the naval base, but the undeniable presence of actual or de facto sovereignty there,[3] the Court turned to a test known as the "im-

1. 128 S. Ct. 2229, 2251–58 (2008). The *Boumediene* case is the latest in a series of Court decisions dealing with the situation of detainees held by the United States in Guantánamo and elsewhere in connection with the "war on terror." See Hamdan v. Rumsfeld, 548 U.S. 557 (2006) (striking down military commissions established by Bush administration in Guantánamo as violating Geneva Convention); Hamdi v. Rumsfeld, 542 U.S. 507 (2004) (holding due process requires U.S. citizen held as unlawful combatant to have meaningful opportunity to challenge detention); Rasul v. Bush, 542 U.S. 466 (2004) (holding courts have jurisdiction under federal habeas statute to hear challenges to detention brought by detainees in Guantánamo). On remand in *Boumediene*, the district court granted habeas to five of six detainees. See Boumediene v. Bush, 579 F. Supp. 2d 191, 197–98 (D.D.C. 2008). The government decided not to appeal the district court's decision. See WilmerHale, Guantanamo: *Boumediene v. Bush*, at http://www.wilmerhale.com/boumediene/ (last visited April 8, 2009) (on file with the *Columbia Law Review*).

2. See *Boumediene*, 128 S. Ct. at 2258 (implying that Court's approach is "functional"); id. at 2298 (Scalia, J., dissenting) (describing Court's approach as "'functional' test"); see also Michael John Garcia, Cong. Research Serv., *Boumediene v. Bush*: Guantanamo Detainees' Right to *Habeas Corpus* 4, 10 (2008) ("functional approach").

3. *Boumediene*, 128 S. Ct. at 2252–53; see Lease of Lands for Coaling and Naval Stations, U.S.-Cuba, art. III, Feb. 6–23, 1903, T.S. No. 418 (granting United States "complete jurisdiction and control" over Guantánamo Bay); see also Treaty of Relations, U.S.-Cuba, art. III, May 29, 1934, 48 Stat. 1682 (providing for continuation of 1903 lease "[u]ntil the two contracting parties agree to the modification or abrogation of [its] stipulations"). On the early history of how the United States came to acquire its asserted rights to lease lands for a naval base at Guantánamo (i.e., the history of the "Platt Amendment," in which these rights were first codified), see generally David F. Healy, The United States in Cuba, 1898–1902: Generals, Politicians, and the Search for Policy 150–78

practicable and anomalous" test, which it traced principally to its earlier decisions in *Reid v. Covert*, *Johnson v. Eisentrager*, and the *Insular Cases*.[4] These cases all concerned the applicability of the Constitution outside the "United States"—whether in foreign countries or in the nonstate "territories" of the United States.[5] Applying that test, the Court evaluated a set of factors with a view toward determining whether the application of the constitutional right to habeas in Guantánamo would be "impractica-

---

(1963) (describing events surrounding adoption of Platt Amendment); Louis A. Pérez, Jr., Cuba Under the Platt Amendment, 1902–1934, at 29–55 (1986) (same); 1 Emilio Roig de Leuschenring, Historia de la Enmienda Platt: Una Interpretación de la Realidad Cubana 1–185 (1935) (same); Lejeune Cummins, The Formulation of the "Platt" Amendment, 23 Americas 370 (1967) (discussing historiographical debates over Platt Amendment's authorship and motives behind Amendment); Christina Duffy Burnett, A Clash of Constitutionalisms: The Conflict over the Platt Amendment, 1900–1901 (2009) (unpublished manuscript, on file with the *Columbia Law Review*) (focusing on debates over Platt Amendment at Cuban constitutional convention in 1901). On Guantánamo's status, see generally Joseph Lazar, International Legal Status of Guantanamo Bay, 62 Am. J. Int'l L. 730 (1968) (reviewing history of Platt Amendment, 1903 lease, and 1934 treaty, and analyzing status of Guantánamo from perspective of municipal and international law); Gerald L. Neuman, Closing the Guantánamo Loophole, 50 Loy. L. Rev. 1, 3–44 (2004) (analyzing Guantánamo's constitutional status in light of doctrines of constitutional extraterritoriality and status of several similarly ambiguously situated places); Kal Raustiala, The Geography of Justice, 73 Fordham L. Rev. 2501, 2534–46 (2005) [hereinafter Raustiala, Geography] (examining questions of "legal spatiality" in context of Guantánamo).

4. Reid v. Covert, 354 U.S. 1 (1957); Johnson v. Eisentrager, 339 U.S. 763 (1950). The *Insular Cases* include a long list of decisions handed down between 1901 and 1922; the *Boumediene* Court cited Balzac v. Porto Rico, 258 U.S. 298 (1922); Dorr v. United States, 195 U.S. 138 (1904); Hawaii v. Mankichi, 190 U.S. 197 (1903); De Lima v. Bidwell, 182 U.S. 1 (1901); Dooley v. United States, 182 U.S. 222 (1901); Armstrong v. United States, 182 U.S. 243 (1901); Downes v. Bidwell, 182 U.S. 244 (1901). See *Boumediene*, 128 S. Ct. at 2254–55. For discussions of which cases belong on a full list of the *Insular Cases*, see Stanley K. Laughlin, Jr., The Law of United States Territories and Affiliated Jurisdictions 114 & nn.34–35 (1995) [hereinafter Laughlin, The Law of United States Territories] (describing *Insular Cases* as six cases decided in 1900 term "although later decisions treating the status of territories are subsumed under the title"); Christina Duffy Burnett, A Note on the *Insular Cases*, *in* Foreign in a Domestic Sense: Puerto Rico, American Expansion, and the Constitution 389, 389–92 (Christina Duffy Burnett & Burke Marshall eds., 2001) [hereinafter Burnett & Marshall] (claiming that despite "nearly universal consensus that the series culminates with *Balzac v. Porto Rico* in 1922, and that *Downes v. Bidwell* is the single most important of these cases, authors rarely provide a complete list"); see also Bartholomew Sparrow, The *Insular Cases* and the Emergence of American Empire 257–58 (2006) (noting that "[a]lmost every writer . . . has his or her own particular list of cases, from as few as three to as many as twenty-three"); Efrén Rivera Ramos, The Legal Construction of American Colonialism: The *Insular Cases* (1901–1922), 65 Rev. Jur. U. P.R. 225, 240–41 & nn.40–42 (1996) (noting that although *Insular Cases* rubric is traditionally thought to encompass nine decisions from 1901, "some authors have extended the name to another set of cases decided from 1903 to 1914"). Sparrow cites several additional works and offers the most expansive list at thirty-five cases. Sparrow, supra, at 257.

5. As for what precisely the "United States" encompasses, this is a contentious subject, as I discuss below. See infra notes 21–25, 44–48 and accompanying text.

ble and anomalous."[6] Finding that it would not be, the Court concluded that the detainees may seek the writ in federal court.[7]

This Article offers a critique of the "impracticable and anomalous" test and of the broader legal framework for dealing with questions of constitutional extraterritoriality that has given rise to it, and offers an alternative approach to understanding and resolving questions concerning the scope and content of constitutional provisions outside the United States. Although the *Boumediene* Court got it right when it rejected the proposition that the Constitution stops where de jure sovereignty ends (a.k.a. "strict territoriality"), it took a wrong turn when it embraced a "functional" approach, and in particular when it endorsed the so-called impracticable and anomalous test, in the process of determining the "reach" (as the *Boumediene* Court put it) of the constitutional right to habeas.[8]

Agreeing wholeheartedly with the *Boumediene* Court's conclusion that the Constitution does not stop at the border even if not all of its provisions apply in every circumstance, I argue that the answer to the question of which provisions apply when and where does not lie in the "impracticable and anomalous" test. While the test masquerades as a moderate and reasonable "middle way" between two extremes—strict territoriality on the one hand and what is known as "universalism" on the other—it actually slips a version of strict territoriality into the analysis through the back door.[9] It does so by enabling courts to make decisions respecting the applicability—not *enforceability*, but *applicability*—of constitutional provisions abroad based entirely on policy concerns—an approach that would have trouble finding favor domestically, where we take

---

6. *Boumediene*, 128 S. Ct. at 2255–56 (citing Justice Harlan's concurring opinion in *Reid*, 354 U.S. at 74–78, and describing Justice Kennedy's concurring opinion in United States v. Verdugo-Urquidez, 494 U.S. 259, 277–78 (1990) (Kennedy, J., concurring), as applying same approach); id. at 2262 (concluding application of writ in Guantánamo would not be "impracticable or anomalous" under present circumstances, although it might be so under different circumstances (internal quotation marks omitted)). As the quotations from articles discussed in Parts II & III indicate, courts and scholars sometimes use the term "impractical" instead of "impracticable." Harlan himself used both words interchangeably. *Reid*, 345 U.S. at 74–75 (Harlan, J., concurring in the result).

7. *Boumediene*, 128 S. Ct. at 2262.

8. Id. at 2255–58, 2259–62.

9. For a taxonomy of approaches to the question of the scope of constitutional rights, see, e.g., Gerald L. Neuman, Strangers to the Constitution: Immigrants, Borders, and Fundamental Law 5–8 (1996) [hereinafter Neuman, Strangers] (describing "universalism," "membership," "mutuality of obligation" (including "strict territoriality"), and "balancing" or "global due process"). Strict territoriality in its strictest form holds that constitutional guarantees do not apply outside the United States to anyone, whether citizen or alien. See In re Ross, 140 U.S. 453, 464 (1891) (holding that constitutional guarantees do not apply abroad even to citizens). A more commonly held, less draconian version of strict territoriality holds, in essence, that citizens enjoy constitutional guarantees abroad, but noncitizens do not. See *Verdugo-Urquidez*, 494 U.S. at 278 (Kennedy, J., concurring) (declaring that constitutional guarantees do apply to citizens abroad and suggesting that citizenship might be the decisive factor in determining whether they apply); *Reid*, 354 U.S. at 14 (same).

for granted that the Constitution "applies." The questionable functional approach, I argue, has been encouraged by an understanding of extraterritoriality that exaggerates the difference between the "domestic" and the "foreign" when it comes to questions of the scope and content of constitutional guarantees.

It is one thing to acknowledge, as the *Boumediene* Court did, that even if the Constitution is in force, not all of its provisions apply in every conceivable circumstance.[10] It is another thing entirely to reason from there that courts should apply a functional test in order to determine which provisions apply when and where. Not only does the latter step not follow from the former; it actually undermines the former, because it assumes a sharp distinction between "foreign" and "domestic" territory for purposes of determining whether a given element of the Constitution applies in a liminal or extraterritorial situation, and in that way strengthens the basic premise of strict territoriality even as the same test purports to follow from a rejection of strict territoriality. It is true, of course, that not all constitutional provisions apply in all circumstances. But this is true not only abroad; it is also true domestically. "The Constitution" as such, in its entirety, does not "apply" anywhere: some of its provisions apply in some circumstances, others in other circumstances. This is true even of the Bill of Rights, despite the familiar refrain in the literature on constitutional extraterritoriality that the Bill of Rights applies "in full" at home.[11] At home, neither the Fifth Amendment right to a grand jury indictment nor the Seventh Amendment right to a civil trial by jury applies against the states.[12] At home, the rest of the Bill of Rights did not apply against the states either, until the Fourteenth Amendment "incorporation" jurisprudence of the Warren Court held otherwise with respect to most of these provisions.[13] In short, the extraterritorial setting does not have a monopoly on the question of which constitutional guarantees apply when and where; this issue can be uncertain and unresolved domestically as well. Yet the extraterritorial setting does have a monopoly on the rhetoric of "impracticability" and "anomalousness," a rhetoric that both con-

---

10. *Boumediene*, 128 S. Ct. at 2254–55 (quoting with approval statement in Balzac v. Porto Rico, 258 U.S. 298, 312 (1922), that "the real issue in the *Insular Cases* was not whether the Constitution extended to the Philippines or Porto Rico when we went there, but which of its provisions were applicable by way of limitation upon the exercise of executive and legislative power in dealing with new conditions and requirements").

11. See Christina Duffy Burnett, *Untied* States: American Expansion and Territorial Deannexation, 72 U. Chi. L. Rev. 797, 808 nn.39–40 (2005) [hereinafter Burnett, Untied] (collecting sources making this claim).

12. Hurtado v. California, 110 U.S. 516, 538 (1884) (holding Fifth Amendment right to grand jury indictment not applicable against the states); Walker v. Sauvinet, 92 U.S. 90, 92 (1875) (same for Seventh Amendment right to trial by jury in civil cases).

13. See infra Part III.A. In addition to the Fifth Amendment right to a grand jury indictment and the Seventh Amendment right to jury trials in civil lawsuits, the Bill of Rights provisions that have not been held applicable against the states are the Second Amendment's right to bear arms, the Third Amendment's right against quartering troops, and the Eighth Amendment's right against excessive bails and fines.

fuses matters (because it suggests that pragmatic considerations can and should play a greater role in constitutional interpretation abroad than at home) and gives excessive leeway to courts to hold constitutional guarantees inapplicable in places outside the "United States" (because its criteria for selecting and evaluating pragmatic considerations are so open ended).

As I show in this Article, there are in fact significant symmetries between the Fourteenth Amendment cases and the cases on constitutional extraterritoriality: Both concern (a) *whether* constitutional provisions apply in a given set of circumstances and (b) *how*, if applicable, they should be enforced. That is, the Fourteenth Amendment incorporation jurisprudence addresses the same question domestically that the jurisprudence on constitutional extraterritoriality addresses outside the "United States" (be it in U.S. territories or abroad). Yet the idea that a sharp divide exists between questions of constitutional applicability domestically and the same questions extraterritorially has persisted, and has provided support for the development of very different approaches to what are actually rather similar problems. In the Fourteenth Amendment incorporation cases, the Court has not asked whether it would be "impracticable" and/or "anomalous" to hold particular provisions of the Bill of Rights applicable against the states (though it has, of course, taken pragmatic considerations into account). That excessively pragmatic approach is simply not how one would address the threshold question of the applicability of a constitutional provision in a domestic setting: In that setting, the Court has taken practical considerations into account primarily for purposes of determining *how* to enforce the provisions it has held applicable. Meanwhile, the "impracticable and anomalous" test has been reserved for extraterritorial use.

Prevailing conceptions of extraterritoriality suggest—wrongly, I argue—that the interpretation of the Constitution abroad differs not only in degree but in kind from constitutional interpretation at home. To be sure, it is useful and accurate to distinguish between the domestic and the extraterritorial. Indeed in this Article, I not only distinguish between these two settings, but also, where necessary for purposes of clarity, I refer separately to the "territorial" as opposed to the "extraterritorial" when dealing specifically with the U.S. territories (although for conciseness and where appropriate, I use the phrase "constitutional extraterritoriality" as a shorthand with reference both to the U.S. territories, which are considered partially domestic and partially foreign, and to altogether "foreign" contexts). At the same time, I argue that it is a mistake to treat these contexts—the domestic on the one hand and the extraterritorial on the other—as unrelated fields of inquiry when it comes to the scope (or applicability) and content (or enforceability) of constitutional provisions.

Questions of constitutional scope and content arise within the United States as well as outside of it (and in the ambiguously situated places in between). Here, I illustrate this point by examining the ques-

tion of constitutional extraterritoriality in light of the Fourteenth Amendment incorporation debate, and argue that that debate points to an alternative "middle way" toward approaching the problem of the extraterritorial applicability of constitutional guarantees: one preferable to the functional approach, because it is less driven by policy concerns, without ignoring them altogether.

My argument unfolds in three parts. In Part I, I discuss the Court's first proposition—that the Constitution does not stop where de jure sovereignty ends—and argue that the Court got this part of the analysis right, both descriptively (i.e., as a reading of constitutional text and structure, history, and the relevant precedents) and normatively. As the Court in *Boumediene* correctly points out, even the opinions in the *Insular Cases* of 1901—cases decided at a time of imperial exuberance in the United States and long tainted by association with the proposition that the Constitution does not "follow the flag" outside the United States (except for a few "fundamental" guarantees)—acknowledged that the Constitution is always and everywhere operative with respect to federal government action, even if not all of its provisions apply in all places or at all times.[14] I then show that, despite later efforts to trace the "impracticable and anomalous" test to the *Insular Cases*, the Court in those decisions did not rely on a functional approach per se, though it did take practical considerations into account in its analysis.

In Part II, I offer a genealogy of the "impracticable and anomalous" test, and argue that the *Boumediene* Court took a wrong turn when it endorsed this approach to constitutional extraterritoriality. The test originated under altogether different circumstances from those at issue in *Boumediene* and was questionably appropriate even in its original setting.[15] The product of constitutional improvisation in marginal places—

---

14. *Boumediene*, 128 S. Ct. at 2254; see also Burnett, Untied, supra note 11, at 820–53 (challenging standard account of the *Insular Cases* as having carved out nearly extraconstitutional zone for unincorporated territories). Two of the most often cited examples of the turn of phrase that depicts the Constitution as "following" (or not following) the "flag" are the fictional Mr. Dooley's ("[N]o matther whether th' constitution follows th' flag or not, the supreme coort follows th' iliction returns." Finley Peter Dunne, Mr. Dooley's Opinions 26 (Gordon Press 1974) (1901)), and Elihu Root's ("[A]s near as I can make out the Constitution follows the flag—but doesn't quite catch up with it." 1 Philip C. Jessup, Elihu Root 348 (Archon Books 1964) (1938)), but the phrase was in widespread use at the time. A couple of early appearances of it in law review pieces were inspired by cases dealing with the territories annexed in 1898. See, e.g., Recent Cases, Begley v. N.Y. & P.R.S.S. Co., 105 Fed. 74 (1900), 10 Yale L.J. 219, 219 (1901) (describing what editors considered a "practicable solution of the 'Constitution following the flag' question"); Recent Cases, People ex rel. Juarbe v. Board of Inspectors, 67 N.Y. Supp. 236 (1900), 10 Yale L.J. 162, 164 (1901) (paraphrasing court's holding as rejecting claim that "Constitution follows the flag"); see also L.R. Wilfley, Our Duty to the Philippines, 10 Yale L.J. 309, 310 (1901) (noting difficulties, with respect to governance of Philippines, in determining "to what extent the Constitution follows the flag").

15. As discussed below, the test was first articulated by Justice Harlan in Reid v. Covert, 354 U.S. 1, 74–75 (1957) (Harlan, J., concurring in the result), where he traced its

U.S. military bases abroad—it has proven alarmingly adaptable, working its way into the jurisprudence on the application of the Constitution to U.S. territories, and from there to a case concerning the rights of a foreign national (detained on U.S. soil) with respect to his property in foreign territory, and from there to *Boumediene*, which deals with the rights of noncitizens in a place labeled "foreign" but actually subject to de facto (and exclusive) U.S. sovereignty.[16] I show that courts dealing with constitutional rights in the U.S. territories have used the test in unexpected and troubling ways, a development that deserves scrutiny precisely because of the malleability of the test and the permeability of the boundaries between the different kinds of places with respect to which it has been used. I pay attention to the territorial cases because to do so allows for a fuller picture of the test to emerge than the one that comes across in the genealogy that threatens to become canonical, which, with the exception of the *Insular Cases*, focuses on the extraterritorial context.[17]

In Part III, I examine the "impracticable and anomalous" test in light of the jurisprudence of Fourteenth Amendment incorporation. These two lines of cases have developed separately; scholars have rarely examined them together.[18] But like the jurisprudence on constitutional extraterritoriality, the Fourteenth Amendment cases deal with the applicability of constitutional provisions—in this case, in the states of the Union, which is to say, in places entirely within the "United States." Although judges and scholars have strongly disagreed concerning the best approach to the question of the applicability of constitutional guarantees in the domestic setting, nothing quite like the "impracticable and anomalous" test has taken hold at home (even though the test itself was articulated before the heyday of the Fourteenth Amendment incorporation jurisprudence in the 1960s). The Fourteenth Amendment cases, I argue, shed light on a critical and useful distinction between the *applicability* and the *enforcement* of constitutional guarantees (i.e., on the difference between the questions of *whether* a constitutional provision applies and *how*

---

origins to the *Insular Cases*; in this Article I challenge his interpretation of those cases as the source of his test. See infra Part II.

16. See United States v. Verdugo-Urquidez, 494 U.S. 259, 278 (1990) (Kennedy, J., concurring) (foreign national, foreign territory); *Reid*, 354 U.S. at 1 (U.S. military bases abroad); King v. Morton, 520 F.2d 1140, 1148 (D.C. Cir. 1975) (U.S. territory of American Samoa).

17. For this genealogy, see *Boumediene*, 128 S. Ct. at 2255–57.

18. But see Neuman, Strangers, supra note 9, at 97, 100–03 (noting parallels between jurisprudence on extraterritoriality and Fourteenth Amendment incorporation jurisprudence); Carlos R. Soltero, The Supreme Court Should Overrule the Territorial Incorporation Doctrine and End One Hundred Years of Judicially Condoned Colonialism, 22 Chicano-Latino L. Rev. 1, 19–34 (2001) (comparing territorial "incorporation" and Fourteenth Amendment "incorporation" cases, and criticizing former in light of latter); Roszell Dulany Hunter IV, Note, The Extraterritorial Application of the Constitution—Unalienable Rights?, 72 Va. L. Rev. 649, 658 (1986) (noting similarity in Justice Harlan's approaches to cases on application of Bill of Rights extraterritorially and against states of Union); id. at 658–59 n.58 (elaborating on Fourteenth Amendment cases).

it may be enforced)—a distinction that could be of use in the jurisprudence on constitutional extraterritoriality.

To be sure, even within the Fourteenth Amendment incorporation debate the adherents of different methods of constitutional interpretation hold different views concerning the importance of pragmatic considerations or practical consequences.[19] In my own proposal, I adhere to a position that takes into account these consequentialist concerns, arguing that they do and should play a role in the analysis, but primarily in the analysis of *how* applicable constitutional guarantees should be enforced, rather than of *whether* they apply in the first place. I draw on the Fourteenth Amendment incorporation cases both to demonstrate that the "impracticable and anomalous" test misapplies a thoroughgoing consequentialist analysis to the issue of *whether* constitutional guarantees apply (giving excessive weight to practical factors over other considerations relevant to the interpretation of constitutional provisions, such as text and structure), and to propose a better approach.[20]

My argument, in short, is that functional considerations should not ordinarily resolve the question of *whether* a constitutional provision applies in a given circumstance, whether that circumstance arises abroad or at home; rather, considerations of practicality should be relevant to the question of *how* a provision that has been held applicable may be enforced. By conflating these two inquiries, the *Boumediene* Court participates in and threatens to perpetuate a troublesome tendency in the juris-

19. For instance, Justice Hugo L. Black (the leading proponent of incorporation) is known for his "textualism," which he combined with a historical approach in the Fourteenth Amendment cases, whereas Justice John Marshall Harlan (the leading opponent of incorporation) is known as a "pragmatist." See, e.g., Philip Bobbitt, Constitutional Fate, 58 Tex. L. Rev. 695, 707–08 (1980) (describing Justice Black's textualism and remarking that "[i]t was Hugo Black who led constitutional argument out of the wilderness of legal realism"); J. Richard Broughton, Unforgettable, Too: The (Juris)Prudential Legacy of the Second Justice Harlan, 10 Seton Hall Const. L.J. 57, 59–60, 68–96 (1999) (describing Justice Harlan as "prudential pragmatist," and tracing legal pragmatism to legal realism); G. Edward White, The Renaissance of Judicial Biography, 23 Revs. Am. Hist. 716, 719 (1995) (describing Black's methodology in incorporation cases as based on "history" and "linguistics"). Of course, these labels should not mislead one into adopting an oversimplified account of the different approaches.

20. Neuman has set forth the most comprehensive account of which I am aware of the possible approaches to constitutional extraterritoriality. See Gerald L. Neuman, Whose Constitution? 100 Yale L.J. 909, 914–20 (1991) [hereinafter Neuman, Whose Constitution?] (describing "universalism," "membership," "municipal law," and "balancing" or "global due process" approaches, and expressing preference for "municipal law"); see also Neuman, Strangers, supra note 9, at 5–8 (same; renaming "municipal law" approach "mutuality" approach). Kal Raustiala defends an approach he describes as falling between Neuman's "mutuality" and "global due process" approaches. See Raustiala, Geography, supra note 3, at 2552. My own proposal could be described as combining elements of the "universalism," "mutuality," and "global due process" approaches, though my goal is not to choose among these approaches or to advocate a specific approach as much as to critique the "impracticable and anomalous" test and to look to the Fourteenth Amendment incorporation cases for insights toward a better way of handling questions of constitutional extraterritoriality. See infra Part III.

prudence of constitutional extraterritoriality: namely, that of allowing consequentialist concerns to dominate the analysis of the threshold question of *whether* a constitutional provision applies outside the United States.

In the wake of *Boumediene*, commentators have been quick to note that the case leaves unanswered a wide range of questions concerning the constitutional rights of foreign detainees abroad. But by shedding light on the relationship between domestic, territorial, and extraterritorial jurisprudence, I draw attention to the permeability of the boundaries between these different kinds of jurisdictions. My aim in doing so is to highlight the potential risks that the legal framework sanctioned in *Boumediene* might pose for the status of constitutional rights not only in far off places, but also closer to home.

I. THE CONSTITUTION BEYOND THE WATER'S EDGE

Until *Boumediene*, few commentators would have guessed that the *Insular Cases* were going to form the basis for a holding that constitutional rights apply extraterritorially, whether in Guantánamo or anywhere else. The *Insular Cases*, a series of Supreme Court decisions handed down between 1901 and 1922, have long been reviled as the cases that held that most of the Constitution does not "follow the flag" outside the United States.[21] These decisions, which dealt with the status of the then-recently annexed territories of the Philippines, Puerto Rico, and Guam, introduced into the Court's jurisprudence on the territories an unprecedented distinction between "incorporated" and "unincorporated" territories:[22] Incorporated territories were known as such because they had

21. On the *Insular Cases*, see generally James E. Kerr, The Insular Cases: The Role of the Judiciary in American Expansionism (1982); Juan R. Torruella, The Supreme Court and Puerto Rico: The Doctrine of Separate and Unequal (1985) [hereinafter Torruella, Supreme Court]; Sarah H. Cleveland, Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs, 81 Tex. L. Rev. 1 (2002); sources cited supra note 4. For works briefly discussing the *Insular Cases* and more broadly examining the consequences of the legal framework of empire as set forth in those cases, see generally Pedro A. Malavet, America's Colony: The Political and Cultural Conflict Between the United States and Puerto Rico (2004); Ediberto Román, The Other American Colonies: An International and Constitutional Law Examination of the United States' Nineteenth and Twentieth Century Island Conquests (2006).

22. The term "incorporation" as a term of art appears in the two lines of constitutional jurisprudence discussed here, with different meanings. The more familiar one concerns the debate over whether the Fourteenth Amendment Due Process Clause incorporates the Bill of Rights. See, e.g., Akhil Reed Amar, The Bill of Rights 137–39 (1998) (describing, and noting the importance of, Fourteenth Amendment incorporation debate); Michael Kent Curtis, No State Shall Abridge: The Fourteenth Amendment and the Bill of Rights 1–4 (1986) (describing extent of disagreement among scholars concerning Fourteenth Amendment incorporation). The less familiar one concerns the doctrine of territorial incorporation developed in the *Insular Cases*. See Christina Duffy Burnett & Burke Marshall, Between the Foreign and the Domestic: The Doctrine of Territorial Incorporation, Invented and Reinvented, *in* Burnett & Marshall, supra note 4, at 1, 1–23 (explaining development of doctrine over course of twentieth century); Frederic

been "incorporated into" the United States and thereby made an integral part of the United States (even if they had not yet been admitted into statehood); unincorporated territories, in turn, "belonged to" but were not "a part of" the United States (and might never become states of the Union).[23] Previously, the "territory" referred to in the Constitution's Territory Clause—which empowers Congress "to make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States"—had been considered part of the "United States."[24] But with the *Insular Cases* came the unincorporated territory, a place that was, in the Court's tortured formulation, "foreign to the United States in a domestic sense."[25]

According to conventional wisdom, the *Insular Cases* held that the Constitution applied in its entirety only to incorporated territories, whereas only "fundamental" rights applied of their own force ("ex proprio vigore") to unincorporated territories—which, although "domestic" and subject to de jure as well as de facto U.S. sovereignty, were deemed to be located outside the United States proper. The *Insular Cases*

R. Coudert, The Evolution of the Doctrine of Territorial Incorporation, 26 Colum. L. Rev. 823 (1926) (explaining development of doctrine in its first two decades of existence). Gerald Neuman suggests that it is "unfortunate" that the same term applies to two different lines of cases, on the ground that the coincidence might confuse the uninitiated. See Neuman, Strangers, supra note 9, at 83; see also Northern Mariana Islands v. Atalig, 723 F.2d 682, 689 (9th Cir. 1984) ("[T]he doctrine of incorporation for purposes of applying the Bill of Rights to the states serves one end while the doctrine of territorial incorporation serves a related but distinctly different one."). (The court in *Atalig* went on to endorse an analysis very different from the one Neuman proposes.) But several scholars have proposed instead that this is a welcome coincidence, because the two lines of cases are in fact closely related. See Hunter, supra note 18, at 673–76 (arguing "absorption" approach of Palko v. Connecticut, 302 U.S. 319, 326 (1937), overruled by Benton v. Maryland, 395 U.S. 784 (1969), should be revived in context of constitutional extraterritoriality); see also id. at 674–75 (analogizing Harlan's approach in extraterritorial cases to Fourteenth Amendment incorporation); Soltero, supra note 18, at 4 n.17 (arguing use of same term in both debates "highlights the fact that there are strong links between the two debates" and exploring those links); infra note 115 and accompanying text (discussing plaintiff's argument in King v. Morton, 520 F.2d 1140 (D.C. Cir. 1975), which included proposition that right to trial by jury applied in American Samoa pursuant to Duncan v. Louisiana, 391 U.S. 145 (1968), a Fourteenth Amendment incorporation case). While the use of the same term in both contexts is indeed a coincidence, I agree with Soltero that it is a welcome one, although my analysis of the parallels between the two debates differs from both his and Hunter's. See infra Part III.

23. Downes v. Bidwell, 182 U.S. 244, 319, 326 (1901) (White, J., concurring). Justice White referred to the "incorporation" of territories in his concurrence in *Downes*. Id. at 341. The first of the *Insular Cases* to use the term "unincorporated" was Rassmussen v. United States, 197 U.S. 516, 525 (1904).

24. U.S. Const. art. IV, § 3, cl. 2; see Cross v. Harrison, 57 U.S. (16 How.) 164, 185, 191–93 (1853) (discussing powers of United States over territory ceded to it); Loughborough v. Blake, 18 U.S. (5 Wheat.) 317, 319 (1820) ("Does [the term United States] designate the whole, or any particular portion of the American empire? Certainly this question can admit of but one answer. It is the name given to our great republic, which is composed of States and territories.").

25. *Downes*, 182 U.S. at 341 (White, J., concurring).

have since been cited by courts in support of the proposition that certain constitutional provisions were inapplicable not only in U.S. territories but also in foreign contexts, and they have been singled out by critics who have decried their creation of an extraconstitutional space during an era of imperialist excess in U.S. history.[26] With this pedigree, they seemed poised to become the cornerstone of a holding that habeas rights did *not* apply in Guantánamo.

Yet after *Boumediene*, the *Insular Cases* look rather like sheep in lion's clothing. The *Boumediene* Court rejected the notion that the *Insular Cases* stand for the proposition that the Constitution does not follow the flag to the unincorporated territories. On the contrary, as interpreted by *Boumediene*, the *Insular Cases* held "that the Constitution has independent force in these territories, a force not contingent upon acts of legislative grace."[27] This assessment of the *Insular Cases* flies in the face of a long-standing consensus that none but the most fundamental guarantees of the Constitution apply outside the boundaries of the "United States," and that the *Insular Cases* were largely to blame for this state of affairs.

But the *Boumediene* Court got it right—not just as a normative matter, but also descriptively. The standard account of the *Insular Cases* has long overstated their holding with respect to constitutional extraterritoriality. While the *Insular Cases* unquestionably distinguished between incorporated and unincorporated territories, the difference between these territories with respect to the application of constitutional provisions has never been as great as courts and commentators have argued.[28]

According to the standard account, by the end of the nineteenth century the Supreme Court's jurisprudence had established that the Constitution applied to the United States' nonstate territories, and at the dawn of the twentieth century, the *Insular Cases* broke with that jurisprudence by withholding most, if not all, of the Constitution from one class of territories (the "unincorporated" ones). In this manner, the Court gave sanction to the policies of the administration of President William McKinley, who had campaigned in part on an imperialist platform in the election of 1900, defeating the anti-imperialist William Jennings Bryan.[29]

---

26. See, e.g., United States v. Verdugo-Urquidez, 494 U.S. 259, 268 (1990) (citing *Insular Cases* in support of proposition that Fourth Amendment does not apply to search of Mexican national's home in Mexico, though he was being held in United States); Burnett, Untied, supra note 11, at 805–13 (describing traditional account); id. at 801 n.12, 808 nn.39–40 (collecting sources).

27. Boumediene v. Bush, 128 S. Ct. 2229, 2254 (2008).

28. I develop this argument in detail in Burnett, Untied, supra note 11, at 814–53.

29. Some historians have emphasized McKinley's initial reluctance to lead the United States into war with Spain in 1898. See, e.g., Kevin Phillips, William McKinley 90–101 (2003). But once the United States declared war—and won—McKinley's administration embarked on an imperialist path, annexing former Spanish possessions and governing them as colonies. On the role of imperialism in the election of 1900, see generally Robert L. Beisner, Twelve Against Empire: The Anti-Imperialists, 1898–1900, at 123–32 (1968) (focusing on anti-imperialists' views on election); id. at 130 ("It is an indication of their

With the Court's go-ahead, the McKinley Administration found itself free to administer its newly acquired overseas empire, free from constitutional fetters. Or so the story goes.

A closer look at the nineteenth century jurisprudence on the application of the Constitution to the territories, however, reveals that the status of the Constitution there was far more ambiguous than the standard account allows, and that the Court's break with that jurisprudence in the *Insular Cases* was not nearly as dramatic as it might seem. For one thing, a number of the nineteenth century cases on the application of the Constitution to the territories were ambiguous. For another, all of these cases were decided against a backdrop that exacerbated this ambiguity, for Congress's organic acts for nineteenth century territories conveyed mixed messages concerning the precise scope and content of the Constitution in the territories. Some organic acts required that territorial legislatures not act inconsistently with the applicable provisions of the Constitution, while others expressly "extended" the Constitution to a given territory, again insofar as applicable.[30] As a result, even those decisions applying constitutional rights in the territories usually left open the question whether the relevant constitutional provision applied of its own force or by legislative grace.

The *Dred Scott* case briefly answered the question in favor of the ex proprio vigore view, with its holding that the Constitution applied of its own force in the territories.[31] Yet the Civil War severely undermined the

---

profound opposition to imperialism that many conservatives who had long reviled [William Jennings] Bryan in the harshest terms found themselves casting their ballots for him."); Sparrow, supra note 4, at 108, 110 (observing that "the election of 1900 was by no means a straightforward referendum on imperialism," but that "for many, McKinley's landslide election in 1900 appeared to be an endorsement of existing White House policies," including those relating to imperialism); Thomas A. Bailey, Was the Presidential Election of 1900 a Mandate on Imperialism?, 24 Miss. Valley Hist. Rev. 43 (1937) (arguing that imperialism was one issue, but not the central one, in election); Krishanti Vignarajah, The Political Roots of Judicial Legitimacy: Explaining the Enduring Validity of the Insular Cases 22–36 (Yale Law Sch., Student Prize Paper No. 39, 2008), available at http://lsr.nellco.org/yale/ylsspps/papers/39 (on file with the *Columbia Law Review*) (marshaling evidence of intensity of debate over imperialism at turn of twentieth century, in support of argument that *Insular Cases* improperly decided non-justiciable political question).

30. See, e.g., Act of March 2, 1853, ch. 90, § 6, 10 Stat. 172, 175 ("[T]he legislative power of the Territory shall extend to all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States."); Act of Sept. 9, 1850, ch. 51, § 17, 9 Stat. 453, 458 ("[T]he Constitution and laws of the United States are hereby extended over and declared to be in force in said Territory of Utah."); see also *Boumediene*, 128 S. Ct. at 2253 ("When Congress exercised its power to create new territories, it guaranteed constitutional protections to the inhabitants by statute."). See generally Burnett, Untied, supra note 11, at 824–34 & n.127 (discussing, and providing full list of relevant statutes).

31. Scott v. Sandford, 60 U.S. (19 How.) 393, 447–49 (1857) ("[W]hen [a] Territory becomes a part of the United States, the Federal Government . . . enters upon it with its powers over the citizen strictly defined, and limited by the Constitution . . . ."). On the links between *Dred Scott* and the *Insular Cases*, see Sanford Levinson, Installing the Insular Cases into the Canon of Constitutional Law, *in* Burnett & Marshall, supra note 4, at 121, 129–30 [hereinafter Levinson, Installing] ("The meta-issue, as it were, of *Dred Scott*, is

persuasive force of the *Dred Scott* decision. And in 1874—after the United States had annexed all of its continental territories—Congress included in the Revised Statutes a blanket provision extending the Constitution to all existing territories: "The Constitution and all laws of the United States which are not locally inapplicable shall have the same force and effect within all the organized Territories, and in every Territory hereafter organized as elsewhere within the United States."[32] As a result, it once more became unclear whether decisions applying constitutional provisions to the territories relied on the statute or on the ex proprio vigore applicability of the relevant provisions.

The Court did not resolve the ambiguity. In fact, at times it remained explicitly undecided on the question: For instance, in *American Publishing Co. v. Fisher*, which dealt with the status of the Seventh Amendment in the Territory of Utah, the Court concluded that "either the Seventh Amendment to the Constitution, or these acts of Congress, or all together, secured to every litigant in a common law action in the courts of the Territory of Utah the right to a trial by jury."[33] Other decisions took the position that the Constitution did apply in the territories of its own force: A mere two weeks after *Fisher*, for instance, the Court decided *Springville v. Thomas*, holding that the Seventh Amendment applied ex proprio vigore in nonstate territories, and that Congress lacked the power to override it.[34] But although *Springville* followed *Fisher*, it cannot be said to have settled the question, for the Court's jurisprudence did not evolve consistently in this direction. Instead, as I have argued elsewhere, the Court tacked back and forth between the ex proprio vigore view and the legislative grace view right up to the eve of the *Insular Cases*.[35]

As a result, when the first series of decisions in the *Insular Cases* came down in 1901, they did not break with precedent quite as dramatically as their critics claimed they had. That they developed this reputation had much to do with the fact that they came down amidst a storm of controversy over "imperialism"—and that they were widely perceived as taking sides with its defenders.[36] The United States had recently intervened in Cuba's war of independence against Spain, entering the conflict just in

---

whether Congress possesses truly 'plenary,' that is, unconstrained, power in regard to the territories of the United States. No issue was more relevant at the turn of the twentieth century, given the turn toward expansion by the United States."); Priscilla Wald, Terms of Assimilation: Legislating Subjectivity in the Emerging Nation, *in* Cultures of United States Imperialism 59, 79 (Amy Kaplan & Donald E. Pease eds., 1993) ("*Downes v. Bidwell* forcefully registers the return of the issues [of] *Dred Scott*.").

32. 18 Stat. 391 (1874). I say all "existing" territories because the provision refers to territories "hereafter organized," not "hereafter acquired," and because I doubt that the provision was enacted with future territorial acquisitions in mind, though this would be worth looking into.

33. 166 U.S. 464, 467–68 (1897).

34. 166 U.S. 707, 708–09 (1897).

35. See Burnett, Untied, supra note 11, at 824–34.

36. See Sparrow, supra note 4, at 99–110 (describing range of views on significance of *Insular Cases*, and concluding that "[a] majority of the Court *did* agree to a decision that

time to seal Cuba's victory over the mother country.[37] The intense congressional debate leading up to that intervention had produced the Teller Amendment to the war resolution, which disclaimed any intention on the part of the United States to keep Cuba forever, declaring instead that the United States' aim in intervening was to help Cuba secure its independence.[38] But the Teller Amendment did not stop the United States from taking sovereignty over Spain's other remaining colonies in the Caribbean and Pacific, which the United States did, annexing the Philippines, Puerto Rico, and Guam.[39]

These annexations intensified the political and popular debate between imperialists and anti-imperialists over whether the United States could take territory without the intent of eventually admitting it into statehood (since few believed the United States planned to make states out of these new possessions, and fewer still expressed any support for the idea).[40] That debate took shape in part as a debate over the extraterritorial applicability of the Constitution—that is, over whether the United States could govern territory unrestrained by constitutional provisions, or, in the popular rhetoric of the time, whether the Constitution "followed the flag" to the new territories.[41]

That contentious question made its way to the Supreme Court in a case involving a dispute over the imposition of duties by the Customs Collector of New York on a shipment of oranges from Puerto Rico.[42] Such duties could only be charged on goods arriving from foreign coun-

---

avoided a confrontation with Congress and happened to be consistent with the United States' new imperial policy").

37. The war of 1898 has given rise to a historiography addressing a range of issues from diplomatic, military, and political issues to issues of race, gender, and globalization/transnationalism. For an enlightening critical discussion of the historiography (focusing in particular on the bias in favor of U.S. sources), see generally Louis A. Pérez, The War of 1898: The United States and Cuba in History and Historiography (1998). For a range of approaches to the topic, see generally Kristin Hoganson, Fighting for American Manhood: How Gender Politics Provoked the Spanish-American and Philippine-American Wars (1998); Thomas Schoonover, Uncle Sam's War of 1898 and the Origins of Globalization (2003); David Trask, The War with Spain in 1898 (1981).

38. See Joint Resolution of Apr. 20, 1898, J. Res. 24, 55th Cong., 30 Stat. 738, 739.

39. See Treaty of Peace, U.S.-Spain, arts. I–III, Dec. 10, 1898, 30 Stat. 1754, 1755–56.

40. Imperialists and anti-imperialists alike were on the whole opposed to statehood: The former argued in favor of keeping the new territories as colonies; the latter argued in favor of relinquishing them altogether. See, e.g., Abbott Lawrence Lowell, The Colonial Expansion of the United States, 83 Atlantic Monthly 145, 145, 154 (1899) (defending imperialist policies); H. Teichmuller, Expansion and the Constitution, 33 Am. L. Rev. 202, 211 (1899) (opposing imperialist policies).

41. See, e.g., Simeon E. Baldwin, The Constitutional Questions Incident to the Acquisition and Government by the United States of Island Territory, 12 Harv. L. Rev. 393 (1898); C.C. Langdell, The Status of Our New Territories, 12 Harv. L. Rev. 365 (1898); Abbott Lawrence Lowell, The Status of Our New Possessions: A Third View, 13 Harv. L. Rev. 155 (1899); Carman F. Randolph, Constitutional Aspects of Annexation, 12 Harv. L. Rev. 291 (1898); James Bradley Thayer, Our New Possessions, 12 Harv. L. Rev. 464 (1898).

42. Downes v. Bidwell, 182 U.S. 244 (1901).

tries under the Uniformity Clause of the Constitution, which requires that "all duties, imposts and excises be uniform throughout the United States."[43] The constitutional question, then, was whether the phrase "United States" as used in the Uniformity Clause included Puerto Rico (and by implication, the other new territories).[44] The Court's answer, in a case called *Downes v. Bidwell*, which would come to be known as the most important of the *Insular Cases*, was that it did not: The new territories, although subject to U.S. sovereignty, were not part of the "United States," because neither the treaty nor subsequent congressional legislation had "incorporated" them into the United States.[45] As a result, the Court held, the Uniformity Clause did not apply in these territories, and did not prevent Congress from imposing duties on their goods.[46]

This aspect of the *Insular Cases*—the distinction between territories that had been incorporated into and were part of the United States, and territories that had not been so incorporated and merely "belonged" to the United States—was a novel contribution to the Court's territorial jurisprudence. The Court had never distinguished between two classes of territory in this manner; on the contrary, it had long held that the "United States" included the states and the territories.[47] The distinction was articulated in a concurring opinion by Justice Edward Douglass White, which would eventually be adopted by a unanimous Court, in which White set forth the new doctrine, which would come to be known as the "doctrine of territorial incorporation." White distinguished between incorporated and unincorporated territories, and explained that the latter, and only the latter, were excluded from the "United States."[48] Certain constitutional provisions applicable in incorporated territories were inapplicable in unincorporated ones—such as the Uniformity Clause, which by its terms applied only within the "United States."[49]

In his opinion for the Court, Justice Henry Billings Brown took the most extreme view, reasoning that, with few exceptions, the Constitution

---

43. U.S. Const. art. I, § 8, cl. 1.

44. *Downes*, 182 U.S. at 249. For a discussion of the debate among lawyers and legal scholars concerning the meaning of the phrase "United States," see Christina Duffy Burnett, The Constitution and Deconstitution of the United States, *in* The Louisiana Purchase and American Expansion, 1803–1898, at 181, 183–89 (Sanford Levinson & Bartholomew Sparrow eds., 2005).

45. *Downes*, 182 U.S. at 279–81.

46. Id. at 287.

47. See Cross v. Harrison, 57 U.S. (16 How.) 164, 197 (1853) (concluding that territory including California "became a part of the United States" when treaty of cession was ratified); Loughborough v. Blake, 18 U.S. (5 Wheat.) 317, 319 (1820) (declaring that term "United States" encompasses "our great republic, which is composed of States and territories").

48. *Downes*, 182 U.S. at 342 (White, J., concurring) (explaining that Puerto Rico "had not been incorporated into the United States, but was merely appurtenant thereto as a possession").

49. Id.

did not apply in the territories unless "extended" there by Congress.[50] White, in turn, steered clear of the proposition that the Constitution did not "apply" in any given place: "In the case of the territories, as in every other instance, when a provision of the Constitution is invoked, the question which arises is, not whether the Constitution is operative, for that is self-evident, but whether the provision relied on is applicable."[51] But the four dissenters were not satisfied by this clarification, and they vehemently rejected both White's theory of "incorporation" and Brown's "extension" theory, arguing that the new territories, like all previous ones, had become part of the United States upon annexation, and that the Uniformity Clause applied to them as it had always applied in the territories, as did the rest of the Constitution.[52]

Despite the vigorous disagreement among the Justices, the holding in *Downes* soon put an end to the popular and political debate. The imperialists had won the day; that much was clear. A majority of the Court had taken their side by allowing the United States to annex and govern territory, unrestrained by the Uniformity Clause at least. Nevertheless, the case, which produced five separate opinions filling 147 pages in the U.S. Reports, did little to clarify the constitutional questions at stake.[53] The "conflict and confusion of so many opinions," as one newspaper put it, made it difficult to know what exactly to make of the decision.[54] Another newspaper ambiguously observed that the decision had finally defeated "the contention . . . that the Constitution followed the flag *in the broadest possible sense.*"[55] But did it follow the flag in some narrower sense? Not according to yet another paper, which declared that in light of *Downes*, the United States "could hold conquered or purchased territory according as its own interests as master and the interests of the conquered, humanely considered, might dictate."[56] Conflicting interpretations proliferated, leading one editorial to observe that "neither lawyers

---

50. Id. at 286, 278–79, 287 (majority opinion).

51. Id. at 292 (White, J., concurring).

52. Id. at 369 (Fuller, C.J., dissenting); id. at 376 (Harlan, J., dissenting).

53. These included the opinion for the Court written by Justice Brown and not joined by any other Justice; the concurring opinion by Justice White, joined by two others; a separate concurrence by Justice Horace Gray; and two dissenting opinions, one authored by Chief Justice Melville Fuller and signed by all four dissenting Justices, and a separate dissent by Justice John Marshall Harlan.

54. Sparrow, supra note 4, at 99 (quoting A Momentous Decision Resting on a Foundation of Sand, N.Y. Herald, May 29, 1901, at 8).

55. Id. at 101 (emphasis added) (quoting Supreme Court Upholds President's Insular Policy, Phila. Inquirer, May 28, 1901, at 1).

56. Id. (quoting Supreme Court Sustains Government's Insular Policy, Chi. Rec.-Herald, May 28, 1901, at 1). The *Philadelphia Inquirer* article agreed with the *Chicago Record-Herald* article that the Constitution followed the flag in a "limited sense," but when it went on to explain what that meant, it declared that "the islands can be governed by Congress just as Congress sees fit." Supreme Court Upholds President's Insular Policy, Phila. Inquirer, May 28, 1901, at 1.

nor laymen have been able to agree as to [the decision's] meaning or scope."[57]

The same editorial remarked that the decision was so "absurd and mischievous" that it was "difficult to speak of it with patience or moderation."[58] Among those who experienced this difficulty were the four dissenting Justices, who contributed two passionately angry opinions to the total of five, accusing the majority of giving sanction to extraconstitutional action by the federal government.[59] And despite the confusion among contemporary observers, after the dust settled it was this, the most extreme account of the holding, that stuck. Not only did commentators continue to criticize the cases as sanction for extraconstitutional government action, but courts dealing with constitutional questions in the territories adopted this account of the cases as well, thus giving it the force of law.[60]

Yet despite the emergence of this broad consensus on the *Insular Cases* in subsequent cases and in scholarly commentary, the standard account does not accurately describe those controversial decisions. Yes, *Downes* held that the Uniformity Clause did not apply to the so-called unincorporated territories, on the extremely dubious ground that these territories were not part of the United States despite being subject to its sovereignty. And several later cases in the series held that the right to a trial by jury did not apply in unincorporated territories as it applied in incorporated territories. But these two propositions just about cover what the *Insular Cases* themselves did by way of withholding the Constitution from the unincorporated territories, and even these holdings have more limited implications than have been attributed to them.

Consider first the Uniformity Clause. Several years after *Downes* allowed the imposition of duties on Puerto Rican goods despite the Uniformity Clause, the Court handed down its decision in *Binns v. United States*.[61] In *Binns*, the Court upheld Congress's imposition of a special system of license taxes in the territory of Alaska, despite its apparent conflict with the Uniformity Clause. To reach that result, the Court relied on Congress's plenary power over territories—*all* territories, not just unincorporated ones. The plaintiffs in *Binns* argued that the challenged taxes were "excise" taxes within the meaning of the Uniformity Clause—and the Court agreed. "We shall assume," wrote Justice Brewer for a unanimous Court, "that . . . the license fees are excises within the constitutional

57. Sparrow, supra note 4, at 102 (quoting Does the Decision Settle Anything or Can It Stand?, N.Y. Herald, May 30, 1901, at 8).

58. Id.

59. Downes v. Bidwell, 182 U.S. 244, 358, 362, 369, 372 (1901). For descriptions of the reaction to *Downes*, see Kerr, supra note 21, at 98–118; Sparrow, supra note 4, at 99–110.

60. See Burnett, Untied, supra note 11, at 808–13.

61. 194 U.S. 486 (1904).

sense of the term."[62] But the Court upheld the scheme anyway, reasoning that the challenged fees were to be regarded as "local taxes," and therefore within Congress's plenary power.[63] That power, explained the Court, encompassed the power to act as both the territorial or "quasi-state" government of Alaska, and as the federal government in Alaska.[64] When acting as the former, Congress could take certain actions that it could not constitutionally take when acting as the latter. On this reasoning, the Court upheld taxes in an *incorporated* territory that would otherwise have violated the Uniformity Clause.

The rationale in *Binns* was not the same as the rationale in *Downes*, to be sure: In White's concurring opinion, the novel doctrine of territorial incorporation, rather than the traditional plenary power analysis, was decisive. Nor was the rhetoric the same: The *Downes* Court made much of the differences between the United States and its new territories in terms of culture, race, history, and traditions, whereas the *Binns* decision did not allude to such distinctions with respect to Alaska.[65] Nevertheless, the fact that the Court withheld the Uniformity Clause from an incorporated territory raises questions about the conclusion that withholding the same clause from the unincorporated territories somehow relegated them to an extraconstitutional space. No one argued after *Binns* that the Constitution did not "follow the flag" to Alaska.[66]

A similar point can be made about the right to a trial by jury, at least with respect to Puerto Rico. Several of the *Insular Cases* held that the Sixth Amendment right to a jury in a criminal trial did not apply in the unincorporated territories, whereas it did apply in the incorporated territories.[67] In these decisions, the Court more clearly distinguished be-

---

62. Id. at 491. Justice Harlan, who dissented vigorously in *Downes* and other decisions in the *Insular Cases* line, did not participate in the case.

63. Id.

64. Id.

65. The treaty for the acquisition of Alaska had distinguished between Russian subjects and "uncivilized native tribes" and denied citizenship to the latter. See Treaty Concerning the Cession of the Russian Possessions in North America by His Majesty the Emperor of All the Russias to the United States of America, U.S.-Russ., art. III, June 20, 1867, 15 Stat. 539. But that distinction (which predated the doctrine of territorial incorporation) did not serve as the basis for the differential treatment of the territory of Alaska as a whole.

66. For a different take on *Binns*, see Sparrow, supra note 4, at 148–49.

67. See Balzac v. Porto Rico, 258 U.S. 298, 304–305, 309, 311 (1922) (explaining that "the Porto Rican can not insist upon the right of trial by jury" because constitutional right to trial by jury does not extend to unincorporated territory such as Puerto Rico); Ocampo v. United States, 234 U.S. 91, 98 (1914) (holding Fifth Amendment grand jury requirement did not apply "of its own force" to Philippine Islands); Dowdell v. United States, 221 U.S. 325, 332 (1911) (holding there was "no right to demand trial by jury in criminal cases in the Philippine Islands"); Rassmussen v. United States, 197 U.S. 516, 525 (1905) (holding right to trial by jury applies to Alaska because it is incorporated); Dorr v. United States, 195 U.S. 138, 149 (1904) ("[T]he power to govern territory . . . does not require [Congress] to enact for ceded territory, not made part of the United States . . . the right of trial by jury."); Hawaii v. Mankichi, 190 U.S. 197, 217–18 (1903) (interpreting

tween the two types of territory, and explained that Congress, despite its plenary power over all territories, did not have the power to withhold jury trial rights from incorporated ones, whereas it could withhold them from unincorporated territories. Moreover, the Court supported these holdings with the rationale that only "fundamental" rights were guaranteed in the latter, whereas the right to a trial by jury was merely a method of procedure. Yet even this series of holdings does not warrant the conclusion that "the Constitution" did not "apply" in unincorporated territories.

In the Philippines, where there was only one territorial court system under U.S. sovereignty, these holdings did mean that the right to a trial by jury did not apply at all. But in Puerto Rico, where there were parallel territorial and federal court systems, these holdings did not apply in federal court: There, juries were in place from day one. In this sense Puerto Rico looked like a state of the Union, for the Sixth Amendment right to a trial by jury did not apply against state governments, either, until 1968.[68] Moreover, it did not apply against the states for the same reason: because it was not considered fundamental. Yet no one ever argued that the Constitution did not "follow the flag" to the states.

The *Insular Cases* undoubtedly created a new type of second-class territory—the unincorporated territory—and they undoubtedly withheld certain constitutional provisions from these jurisdictions. But when it comes to the applicability of constitutional provisions, the line between them and the places comprising the "United States" turns out, on closer examination, to be far blurrier than the standard account of the *Insular Cases* suggests. That account has tended to emphasize language in those decisions reflective of the racism and arrogance of the time, in which the Court voiced widely held views about the supposed inability of non-Anglo Saxon peoples to govern themselves without the guiding hand of white father. There is no question that the cases distinguished the new territories from previous ones on these grounds, which we now recognize as illegitimate. But the consequences of this unsound reasoning did not, as it happens, include the creation of an extraconstitutional space. As Dr. José Celso Barbosa, a leading Puerto Rican politician and intellectual at the time, remarked in a 1902 letter (less than a year after the Court's first round of decisions in the *Insular Cases*), everyone knew that "the U.S. Constitution rules in Puerto Rico in everything having to do with individual rights."[69]

Newlands Resolution for annexation of Hawaii as not having extended right to trial by jury to Hawaii during period between its annexation and its incorporation, despite resolution's own requirement that Hawaiian laws be "'no[t] contrary to the Constitution of the United States'" (quoting Joint Resolution to Provide for Annexing the Hawaiian Islands to the United States, H.R.J. Res. 55, 55th Cong., 30 Stat. 750, 750-51 (1898))).

68. Duncan v. Louisiana, 391 U.S. 145, 162 (1968).

69. Letter from José Celso Barbosa to Federico Degetau y González (Jan. 28, 1902) (on file with the *Columbia Law Review*) (author's translation). Barbosa would go on to complain that "in practice," individual rights remained unprotected.

The *Boumediene* Court got this much right: The *Insular Cases* did not create a Constitution-free zone, or even an almost Constitution-free zone.[70] The overheated rhetoric in the cases and the vigorous criticism they inspired combined to give them a worse reputation than the decisions warrant. A less draconian interpretation of the *Insular Cases* is faithful to those cases themselves, even as it goes against the grain of much of their progeny and most of the relevant scholarship. As *Balzac v. Porto Rico*, the last decision in the series, put it, "the real issue in the *Insular Cases* was not whether the Constitution extended [to the territories], but which of its provisions were applicable" (a statement echoing White's insistence in *Downes* that "the question which arises is, not whether the Constitution is operative, for that is self-evident, but whether the provision relied upon is applicable").[71] While scholars have been quick to point out that these caveats contain the seeds of their own undoing (if

70. The notion that the *Insular Cases* created a virtually extraconstitutional zone, which translates all too easily into the shorthand that only those constitutional provisions affording "fundamental rights" apply outside the United States, has contributed to a certain amount of confusion concerning the criteria for determining the applicability of provisions *not* involving rights. For instance, a recent decision of the United States District Court for the District of Puerto Rico states that certain "protections" of the Spending Clause (i.e., constitutional limitations on the spending power—in this case, a "clear notice" requirement) do not apply to Puerto Rico unless Congress has "incorporated" the island, "because [the Spending Clause] is not the source of any fundamental rights." Consejo de Salud Playa de Ponce v. Rullan, 586 F. Supp. 2d 22, 25 (D.P.R. 2008); see also Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17 (1981) (explaining constitutional clear notice limitation on spending power). But this proposition misses the mark. To be sure, the Spending Clause is not the source of "fundamental rights," just as most constitutional provisions are not the source of fundamental rights. But the criterion of "fundamentality," relevant to the inquiry whether a rights provision applies, is not relevant here at all, where the provision at issue involves a grant of federal power. Indeed, even the *Consejo de Salud* opinion itself implicitly concedes that the Spending Clause (putting aside its "protections" for a moment) applies in Puerto Rico: Congress can, of course, exercise its spending power in Puerto Rico, despite the fact that the Spending Clause is "not a source of fundamental rights"—in that sense, the Spending Clause "applies" in Puerto Rico. By raising the question of whether the *limitations* on the spending power similarly apply, the *Consejo de Salud* opinion assumes that Congress may be able to exercise the spending power in Puerto Rico without limitation because Puerto Rico is unincorporated. But it is not at all clear that the limitation at issue—the clear notice requirement (according to which Congress cannot impose obligations on the states via an exercise of the spending power without affording them clear notice of those obligations, see *Pennhurst*, 451 U.S. at 17)—would not apply in a territory. The reasoning behind this limitation is that legislation enacted pursuant to the spending power functions like a contract: "[I]n return for federal funds, the States agree to comply with federally imposed conditions." Id. Territories, like states, have the option to participate in legislative schemes enacted pursuant to the spending power, taking on the concomitant obligations, or to decline to participate. See *Consejo*, 585 F. Supp. 2d at 23 (noting that Puerto Rico "elected to participate" in Medicaid program at issue). Thus the spending power is contract-like with respect to the territories, too; there is no reason to think that the relevant "clear notice" requirement would not apply. Moreover, if for some reason it did not apply, it would most likely not apply in *any* territory, not just unincorporated ones—for Congress has plenary power over all territories. Thus "incorporating" Puerto Rico would make no difference.

71. *Balzac*, 258 U.S. at 312; Downes v. Bidwell, 182 U.S. 244, 292 (1901).

enough constitutional provisions turn out to be inapplicable, then the Constitution might as well not be in force at all), not only did that doomsday scenario not play out in the unincorporated territories, but also, that scenario does not follow from the proposition that not every constitutional provision applies always and everywhere.

Too much insistence on an unflattering interpretation of the *Insular Cases* as the source of extraconstitutional power has inadvertently smoothed the way for an unnecessarily creative jurisprudence on constitutional extraterritoriality, featuring the "impracticable and anomalous" test: a test of questionable merit, inaccurately attributed to the *Insular Cases*, and elaborated upon with considerable license ever since. To that test I now turn.

II. A PRACTICAL BUT ANOMALOUS JURISPRUDENCE

A scholar who has written extensively on constitutional extraterritoriality, Gerald Neuman, not long ago observed that the "impracticable and anomalous" test "has not yet acquired an academic theorist who would elaborate and defend it as the best interpretation of U.S. constitutionalism."[72] A version of the standard has since found a few academic defenders.[73] And it has had precedential support for some time (as Neuman

72. Gerald L. Neuman, Extraterritorial Rights and Constitutional Methodology After *Rasul v. Bush*, 153 U. Pa. L. Rev. 2073, 2076 (2005) [hereinafter Neuman, Extraterritorial Rights]. Neuman himself has since written an article exploring what there is to be said in favor of what he calls the "global due process approach." See Neuman, Understanding Global Due Process (forthcoming Geo. J. Int'l L. 2009) (on file with the *Columbia Law Review*). A student note recently published in the Harvard Law Review quotes Neuman's earlier article and takes up the implicit challenge in Neuman's statement, arguing that the "'impracticable and anomalous' standard need not be considered quite so problematic if it is interpreted, in light of the precedents on which it relies, as implicitly referencing generally applicable international law." Note, The Extraterritorial Constitution and the Interpretive Relevance of International Law, 121 Harv. L. Rev. 1908, 1908 (2008) [hereinafter Note, The Extraterritorial Constitution]; see also Wabol v. Villacrusis, 958 F.2d 1450, 1462 (9th Cir. 1992) (discussing, in context of U.S. territories, idea that rights may be fundamental in an "international sense"). The argument in the note, and a different version of it in *Wabol*, is intriguing, and offers a more appealing version of the standard than the one articulated in the case law; but it is not, in my view, persuasive, as I argue below. See infra notes 147–152 and accompanying text. For another argument that international law (among other factors) should govern the protection of noncitizens abroad, see J. Andrew Kent, A Textual and Historical Case Against a Global Constitution, 95 Geo. L.J. 463, 540 (2007). For a discussion of arguments based on international law that the *Boumediene* Court could have used but did not, see Gerald L. Neuman, The Extraterritorial Constitution After *Boumediene v. Bush*, 82 S. Cal. L. Rev. 259, 274–77 (2009).

73. See generally Note, The Extraterritorial Constitution, supra note 72 (defending "impracticable and anomalous" test if understood with reference to international law); see also A. Hays Butler, The Supreme Court's Decision in *Boumediene v. Bush*: The Military Commissions Act of 2006 and Habeas Corpus Jurisdiction, 6 Rutgers J.L. & Pub. Pol'y 149, 173 (2008) (describing "impracticable and anomalous test" or "global due process model" as "imprecise and vague," but arguing that "it balances . . . national security concerns . . . with human rights concerns by giving the Court flexibility to take into account military

also pointed out).[74] Now, in *Boumediene*, a version of it has garnered the vote of a majority of the Justices.[75] But there are excellent reasons for the

considerations in determining whether to apply the Constitution in extraterritorial situations"); Daniel Michael, Recent Development, The Military Commissions Act of 2006, 44 Harv. J. on Legis. 473, 502–03 (2007) (offering qualified defense of what author calls Kennedy's "contextual due process" approach in United States v. Verdugo-Urquidez, 494 U.S. 259 (1990)). Several scholars had praised the test earlier in specific contexts, though as Neuman observes, a full elaboration and defense of it has yet to be written. See, e.g., Eric Bentley, Jr., Toward an International Fourth Amendment: Rethinking Searches and Seizures Abroad After *Verdugo-Urquidez*, 27 Vand. J. Transnat'l L. 329, 363–64 (1994) (praising Kennedy's test in *Verdugo* as more responsive to transnational context of case than that of plurality and dissent, but proposing approach even more responsive to that context); Daniel E. Hall, Curfews, Culture, and Custom in American Samoa: An Analytical Map for Applying the U.S. Constitution to U.S. Territories, 2 Asian-Pac. L. & Pol'y J. 69, 93–94 (2001) (arguing for combination of fundamental rights test and impracticable and anomalous test); Robert A. Katz, The Jurisprudence of Legitimacy: Applying the Constitution to U.S. Territories, 59 U. Chi. L. Rev. 779, 780–81 (1992) (arguing that circuit split with respect to whether fundamental rights test or impracticable and anomalous test should apply in territories should remain unresolved, because test used in each circuit respectively best promotes legitimacy of U.S. involvement); Stanley K. Laughlin, Jr., The Application of the Constitution in United States Territories: American Samoa, A Case Study, 2 U. Haw. L. Rev. 337, 341–42 (1981) (defending disjunctive "impractical or anomalous" test); Eric B. Fisher, Note, The Road Not Taken: The Extraterritorial Application of the Fourth Amendment Reconsidered, 34 Colum. J. Transnat'l L. 705, 720, 727–29 (1996) (defending Kennedy's use of test in *Verdugo* as best approach, though noting that Kennedy does not explain "general principles of interpretation" that he purports to apply, and offering account of those principles with view toward preventing test from slipping into "simple functionalism or harmless universalism"). In an article published the same year that Neuman made his statement, Stanley K. Laughlin Jr., published a defense of the impracticable and anomalous test. See Stanley K. Laughlin, Jr., Cultural Preservation in Pacific Islands: Still a Good Idea—And Constitutional, 27 U. Haw. L. Rev. 331, 368–73 (2005) [hereinafter Laughlin, Cultural Preservation] (defending test as best means for cultural preservation in territories). In this article, Laughlin describes his position in the 1981 article, supra, as the view that either impracticality or anomalousness could "justify a departure from mainland constitutional norms." Id. at 352–53.

74. See Neuman, Extraterritorial Rights, supra note 72, at 2076 n.18, 2076–77 (noting precedential support by way of explaining his reliance on it in briefs, despite his preference for "mutuality" approach). The test has also found defenders among practicing attorneys. See Posting of Cecillia Wang to ACSBlog, Guest Blogger: *Boumediene v. Bush*: Avoiding a Pyrrhic Victory, at http://www.acsblog.org/guest-bloggers-guest-blogger-boumediene-v-bush-avoiding-a-pyrrhic-victory.html (Dec. 4, 2007, 6:50 PM EST) (on file with the *Columbia Law Review*) ("By adopting the 'impracticable and anomalous' test in *Boumediene*, the Court would serve both national security and the rule of law."). In Wang's version, which is the version the ACLU proposed in its brief, the default rule is that rights apply everywhere outside the United States—unless it is "impracticable and anomalous" to apply them. See Brief Amicus Curiae of the American Civil Liberties Union and Public Justice in Support of Petitioners at 17–21, Boumediene v. Bush, 128 S. Ct. 2229 (2008) (No. 06-1195) ("By adopting the 'impracticable and anomalous' test, the Court would provide much needed guidance to the lower courts in an age of increasing U.S. government activity outside the 50 states."). Although this version of the test tries to give expansive reach to constitutional rights, it still asks the "impracticable and anomalous" question at the whether stage, not the how stage.

75. Justices Stevens, Souter, Ginsburg, and Breyer joined Justice Kennedy's opinion.

scarcity of advocates of the "impracticable and anomalous" test or "functional" approach. The danger now lies in *Boumediene* paving the way for its widespread acceptance and further extension.

A. Reid v. Covert *and Governmental Convenience*

The "impracticable and anomalous" standard was first articulated in the second Justice John Marshall Harlan's concurring opinion in *Reid v. Covert*.[76] The *Reid* case and its companion *Kinsella v. Krueger* addressed the question of whether civilian dependents living on military bases abroad enjoyed the right to a trial by jury in capital cases. During the previous term, in 1956, the Court had ruled against the petitioners, two civilian women who had killed their servicemen husbands on military bases abroad (in England and Japan, respectively).[77] But the Court took the rare step of granting a petition for rehearing,[78] and reversed itself the following year.

The Court in the first *Reid* case had reasoned that the rights to an indictment by a grand jury and a trial by jury guaranteed in Article III and the Fifth and Sixth Amendments to the Constitution did not apply abroad, and that Congress had the power under the Territory Clause to provide for alternative trial procedures as long as they were reasonable and consistent with due process.[79] In the second *Reid* case, the Court changed its mind about the relevant constitutional source of congressional power: It was not the Territory Clause, but rather Article I, Section 8, Clause 14, which grants Congress the power "[t]o make Rules for the

---

76. 354 U.S. 1, 74–78 (1957) (Harlan, J., concurring in the result). *Boumediene* cites Johnson v. Eisentrager, 339 U.S. 763 (1950), along with the *Insular Cases* and *Reid* in support of the functional approach. *Boumediene*, 128 S. Ct. at 2254–58. I do not discuss *Eisentrager* in the text because while that case did take into account practical considerations, it did not use the "impracticable and anomalous" test. The *Insular Cases*, as I argue, did not use the test either, but I discuss them in the text because Harlan traces the origins of the test to those cases.

77. Kinsella v. Krueger, 351 U.S. 470, 471–73 (1956), overruled by *Reid*, 354 U.S. at 5. A "reservation" by Justice Frankfurter and a dissent by Chief Justice Warren and Justices Black and Douglas insisted that the Court needed more time to consider the issues in the case. Id. at 481–85 (Frankfurter, J., reserving judgment); id. at 485–86 (Warren, C.J., joined by Black & Douglas, JJ., dissenting). These opinions must have made it evident to the parties that a petition for rehearing had a good chance of being granted, since they supplied four of the five votes required for a grant. See Robert L. Stern et al., Supreme Court Practice 804 (9th ed. 2007) ("'A petition for rehearing . . . will not be granted except by a majority of the Court.'" (quoting Sup. Ct. R. 44, which "follows closely" version in force in 1950s)).

78. Reid v. Covert, 352 U.S. 901 (1956) (granting petition for rehearing).

79. *Kinsella*, 351 U.S. at 474–76; see U.S. Const. art. III, § 2, cl. 3 ("The Trial of all Crimes, except in Cases of Impeachment; shall be by Jury . . . ."); id. amend. V ("No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger . . . ."); id. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a . . . trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . .").

Government and Regulation of the land and naval Forces," that empowered Congress to provide for alternative trial procedures on military bases abroad.[80] The Court then ruled that this clause does not empower Congress to deprive civilian dependents of jury trials, at least in capital cases.[81]

Justice Hugo Black's plurality opinion in *Reid* strongly criticized the *Insular Cases*, along with an earlier decision, *In re Ross*, which had held that a U.S. citizen seaman tried for murder on a U.S. vessel off the coast of Japan did not have the right to a trial by jury (thus espousing the strictest form of strict territoriality, in which constitutional rights do not protect even U.S. citizens abroad).[82] The *In re Ross* case, Black reasoned, relied on an outmoded and indefensible standard of strict territoriality.[83] The *Insular Cases*, he continued, held that only "those constitutional rights which are 'fundamental' protect Americans abroad," but "we can find no warrant, in logic or otherwise, for picking and choosing among the remarkable collection of 'Thou shalt nots' which were explicitly fastened on all departments and agencies of the Federal Government by the Constitution and its Amendments."[84] In light of "our heritage and the history of the adoption of the Constitution and the Bill of Rights," he added, it was "peculiarly anomalous" to suggest that the right to a jury trial was not "fundamental."[85]

To the extent that the *Insular Cases* had held otherwise, he went on, they must be distinguished on the ground that they concerned "territories with wholly dissimilar traditions and institutions whereas here the basis for governmental power is American citizenship."[86] At any rate, Black

---

80. *Reid*, 354 U.S. at 5 (Black, J., plurality opinion).

81. Id.

82. Id. at 10–14.

83. Id. at 12.

84. Id. at 8–9 (quoting Dorr v. United States, 195 U.S. 138, 144–48 (1904)).

85. Id. at 9.

86. Id. at 14. In fact, citizenship had been extended to the inhabitants of the territory of Puerto Rico, at least, decades earlier, in 1917. Act of March 2, 1917, ch. 145, 39 Stat. 951, 953; see generally José A. Cabranes, Citizenship and the American Empire: Notes on the Legislative History of the United States Citizenship of Puerto Ricans (1979). On the unresolved question of whether such citizenship is merely statutory or constitutional (i.e., Fourteenth Amendment) citizenship, see Lisa Maria Perez, Note, Citizenship Denied: The *Insular Cases* and the Fourteenth Amendment, 94 Va. L. Rev. 1029, 1036–42 (2008). Other studies of the legal, historical, and political significance and consequences of the citizenship status of Puerto Ricans include José Julián Alvarez González, The Empire Strikes Out: Congressional Ruminations on the Citizenship Status of Puerto Ricans, 27 Harv. J. on Legis. 309 (1990) (discussing U.S. citizenship of persons born in Puerto Rico in context of proposed referendum on Puerto Rico's political status); Ediberto Román, The Alien-Citizen Paradox and Other Consequences of U.S. Colonialism, 26 Fla. St. U. L. Rev. 1 (1998) (arguing current citizenship status of Puerto Ricans constitutes "subordination" and conflicts with American ideals of equal treatment). On the initial denial of U.S. citizenship to Puerto Ricans, and their relegation to the status of "non-citizen nationals," see Christina Duffy Burnett, "They Say I Am Not an American . . .": The Noncitizen National and the Law of American Empire, 48 Va. J. Int'l L. 659 (2008) [hereinafter

not only tried to distinguish the *Insular Cases*, but declared that they should be overruled:

> [N]either the [*Insular Cases*] nor their reasoning should be given further expansion. The concept that the Bill of Rights and other constitutional protections against arbitrary government are inoperative when they become inconvenient or when expediency dictates otherwise is a very dangerous doctrine and if allowed to flourish would destroy the benefit of a written Constitution . . . .[87]

Although there were six votes for the holding in the second *Reid*, there were only four for Black's reasoning. Justices Harlan and Felix Frankfurter both wrote separate concurrences specifically making clear that they still considered *In re Ross* and the *Insular Cases* good law, and advocating a different analysis of constitutional extraterritoriality.[88] Harlan's concurrence, in which he made the case for a functional approach, proved to have the longer shelf life.

Harlan agreed with the plurality that the power at issue in the case derived from Article I, Section 8, Clause 14, not the Territory Clause, and that the relevant limitations, if any, were to be found in the guarantees of Article III and the Fifth and Sixth Amendments. With respect to the power, Harlan described a long tradition of military disciplinary jurisdiction over civilian dependents and asserted its continuing relevance (to this end quoting the Commander of the Eighth Army in Japan on why "it is essential that the commander be vested with the law enforcement authority commensurate with his responsibilities").[89] As Harlan made clear, however, the discussion of Article I, Section 8, Clause 14 established only that Congress could provide for some form of military disciplinary jurisdiction over civilian dependents—it did not resolve the question of limitations on that power: "[N]o matter how practical and how reasonable this jurisdiction might be, it still cannot be sustained if the Constitution guarantees to these army wives a trial in an Article III court, with indictment by grand jury and jury trial as provided by the Fifth and Sixth Amendments."[90] Once Congress's power to enact the challenged statute had been established in the first place, the question was whether "this statute, though reasonably calculated to subserve an enumerated power, collide[s] with other express limitations on congressional power."[91]

Harlan did not join in the Court's analysis of the precedents. "I do not go as far as my brother Black seems to go on this score," he wrote,

---

Burnett, American]; Sam Erman, Meanings of Citizenship in the U.S. Empire: Puerto Rico, Isabel Gonzalez, and the Supreme Court, 1898 to 1905, J. Am. Ethnic Hist., Summer 2008, at 5.

87. *Reid*, 354 U.S. at 14 (Black, J., plurality opinion).

88. Id. at 41–64 (Frankfurter, J., concurring in the result); id. at 65–78 (Harlan, J., concurring in the result).

89. Id. at 73 (Harlan, J., concurring in the result) (internal citation omitted).

90. Id. at 74.

91. Id. at 70.

and insisted that *In re Ross* and the *Insular Cases* still had "vitality."[92] A proper understanding of them, according to Harlan, must include a recognition that "they stand for a wise and necessary gloss on our Constitution":

> The proposition is, of course, *not* that the Constitution 'does not apply' overseas, but that there are provisions in the Constitution which do not *necessarily* apply in all circumstances in every foreign place. In other words, it seems to me that the basic teaching of *Ross* and the *Insular Cases* is that there is no rigid and abstract rule that Congress, as a condition precedent to exercising power over Americans overseas, must exercise it subject to all the guarantees of the Constitution, no matter what the conditions and considerations are that would make adherence to a specific guarantee altogether impracticable and anomalous.[93]

Harlan's concurrence, like the *Boumediene* opinion, thus began with the more moderate, and accurate, account of the *Insular Cases*—dispensing with the rhetoric of whether the Constitution as such "applies" or does not "apply" extraterritorially, and echoing White's more subtle proposition: "In the case of the territories, as in every other instance, when a provision of the Constitution is invoked, the question which arises is, not whether the Constitution is operative, for that is self-evident, but whether the provision relied upon is applicable."[94] Elaborating on his test, Harlan continued: "Decision is easy if one adopts the constricting view that these constitutional guarantees as a totality do or do not 'apply' overseas." Instead, "for me, the question is *which* guarantees of the Constitution *should* apply in view of the particular circumstances, the practical necessities, and the possible alternatives which Congress had before it."[95]

Harlan here made the leap that *Boumediene* would later make, as described above: He reasoned from the proposition that the provisions of the Constitution do not apply always and everywhere to the proposition that the way to determine whether a provision "applies" extraterritorially is to look at whether it would be impracticable or anomalous to apply it.[96] The former is both correct and unremarkable. Yes, there are provisions in the Constitution that do not necessarily apply in all circumstances in every foreign place. What's more, there are provisions in the Constitution that do not necessarily apply in all circumstances in every *domestic* place.[97] This, however, need not mean that whether a provision applies extraterritorially should depend on whether it is "impracticable and anomalous" to apply it. That latter proposition rolls off the tongue in the extraterritorial context, though it gives pause in the domestic context.

---

92. Id. at 67.
93. Id. at 74 (first emphasis added).
94. Downes v. Bidwell, 182 U.S. 244, 292 (1901) (White, J., concurring).
95. *Reid*, 354 U.S. at 75 (Harlan, J., concurring in the result).
96. See supra notes 10–13 and accompanying text.
97. See infra notes 171–174 and accompanying text.

What would the alternative be? Harlan could have reasoned instead that the grand jury and jury trial provisions applied (for instance by employing the analysis that led him to characterize these guarantees as "express limitations on congressional power"[98] in the first place; presumably little more than a reading of the constitutional text sufficed for that), but that functional considerations would affect *how* or the extent to which these guarantees could be given effect. Put differently, instead of asking *which* guarantees of the Constitution *should* apply, Harlan might have asked *how* these applicable provisions could and should be enforced. Such an approach would not even necessarily rule out the conclusion that functional considerations made it impossible to give these guarantees any effect in this particular context. But instead, Harlan stated what might have been the *how* question as a second incarnation of the *whether* question, and then answered that question by resort to functional considerations. Instead of concluding that grand jury and jury trial rights were applicable but that, in noncapital cases, they would be unenforceable or only partially enforceable—a conclusion consistent with his own recognition that these guarantees constituted "express limitations on congressional power"—Harlan concluded that they did not "apply" after all.[99]

As for what precisely rendered them "impracticable and anomalous" to apply, Harlan at first turned to the language of due process: "[T]he question of which specific safeguards of the Constitution are appropriately to be applied in a particular context overseas can be reduced to the issue of what process is 'due' a defendant in the particular circumstances of a particular case."[100] However, his impracticable and anomalous test focused not on what process was "due" the defendants, but rather on what process the government could provide them without too much difficulty, as the discussion that followed made clear.[101]

Harlan conducted the functional test (that is, the analysis of the relevant circumstances, necessities, and alternatives) entirely in a footnote—

---

98. *Reid*, 354 U.S. at 70 (Harlan, J., concurring in the result).

99. Id. at 76 (explaining that, "for me, the question is *which* guarantees of the Constitution *should* apply," and going on to conclude that "a full Article III trial" would not be "required" in noncapital cases on military bases abroad).

100. Id. at 75. In this passage Justice Harlan expressed his agreement with Justice Frankfurter, who had also described the issue as one of due process. See id. at 44 (Frankfurter, J., concurring in the result.). Justice Frankfurter's multi-factor analysis differed from Harlan's, but each of these passages implicitly raised the analogy to Fourteenth Amendment incorporation, and each Justice's views (as well as Justice Black's as expressed in the *Reid* plurality) were, not surprisingly, somewhat consonant with their positions in that debate. For more detail on this, see infra Part III. For Frankfurter's invocation of due process, see *Reid*, 354 U.S. at 53 (Frankfurter, J., concurring in the result).

101. Harlan did conclude that due to the "special" nature of capital cases, the asserted guarantees applied in these cases (including ones before the Court in *Reid*). *Reid*, 354 U.S. at 76 (Harlan, J., concurring in the result). But he did not consider a defendant's interest in the vindication of her grand jury and jury trial rights when he conducted the "impracticable and anomalous" test. Id. at 75–77 & n.12.

and in dicta, for in this passage Harlan referred only to the impracticability and anomalousness of applying grand jury and jury trial rights to trials of civilian dependents on military bases abroad for noncapital offenses, whereas the offenses at issue in *Reid* and its companion case were capital.[102] The analysis included, first, an allusion to the detailed discussion earlier in the opinion of the military's need for disciplinary jurisdiction over dependents living on bases abroad and, second, an explanation of why the alternative of a full-fledged jury trial would not be viable under the circumstances.[103] In other words, it consisted entirely of a discussion of policy considerations, defined according to the government's interests—not of anything that could fairly be described as an inquiry into what process the defendants were "due."

Harlan reasoned that the Constitution did not guarantee civilian dependents on military bases abroad grand jury and jury trial rights because, in short, it would be difficult, and in some cases virtually impossible, to enforce these rights.[104] There were, he said, three alternatives to military disciplinary jurisdiction for civilian dependents, i.e., three imaginable ways of providing them with full trials: conducting these trials in the United States; holding full-fledged civilian trials abroad; and trying them in foreign courts. The first option raised "obvious and overwhelming" practical problems (mainly the transportation of innumerable petty offenders back to the United States) and might raise objections on the part of foreign governments desirous of punishing violations of local law in their own courts. The second posed "considerable difficulties," which Harlan identified as the recruitment of juries abroad and, again, the potential objections of foreign governments, this time to the establishment of extraterritorial jurisdiction, which might be reminiscent of the consular courts of the imperialist era. The third was "no more palatable," for foreign criminal procedures might not be up to par, or might not treat certain offenses as punishable at all, and could require foreign officials to

---

102. See id. at 76 n.12.

103. Id.

104. For the contesting claims of the briefs on the feasibility of the alternatives Harlan dismissed as unfeasible, see Brief for the Appellee at 103–07, *Reid*, 354 U.S. 1 (No. 701) (refuting government's claim that full jury trials for civilian dependents would "result in . . . 'tremendous expense, fantastic waste, cumbersome procedures and interminable delay'"); Reply Brief for Appellant and Petitioner at 13–14, 20–22, *Reid*, 354 U.S. 1 (No. 701) (characterizing trials by "*ad hoc* American civilian courts" abroad as impractical, and arguing against full jury trials in United States because they would involve "enormous, frequently insurmountable difficulties"); Supplemental Brief for Appellant and Petitioner on Rehearing at 61, *Reid*, 354 U.S. 1 (No. 701) (foreseeing problems ensuring adequate counsel, organizing juries, and procuring acceptance by foreign governments); Supplemental Brief on Rehearing on Behalf of Appellee and Respondent at 153–55, *Reid*, 354 U.S. 1 (No. 701) (arguing practical means exist for transporting civilian dependents and witnesses to United States for trial); Reply Brief for Appellant and Petitioner on Rehearing at 3, 16 n.6a, 17, *Reid*, 354 U.S. 1 (No. 701) (claiming grand and petit juries cannot be assembled abroad).

conduct investigations on U.S. military installations, which would be unacceptable.[105]

Harlan ended the analysis by turning to the cases at hand, which, as noted, involved capital crimes: He observed that "special considerations apply" in such cases, dismissed the need to "go into details," and concluded that it would not be impracticable or anomalous to provide jury trials in capital cases such as the ones before the Court.[106] On that ground he concurred in the Court's holding.[107]

The allusions to citizenship elsewhere in Harlan's concurrence—though there were none in the passage applying the test—suggested that the U.S. citizenship of the defendants was another factor in the analysis. But because these allusions did not occur in the passage actually setting forth the functional approach, it is difficult to say precisely how citizenship mattered. Obviously it militated in favor of applying grand jury and jury trial rights, but apparently it would not outweigh the practical considerations against the enforcement of these rights in the noncapital context. The ambiguous role of citizenship is worth noting because it would return in later opinions.[108]

The "impracticable and anomalous" inquiry put forward by Harlan in *Reid* has been criticized as a standardless approach, lacking a "textual anchor" in the Constitution and therefore conferring excessive discretion upon courts.[109] To these criticisms this Article adds another: The approach failed to distinguish clearly between the applicability and enforceability of constitutional guarantees, and in the process subjected the question of applicability to an analysis driven entirely by consequentialist concerns. Although Harlan insisted, rightly, that the Constitution is always operative with respect to the federal government, whether at home or abroad, he emptied that proposition of serious content by proceeding to an evaluation of the *applicability* of specific guarantees—not their enforceability, nor the character of that enforcement, but their applicability

105. *Reid*, 354 U.S. at 76 n.12 (Harlan, J., concurring in the result). Several years later, the Court rejected the constitutional relevance of a distinction between capital and noncapital crimes for these purposes. See Kinsella v. United States ex rel. Singleton, 361 U.S. 234, 246, 249 (1960) (holding courts martial of civilian dependents abroad for noncapital crimes unconstitutional). As part of its reasoning, the Court disagreed that it would be impracticable and anomalous to enforce grand jury and jury trial rights in these circumstances, citing the low number of trials at issue. See id. at 244 n.9 ("Aside from traffic violations, there were only 273 cases (both capital and noncapital) involving dependents subject to foreign jurisdiction during the period between December 1, 1954, and November 30, 1958. This number includes 54 'Offenses against economic control laws' and 88 offenses denominated 'other.'" (citation omitted)). But see Reply Brief for Appellant and Petitioner, supra note 104, at 3 (claiming 400 cases per year in early 1950s).

106. *Reid*, 354 U.S. at 76 (Harlan, J., concurring in the result).

107. Id.

108. See infra notes 205, 236–237 and accompanying text.

109. Neuman, Whose Constitution?, supra note 20, at 987–90; see also Neuman, Extraterritorial Rights, supra note 72, at 2076 (criticizing test for its "lack of textual anchor").

simpliciter—that looked entirely to matters of feasibility. In so doing, he contributed to the very misunderstanding that he himself had sought to dispel when he rejected the proposition "that the Constitution 'does not apply' overseas":[110] Only where we do not take it for granted that the Constitution "applies" would we evaluate the applicability of its guarantees—guarantees designed to restrain the government—solely with reference to the interests of that very government.

As for what considerations other than feasibility might come into play at the applicability stage of the inquiry, these might have included, for instance, textual ones (such as the lack of an express geographical limitation in the relevant grand jury and jury trial provisions—perhaps not decisive, but not irrelevant, either). Or they might have included precedential ones, such as an analysis of whether the guarantees at issue should be considered "fundamental"—an analysis that would have been consistent with the approach in the *Insular Cases* (and would have been closer to analogous approaches in the domestic context, as we will see below). One need not embrace any particular approach to recognize that better alternatives exist to deciding questions of the prima facie applicability of constitutional provisions based on a functional test—better because these alternatives more effectively constrain the discretion of courts than a test that leaves the matter of which constitutional provisions apply when and where to be decided on pragmatic grounds alone.

As we have seen, Harlan's analysis could be reframed in these proposed terms. That is, one could argue that the analysis first discussed the *applicability* of the relevant constitutional provisions, which it identified as the power to make rules for the land and naval forces and the guarantees of a grand jury and jury trial, and then assessed the viability of *enforcing* these otherwise applicable limitations, concluding (in dicta concerning noncapital trials) that enforcement outside the context of capital cases would not be feasible. This is not, however, what the concurrence actually says (nor is it how the concurrence has been read subsequently by courts and scholars). It instead concludes that the relevant limitations do not *apply* (in the noncapital context) because it would be impracticable and anomalous to apply them. The notion that whether constitutional guarantees apply abroad depends on whether it would be impracticable and/or anomalous to apply them has taken root, and paved the way for even more creative uses of the test in the territorial jurisprudence.

B. *From Convenience to Culture*

In the territorial cases employing the impracticable and anomalous test, the protection of local culture takes center stage. On the one hand, this is an unobjectionable, even laudable goal. On the other hand, what we see in these cases is the further development of a jurisprudence on constitutional guarantees that subjects their applicability in the first in-

110. *Reid*, 354 U.S. at 74 (Harlan, J., concurring in the result).

stance to policy considerations (in this case, the importance of protecting local culture in places over which the federal government claims some degree of sovereignty, but which it does not consider candidates for statehood). Here, even the premise that the Constitution is "operative" with respect to federal action stands on shaky ground, because courts have adopted the standard, oversimplified account of the *Insular Cases*, according to which the Constitution "does not apply" except for a very few "fundamental" guarantees. Moreover, because impracticability and anomalousness are such open-ended criteria, the courts in these cases have ended up wielding a nearly unbounded discretion in selecting the factors relevant to a determination of what constitutional guarantees apply when and where.

Harlan's test first found its way into the territorial context in 1975, in a decision of the U.S. District Court for the District of Columbia, which has jurisdiction over certain cases arising in the unincorporated U.S. territory of American Samoa.[111] The case was *King v. Morton*, in which a criminal defendant challenged the absence of juries in criminal trials in this unincorporated U.S. territory.[112] The plaintiff, a U.S. citizen and resident of the territory, was charged with tax evasion in violation of Samoan law.[113] As proceedings began in the Trial Division of the Samoan High Court, he moved unsuccessfully for a jury trial, a motion rejected on the grounds that Samoan law did not provide for jury trials and that the right to a jury trial under the U.S. Constitution did not apply to unincorpo-

111. On the issue of federal jurisdiction over American Samoa, see U.S. Gov't Accountability Office, American Samoa: Issues Associated with Potential Changes to the Current System for Adjudicating Matters of Federal Law 1–7, 9–14, 16–55 (2008). On the relationship of American Samoa and other unincorporated territories to the United States, see Arnold H. Leibowitz, Defining Status: A Comprehensive Analysis of United States Territorial Relations (1989). For a legal treatise on territorial jurisprudence that discusses this and related cases, see Laughlin, The Law of United States Territories, supra note 4.

112. 520 F.2d 1140 (D.C. Cir. 1975).

113. Id. at 1142. Persons born in American Samoa (and Swain's Island) are not U.S. citizens but U.S. "nationals" by birth (unless they have a U.S. citizen parent, in which case they are U.S. citizens at birth). See Immigration and Nationality Act, 8 U.S.C. § 1101(a)(21)–(22), (29) (2006) (defining "national," "nation of the United States," and "outlying possessions of the United States"); § 1408(1) (citizenship of persons born in outlying territories); § 1401(e) (citizenship of those born to citizens in outlying territories). The plaintiff in *King* was either born elsewhere and relocated to American Samoa or born on American Samoa of at least one U.S. citizen parent. For an interesting discussion of the "Natural Born Citizen" Clause in the context of the Panama Canal which briefly addresses the status of the noncitizen national, see Gabriel J. Chin, Commentary, Why Senator John McCain Cannot Be President: Eleven Months and a Hundred Yards Short of Citizenship, 107 Mich. L. Rev. First Impressions 1 (2008), at http://www.michiganlawreview.org/firstimpressions/vol107/chin.pdf (on file with the *Columbia Law Review*). For more extended discussions of the status of the noncitizen national and of the ambiguous nature of U.S. citizenship in the territories, see generally sources cited supra note 86. For discussions of the problem of statelessness in the United States, see Catheryn Seckler-Hudson, Statelessness: With Special Reference to the United States (1934); Linda K. Kerber, Presidential Address, The Stateless as the Citizen's Other: A View from the United States, 112 Am. Hist. Rev. 1 (2007).

rated territories. Before the trial itself began, he initiated an action in federal court against the U.S. Secretary of Interior, who administers American Samoa, challenging the denial of the right to a trial by jury in Samoa. The district court dismissed for lack of jurisdiction, but the Court of Appeals for the D.C. Circuit reversed. (Meanwhile, the defendant was tried and convicted in the Trial Division of the Samoan High Court, and his conviction was affirmed.[114])

The D.C. Court of Appeals did not reach the merits of the jury trial issue, instead setting forth the standard the district court should apply on remand. The plaintiff had argued that although the *Insular Cases* held that the right to a trial by jury did not apply to unincorporated territories because it was not "fundamental," the Supreme Court had implicitly overruled that aspect of the *Insular Cases* with its decision in *Duncan v. Louisiana*, which held that the federal right to a trial by jury applied against the states via the Fourteenth Amendment because the right was "fundamental" after all.[115] The court of appeals was not persuaded by this approach, which it dismissed as overly reliant on "key words."[116] Instead, it embraced the impracticable and anomalous test:

> The decision in the present case does not depend on key words such as "fundamental" or "unincorporated territory" . . . , but can be reached only by applying the principles of the earlier cases, as controlled by their respective contexts, to the situation as it exists in American Samoa today. As Mr. Justice Harlan wrote in Reid v. Covert, "the particular local setting, the practical necessities, and the possible alternatives are relevant to a question of judgment, namely, whether jury trial should be deemed a necessary condition of the exercise of Congress' power to provide for the trial of Americans overseas."[117]

Arguably, *Duncan* was one of those "earlier cases" whose principles, modified in response to context, could inform the court's decision. But the court did not see it that way, rejecting the suggestion that the domestic jurisprudence on the scope and content of jury trials in the states of the Union should have any light to shed on the same question in American Samoa, and instead explaining that the analysis must in turn "rest on a solid understanding of the present legal and cultural development of American Samoa."[118] Adding that this understanding must be based on "facts," not "opinions," the court outlined the factual issues the lower court should address:

> [I]t must be determined whether the Samoan mores and matai culture with its strict societal distinctions will accommodate a jury system in which a defendant is tried before his peers; whether a jury in Samoa could fairly determine the facts of a

114. King v. Morton, 520 F.2d at 1142–43.
115. Id. at 1146–47; see Duncan v. Louisiana, 391 U.S. 145, 149 (1968).
116. King v. Morton, 520 F.2d at 1147.
117. Id. (citations omitted).
118. Id.

> case in accordance with the instructions of the court without becoming unduly influenced by customs and traditions of which the criminal law takes no notice; and whether the implementation of a jury system would be practicable. In short, the question is whether in American Samoa "circumstances are such that trial by jury would be impractical and anomalous."[119]

In other words, the twofold question was whether juries would work in American Samoa and whether it would be feasible, practically speaking, to institute them. Although the parties on appeal had offered evidence on both sides, the court concluded that the evidence fell short of what would be necessary to answer the question, and remanded the case.[120]

It is indeed difficult to imagine what it would take for a federal court to acquire "a solid understanding of the present legal and cultural development of American Samoa." Nevertheless, on remand the district court in *King v. Andrus* took up the appointed task with earnest diligence, examining and explaining the details of Samoan culture on its way toward the conclusion that trials by jury would not be impracticable and anomalous there.[121] These cultural features included the "'Fa'a Samoa' (the Samoan way of life)," the "'aiga' or extended family, the 'matai' or chieftal system, the land tenure system under which nearly all land is communally owned, and the custom of 'ifoga' whereby one family renders formal apology to another for a serious offense committed by one of its members."[122] Noting that the "major cultural difference between the United States and American Samoa is that land is held communally in Samoa," the court concluded that jury trials "would have no foreseeable impact on that system."[123] As for the other aspects of Samoan culture the court reviewed, it noted that these by now exercised "waning influence" in American Samoa in any event, so that even if jury trials did have an impact, it would be part of a cultural transformation already underway: "The institutions of the present government of American Samoa reflect not only the democratic tradition, but also the apparent adaptability and flexibility of the Samoan society. It has accommodated and assimilated virtually *in toto* the American way of life."[124] In other words, it was

---

119. Id. The *King v. Morton* court here uses "impractical" rather than "impracticable." As noted supra note 6, Harlan used the two terms interchangeably, though arguably they do not mean quite the same thing (with "impracticable" implying a more stringent standard, closer to impossibility, and "impractical" implying a lower one, thereby making room for considerations closer to convenience).

120. 520 F.2d at 1147–48.

121. 452 F. Supp. 11, 13–17 (D.D.C. 1977).

122. Id. at 13.

123. Id. at 15.

124. Id. For a scholarly discussion of the culture of American Samoa, see Hall, supra note 73, at 70–76. Hall based his description on field research and a mailed survey. Id. at 70 n.2. Hall discusses the custom of "ifoga" mentioned by the district court in *King v. Andrus*. See id. at 78 n.55 (citing La'auli Filoiali'i & Lyle Knowles, The Ifoga: The Samoan Practice of Seeking Forgiveness for Criminal Behavior, 53 Oceania 384 (1983)).

Samoan culture in its then-current state of Americanization that must be protected.

As this last feature of the analysis suggests, the district court began by considering a somewhat different question than had the court of appeals: not whether juries would work effectively in American Samoa or whether it would be feasible to implement them, but whether juries would in some way corrupt Samoan culture. That is, the court of appeals emphasized the question of "impracticability" while the district court shifted its focus to the issue of "anomalousness," a move not clearly ruled out by Harlan's description of the test, and one that highlights its malleability.

The district court did go on to consider practicability, in a passage reviewing what guidance Samoan law could provide on the question before it.[125] On the one hand, it noted that American Samoa has its own constitution, with a bill of rights echoing the Federal Bill of Rights except for grand and petit jury requirements.[126] On the other hand, it relied on the testimony of a Justice of the Samoan High Court to find that there had been "no difficulty in administering the system of criminal justice which is similar to our own in so many respects," including in its use of adversary proceedings, witness testimony, and cross-examination, and in its application of a substantive criminal law which was a "virtual transplant of the American."[127] Working jury trials into that system, reasoned the court, should not pose insurmountable difficulties. The court thus concluded the denial of the right to a criminal trial by jury in American Samoa was unconstitutional and enjoined the defendants from enforcing the judgment against the plaintiff.[128]

On the face of it, the opinions in *King v. Morton* and *King v. Andrus* engaged the issues before them in a reasonable manner. The test they adopted could fairly be read to give courts free rein in choosing precisely what factors to consider in deciding the question of impracticability and anomalousness. If the applicability of a constitutional provision comes down to "the particular local setting, the practical necessities, and the possible alternatives," as Harlan said in *Reid*,[129] then a foray into Samoan culture would seem to be an appropriate way to approach the question of whether the Constitution requires jury trials in American Samoa.

---

125. King v. Andrus, 452 F. Supp. at 16.

126. Id. The omission of these rights echoed their omission from the organic acts of the Philippines and Puerto Rico. See Act of July 1, 1902, ch. 1369, 32 Stat. 691, 692–93 (providing judiciary for Philippines, but not imposing grand jury or jury trial requirement); Act of April 12, 1900, ch. 191, 31 Stat. 77, 84–86 (same for Puerto Rico). The Constitution of American Samoa appears on the website of its nonvoting delegate in Congress, Eni F.H. Faleomavaega. Revised Constitution of American Samoa, at http://www.house.gov/faleomavaega/samoan-constitution.shtml (last visited Jan. 30, 2009) (on file with the *Columbia Law Review*).

127. King v. Andrus, 452 F. Supp. at 16.

128. Id. at 17.

129. Reid v. Covert, 354 U.S. 1, 75 (1957) (Harlan, J., concurring in the result).

But the approach has questionable implications respecting how the Constitution works to restrain government action. Imagine that there had been an unexpected backlash against the imposition of trials by jury in American Samoa. Would such a development have authorized the courts to reverse their decision that the federal constitutional right to a trial by jury *applies* there? Not, that is, to revise a conclusion concerning the precise contours of the right—its specific content; the means by and extent to which it may be enforced—but concerning its a priori applicability? The logic of the impracticable and anomalous test suggests that it would have: In the face of public resistance, a court could hold that the right to a trial by jury did not apply in American Samoa after all, by conducting the impracticable and anomalous test once again and reaching the opposite conclusion. But to hold a right applicable somewhere and then reverse course solely on functional grounds is to take a pragmatist approach to constitutional limitations on government action too far. It is to rely on practical considerations not simply for purposes of modifying a constitutional rule (such as the manifold modifications of the Fourth Amendment's reasonableness requirement, which courts have concededly carved out on functional grounds[130]), but rather for purposes of answering the prior question of whether the rule at issue applies at all. It becomes difficult to conceive of a limitation on government power as a constitutional restraint on government action if its applicability to an exercise of governmental power can bow to majoritarian winds in this way.

The analysis in the *King* opinions reveals yet another troubling aspect of the "impracticable and anomalous" test: namely, that the federal government has the power to shape the conditions that render a right impracticable and anomalous to apply. With a straight face (so to speak), the district court based its conclusion in part on the finding that American Samoa had "accommodated and assimilated virtually *in toto* the American way of life."[131] This fact, of course, is largely a result of American Samoa's annexation by the United States and its ensuing assimilation into U.S. culture.[132] But the notion that the very applicability of constitutional rights could be at the mercy of government policies designed either to integrate or separate a given place from U.S. traditions and practices, as the case may be, turns the idea that constitutional rights

130. See, e.g., Michigan v. Long, 463 U.S. 1032, 1049 (1983) (holding reasonable suspicion short of probable cause enough to justify search of car compartment); United States v. Martinez-Fuerte, 428 U.S. 543, 562 (1976) (upholding stopping and questioning at fixed checkpoints in absence of individualized suspicion); Terry v. Ohio, 392 U.S. 1, 26 (1968) (holding reasonable suspicion short of probable cause enough to justify stop and search).

131. King v. Andrus, 452 F. Supp. at 15.

132. Even without taking a stand on whether such assimilation is desirable or not, one cannot ignore that this reasoning places an emphatically assimilationist logic at the heart of an analysis purporting to concern itself with the preservation of local culture.

constrain government action on its head.[133] If the applicability of specific constitutional provisions in American Samoa depends entirely on the extent to which federal policies have produced assimilation into U.S. culture, thereby creating conditions hospitable (or inhospitable) to the reception of these provisions, then the constitutional guarantees in question cannot really be said to operate as restraints on the exercise of federal power there.

This is not to suggest that the interpretation of constitutional provisions cannot change over time. It is simply to suggest that attention to the distinction between the applicability and the enforcement of constitutional guarantees encourages an analysis that takes more seriously the existence of restraints on government action. A court empowered to declare (and a government empowered to presume) a guarantee "inapplicable" based on practical considerations enjoys greater freedom of action than a court tasked with determining how or to what extent, in light of practical considerations, an applicable guarantee may be enforced. The idea of extraconstitutionality that holds sway in the jurisprudence on constitutional extraterritoriality encourages the former approach, placing the applicability of constitutional provisions at the mercy of practical considerations, and thereby investing courts with greater discretion than they would otherwise have.

The next territorial case to rely on the impracticable and anomalous test dealt with the Due Process and Takings Clauses of the Fifth Amendment.[134] In *Wabol v. Villacrusis*, the Ninth Circuit held that racial restrictions on the alienation of land in the Commonwealth of the Northern Mariana Islands ("CNMI") did not violate these constitutional provisions, in an analysis further adapting Harlan's "impracticable and anomalous" test to the cultural imperatives of territorial governance.[135]

---

133. Pursuant to the reasoning in these cases, if the United States wished not to recognize the right to a trial by jury somewhere, it would have an incentive not to implement other aspects of its criminal procedure system, even if otherwise desirable, in order to forestall the ensuing assimilation.

134. U.S. Const. amend. V ("No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.").

135. 958 F.2d 1450, 1460–61 (9th Cir. 1992). Before *Wabol*, the Ninth Circuit conducted a test similar to Harlan's but not explicitly relying on Harlan's concurrence. See Northern Mariana Islands v. Atalig, 723 F.2d 682, 690 (9th Cir. 1984) ("The *Insular Cases* acknowledged that traditional Anglo-American procedures such as jury trial might be inappropriate in territories having cultures, traditions and institutions different from our own."). The *Atalig* court noted as well that *Reid*'s actual holding had not altered the holding in the *Insular Cases* because it concerned U.S. military bases abroad, not domestic territories. Id. at 689 n.22. And it rejected the relevance of Fourteenth Amendment incorporation to territorial incorporation. Id. at 690. The *Wabol* decision relied heavily on *Atalig*. See *Wabol*, 958 F.2d at 1459–60. Also, in Corp. of Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Hodel, 637 F. Supp. 1398, 1405–06 n.12 (D.D.C. 1986), the U.S. District Court for the District of Columbia asserted that a court must "undertake a close examination of the present cultural milieu of American Samoa to determine whether a particular constitutional principle applies to the territory," but then

The "Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union With the United States of America" marked the CNMI's transition from trust territory to "commonwealth" in association with the United States.[136] In a striking example of the way in which the applicability of the Constitution in the unincorporated territories of the United States has been treated (under the traditional reading of the *Insular Cases*) as subject to manipulation for policy reasons, the Covenant contains a section purporting to make "applicable" certain constitutional provisions to the CNMI—including, curiously, the first section of the Fourteenth Amendment, which by its terms applies to the "States."[137] In another section, the Covenant empowers the CNMI to restrict the acquisition of long-term interests in local land to persons of Northern Mariana Islands ("NMI") descent, despite the applicability of the Equal Protection Clause, which would be violated by such racial restrictions on the alienation of land within the United States.[138] (A notwithstanding clause in the article extending constitutional provisions purports to resolve this tension.[139])

Under the Covenant and federal statutes, persons born in the CNMI are U.S. citizens or nationals.[140] The Covenant recognizes a subcategory

---

noted that the High Court of Samoa had already held the rights at issue in that case (equal protection and due process) applicable, and therefore concluded that it did not need to conduct the analysis itself. In *Craddick v. Territorial Registrar*, the High Court of American Samoa upheld a similar restriction on the alienation of land, but applied strict scrutiny analysis. 1 Am. Samoa 2d 11, 11–12, 14 (1980). As I discuss below, I find this approach far preferable in theory, although I have reservations concerning how the Samoan court went about it. See infra note 222 and accompanying text.

136. See Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America, U.S.-Northern Mariana Islands, Feb. 15, 1975, 90 Stat. 263 (codified at 48 U.S.C. § 1801 note (2000)) [hereinafter Covenant]. The people of the CNMI chose (via a self-determination process culminating in a plebiscite) to become a "commonwealth," with a Covenant establishing its relationship to the United States, in part in order to secure U.S. citizenship for themselves. Other Trust Territories for which the United States had been responsible chose to become Free Associated States, a status of formal independence with a treaty with the United States establishing certain reciprocal rights and obligations (not including U.S. citizenship). See Howard Loomis Hills, Compact of Free Association for Micronesia: Constitutional and International Law Issues, 18 Int'l Law. 583, 584–86 (1984) (describing Compact of Free Association between U.S. and Micronesian states); Howard L. Hills, Free Association for Micronesia and the Marshall Islands: A Transitional Political Status Model, 27 U. Haw. L. Rev. 1 (2004) (same).

137. See Covenant, supra note 136, § 501(a).

138. See id. § 805. Such restrictions, if imposed by the federal government, would violate the Equal Protection component of the Fifth Amendment Due Process Clause. Bolling v. Sharpe, 347 U.S. 497, 498–99 (1954) (reasoning that Fifth Amendment Due Process Clause prohibits violations of equal protection by federal government); Shelley v. Kraemer, 334 U.S. 1, 20 (1948) (striking down racially restrictive covenants by means of holding them unenforceable in state courts on Fourteenth Amendment equal protection grounds).

139. See Covenant, supra note 136, § 501(b).

140. See id. § 303.

consisting of persons of NMI descent, defined in the CNMI Constitution as anyone "who is a citizen or national of the United States and who is of at least one quarter Northern Marianas Chamorro or Northern Mariana Carolinian blood or a combination thereof."[141]

The plaintiff in *Wabol* brought suit challenging a lease granting a long-term interest in land (as defined in the Covenant) to persons not of NMI descent; the defendants argued that the racial restrictions in the Covenant were unconstitutional.[142] The *Wabol* court ruled for the plaintiff relying on *both* a fundamental rights analysis and the impracticable and anomalous test, treating the two approaches to the question as consistent and complementary.

The analysis began by repeating the standard account of the *Insular Cases*—an account that, as argued above, has long suffered from being overly simplistic, though as the *Wabol* court correctly noted, by that time it had become widely accepted: "It is well established that the entire Constitution applies to a United States territory *ex proprio vigore*—of its own force—only if that territory is 'incorporated.' Elsewhere, absent congressional extension, only 'fundamental' constitutional rights apply in the territory."[143] Note the difference between this first step and the first step in Harlan's analysis in *Reid*: As in the *King* case, the notion that the Constitution is operative recedes here, while the idea of extraconstitutional space (where none of the Constitution applies except for its "fundamental" guarantees) gains ground.

Turning then to the meaning of "fundamental" in the territories (and citing an earlier case involving jury trial rights in the CNMI, *Northern Mariana Islands v. Atalig*,[144] which used a similar approach but did not explicitly rely on Harlan's test), the *Wabol* court—in a move of particular interest for purposes of the argument in this Article—rejected the idea

---

141. Id. § 805(a) (including children adopted by persons of NMI descent); see Commonwealth Constitution art. XII, § 4 (CNMI). The category includes as "full-blooded Northern Marianas Chamorro or Northern Marianas Carolinian" persons "born or domiciled in the Northern Mariana Islands by 1950" and having citizenship of the Trust Territory of the pacific island before the termination of the Trusteeship. Id. For a study of blood quantum laws that discusses the CNMI, see generally Rose Cuison Villazor, Blood Quantum Land Laws and the Race Versus Political Identity Dilemma, 96 Cal. L. Rev. 801, 828–31 (2008). As Villazor explains, such laws have been upheld in the territorial and Indian law contexts, but struck down in the state context. See Rice v. Cayetano, 528 U.S. 495, 499 (2000) (striking down law limiting right to vote for trustees of Hawaiian state agency to Native Hawaiians); Morton v. Mancari, 417 U.S. 535, 553–54 (1974) (upholding laws privileging persons with one-quarter American Indian blood); Craddick v. Territorial Registrar, 1 Am. Samoa 2d 10, 12 (1980) (upholding racial restrictions on alienation of land in American Samoa on ground that preservation of Samoan culture constituted "compelling interest").

142. Wabol v. Villacrusis, 958 F.2d 1450, 1451 (9th Cir. 1992). Actually, the persons were an individual and a corporation.

143. Id. at 1459.

144. Northern Mariana Islands v. Atalig, 723 F.2d 682, 689 (9th Cir. 1984); see supra note 135.

that "fundamental" means the same thing in the Fourteenth Amendment and territorial contexts: "What is fundamental for purposes of Fourteenth Amendment incorporation is that which 'is necessary to an Anglo-American regime of ordered liberty.' In contrast, 'fundamental' within the territory clause are 'those . . . limitations in favor of personal rights' which are 'the basis of all free government.'"[145] A right would apply in the CNMI "only if this guarantee is fundamental in this *international* sense."[146] Elaborating on this distinction, the *Wabol* court drew attention to the different purposes served by the two lines of jurisprudence, explaining that Fourteenth Amendment incorporation "'serves to fix our basic federal structure,'" while territorial incorporation instead "'is designed to limit the power of Congress to administer territories under Article IV of the Constitution.'"[147]

The *Wabol* court's gloss on the meaning of "fundamental" in the territorial context introduced an intriguing and novel feature into the analysis of the status of the Constitution in the territories (although in a sense it amounts to an updated version of the standard of "civilization" that suffused those opinions, albeit stripped of the notions of Anglo-Saxon superiority that accompanied it, since here these notions have been replaced by more modest, and in a sense romantic, notions of Anglo-Saxon cultural specificity). Is it right? Do the *Insular Cases* stand for the proposition that only guarantees that are fundamental in an international sense apply in the unincorporated territories?

Although the *Insular Cases* relied on international law for other purposes, they did not base their understanding of fundamentality upon international law or an international standard, which at any rate would have had very little guidance to provide at that time with respect to the rights of individuals. Rather, they looked to the "general spirit" of the Constitution, as in the following passage from the *Downes* case (quoted from an earlier territorial case):

> Doubtless Congress, in legislating for the territories would be subject to those fundamental limitations in favor of personal rights which are formulated in the Constitution and its amendments; but these limitations would exist rather by inference and the general spirit of the Constitution from which Congress de-

---

145. *Wabol*, 958 F.2d at 1460 (citations omitted) (quoting Duncan v. Louisiana, 391 U.S. 145, 149–50 n.14 (1968) and *Atalig*, 723 F.2d at 690, respectively). Actually the "ordered liberty" approach was associated with Justice Felix Frankfurter, who defended it as an *alternative* to the "incorporation" approach championed by Justice Hugo Black. But both did involve the analysis of what rights applied against states via the Fourteenth Amendment. See infra notes 176–188 and accompanying text.

146. *Wabol*, 958 F.2d at 1460; cf. Note, The Extraterritorial Constitution, supra note 72, at 1908 (arguing that "impracticable and anomalous standard" should be interpreted as "implicitly referencing generally applicable international law"). Note that the *Wabol* court did not rely on international law itself, but rather on a somewhat more amorphous international standard.

147. *Wabol*, 958 F.2d at 1460 (quoting *Atalig*, 723 F.2d at 689).

> rives all its powers, than by any express and direct application of its provisions.[148]

While the *Insular Cases* also alluded more generally to "principles which are the basis of all free government" and to "restrictions of so fundamental a nature that they cannot be transgressed, although not expressed in so many words in the Constitution," all of the Justices agreed that prohibitions such as those respecting bills of attainder, ex post facto laws, and titles of nobility limited congressional power even in the unincorporated territories, thus confirming the Constitution's role as the central referent in the analysis.[149]

The distinction articulated in *Wabol* has a surface appeal, at least to those who see a role for international standards in constitutional jurisprudence. Although, as noted, *Wabol* itself did not rely on international law per se but rather on a more amorphous, international "sense" of fundamentality, its approach does raise an interesting question: Why not use international law as the framework for evaluating the territorial (and extraterritorial) application of constitutional provisions?[150] The answer to this creative proposition is that international law perhaps should play some role in this process, but that replacing constitutional standards with international law or standards as the relevant legal framework would entail the further dilution or elimination of rights that cannot be described as fundamental in any international sense. In *Wabol*, it meant upholding the challenged racial restrictions on the alienation of land (which would not have survived domestically). As the *Wabol* court put it, "the definition of a basic and integral freedom must *narrow* to incorporate the shared beliefs of diverse cultures."[151] On this reasoning, Congress has the power to tweak the definition of rights, not with reference to the meaning of those rights as it has developed over time in our constitutional tradition, or even with reference to the "general spirit" of the Constitution (as the early territorial cases put it), but with reference to an internationally acceptable standard, according to which rights would be selectively diluted or even eliminated to avoid clashes with local culture. The results might well be beneficial for the culture of the Northern Marianas, say, but one worries about their consequences for the constitutional rights in question.

The breadth of the claim in *Wabol* was breathtaking: If cultural difference provided the limiting principle, then not even all of the prohibitions identified in the *Insular Cases* as fundamental would necessarily re-

---

148. Downes v. Bidwell, 182 U.S. 244, 268 (1901) (quoting Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States, 136 U.S. 1, 34 (1890)).

149. Id. at 291.

150. For a different answer to this question than the one offered here, see Note, The Extraterritorial Constitution, supra note 72, at 1908 (arguing that "impracticable and anomalous" standard should be interpreted as "implicitly referencing generally applicable international law" and that test should be construed with reference to "circumstances" in which "international law contemplates protection of individual rights").

151. *Wabol*, 958 F.2d at 1460 (emphasis added).

main so. Even *Downes* acknowledged that "when the Constitution declares that 'no bill of attainder or *ex post facto* law shall be passed,' and that 'no title of nobility shall be granted by the United States,' it goes to the competency of Congress to pass a bill *of that description*."[152] Yet under *Wabol*'s definition of fundamentality, not even these prohibitions would bind Congress.

The *Wabol* court then turned to Harlan's test, asking "whether the claimed right [i.e., an equal right to own land regardless of race] is one which would be impractical or anomalous in NMI."[153] The answer to that question in turn depended on an extended discussion of native land ownership on those islands, in which the court took note of the fact that "land in the [CNMI] is a scarce and precious resource" and recognized "the vital role native ownership of land plays in the preservation of NMI social and cultural stability."[154] It then proceeded to explain how any erosion of native ownership would undermine a central element of NMI culture, and held inapplicable the Equal Protection Clause as understood within the United States on the ground that to apply it in the CNMI would be impracticable and anomalous.

As these cases illustrate, with the impracticable and anomalous test the stage was set for the development of a jurisprudence in which the applicability of constitutional guarantees could depend entirely on policy considerations to be determined on a case-by-case basis—such as, in the case of the CNMI and American Samoa, the goal of cultural protection. As a pragmatically minded attention to the accommodation of cultural predilections and local mores displaced other tenets of constitutional interpretation, text and structure receded from view, while the relevant history became not that of the evolving meaning of any given constitutional provision, but rather that of whatever struck a court as relevant in the specific case before it: in this case, traditions of native land ownership.[155] This was not an unreasonable interpretation of Justice Harlan's "impracticable and anomalous" test, nor of Congress's intent in entering into the Covenant with the CNMI, nor is it an unreasonable way of dealing with the difficult problems raised by the U.S. relationship with its unincorporated territories. If one agrees that the Constitution empowers the United States to enter into political alliances with nonstate territories of the sort embodied in the CNMI Covenant (for instance), and in the process allows the parties to such alliances themselves to select which constitutional guarantees restrain their own actions and which do not, then as a

152. *Downes*, 182 U.S. at 277.

153. *Wabol*, 958 F.2d at 1461.

154. Id.

155. It is not surprising under the circumstances that the one person, one vote principle of Reynolds v. Sims, 377 U.S. 533, 568 (1964), did not survive when it came under scrutiny in the CNMI. See Rayphand v. Sablan, 95 F. Supp. 2d 1133 (D.N. Mar. I. 1999), aff'd without opinion, Torres v. Sablan, 528 U.S. 1110 (2000). Indeed the example cited in support of the proposition that the principle was not fundamental was the U.S. Senate.

policy matter, the courts in these cases may have come up with the best way to proceed. But as a matter of constitutional interpretation, this approach leaves much to be desired.

C. *The Permeability of Boundaries*

Harlan's test crossed yet another boundary when it next found its way into another Supreme Court opinion—though once more in a one-person concurrence, this one by Justice Kennedy (who would later write *Boumediene* for a majority). The case was *United States v. Verdugo-Urquidez*, and the question before the Court was whether the prohibition against unreasonable searches and seizures and the warrant requirement of the Fourth Amendment applied to the search of a Mexican national's home in Mexico City, conducted jointly by federal and Mexican agents after the suspect was apprehended and brought to the United States by federal authorities.[156]

A majority of the Court held that the Fourth Amendment did not apply to searches of noncitizens' homes abroad. Although Kennedy joined Chief Justice William Rehnquist's opinion for the Court, the reasoning in his concurrence was not consistent with Rehnquist's, which set forth what has come to be known as the "substantial connection" test. Rehnquist's opinion relied principally on the reasoning that the Fourth Amendment refers to the "people," a constitutional "term of art," and that Verdugo-Urquidez was not part of the "people" because his presence in the United States, although legal, was nonconsensual—i.e., that he lacked a substantial connection to the United States.[157] But Kennedy rejected both the Rehnquist definition of the "people" and its relevance to the analysis. Instead, he advocated the adoption of Justice Harlan's "impracticable and anomalous" test from *Reid*.[158]

Kennedy began by acknowledging that "the Government may act only as the Constitution authorizes"—a version of White's rejection of strict territoriality in *Downes* ("[T]he question . . . is, not whether the Constitution is operative, for that is self-evident, but whether the provision relied on is applicable.") and Harlan's in *Reid* ("The proposition is,

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

157. Id. at 265–66, 274–75. Rehnquist's opinion set forth an especially aggressive example of what Neuman describes as the "membership" approach, rooted in contractarian theory. See Neuman, Strangers, supra note 9, at 6–7. The opinion also relied on the fact that Verdugo had not been in the United States for very long—only days—when the search took place, declining to decide "[t]he extent to which respondent might claim the protection of the Fourth Amendment if the duration of his stay in the United States were to be prolonged—by a prison sentence, for example." *Verdugo*, 494 U.S. at 271–72.

158. 494 U.S. at 277 (Kennedy, J., concurring). Kennedy cited Johnson v. Eisentrager, 339 U.S. 763 (1950), as well. *Verdugo*, 494 U.S. at 292 (Kennedy, J., concurring). As noted above, in *Eisentrager*, the Court took into account practical considerations, but it did not apply the "impracticable and anomalous" test as such, and did not purport to rely on a functional approach. See supra note 76.

of course, not that the Constitution 'does not apply' overseas, but that there are provisions in the Constitution which do not *necessarily* apply in all circumstances in every foreign place.").[159] Kennedy then qualified that statement with an allusion to the power of the government in foreign affairs (suggesting, though not stating explicitly, that it might trump constitutional restraints): Declaring the continuing validity of *In re Ross* and the *Insular Cases*, and citing as well *United States v. Curtiss-Wright Export Corp.*,[160] he noted that "we must interpret constitutional protections in light of the undoubted power of the United States to take actions to assert its legitimate power and authority abroad."[161] Then, citing Harlan in *Reid*, Kennedy went on to conduct the "impracticable and anomalous" test.

On this occasion, that analysis began with the observation that "[j]ust as the Constitution in the *Insular Cases* did not require Congress to implement all constitutional guarantees in its territories because of their 'wholly dissimilar traditions and institutions,' the Constitution does not require United States agents to obtain a warrant when searching the foreign home of a nonresident alien."[162] Once again, the "wholly dissimilar traditions and institutions" of the territories (that particular phrase was borrowed from Justice Black's plurality opinion in *Reid*) emerged as the purported basis for the decision in the *Insular Cases*, though, as we have seen, these considerations actually played a less exalted role in those decisions than an analysis of the "fundamentality" of constitutional prohibitions. Fundamentality, in turn, was evaluated in those cases not only with respect to cultural difference but also with respect to domestic constitutional traditions, where it was similarly at issue in cases concerning the applicability of constitutional guarantees against the states. At any rate, in *Verdugo* the protection of Mexican culture was not the issue: For one thing, potential differences in Mexican perceptions of privacy did not act as restraints on the activities of federal agents (in collaboration with Mexican agents) in apprehending Verdugo and searching his home in the first place. For another, the obstacles Kennedy identified as standing in the way of the Warrant Clause's application primarily emphasized the difficulties the government would encounter in applying the requirement rather than the dangers it would pose to Mexican culture—difficulties Kennedy summed up as "[t]he absence of local judges or magistrates

159. Reid v. Covert, 354 U.S. 1, 74 (1957) (Harlan, J., concurring in the result); Downes v. Bidwell, 182 U.S. 244, 292 (1901) (White, J., concurring).

160. 299 U.S. 304 (1936) (setting forth doctrine of plenary executive power over foreign relations).

161. *Verdugo*, 494 U.S. at 277 (Kennedy, J., concurring). Note the unusual formulation: Kennedy says not that the power must be read in light of the limitations, but that the limitations must be read in light of the power. This may seem like semantic quibbling, but I think it tells us something about the ways in which the introduction of "extraterritoriality" into a situation can lead to unwarranted revisions to otherwise standard approaches to constitutional interpretation.

162. Id. at 278.

available to issue warrants, the differing and perhaps unascertainable conceptions of reasonableness and privacy that prevail abroad, and the need to cooperate with foreign officials."[163] In short, Kennedy concluded, the warrant requirement "should not apply in Mexico as it does in this country."[164]

Once again the impracticable and anomalous test led to the result that a constitutional guarantee did not apply extraterritorially. In this case, Kennedy's proposed result—that the Warrant Clause was inapplicable in Mexico, as opposed to unenforceable there—was correct, in my view.[165] (The reasonableness requirement is a different matter.[166]) But it is worth pausing to consider the implications of getting to that result by way of the impracticable and anomalous test. One question, as the discussion above suggests, is whether considerations of practicality should enter the analysis at this stage—that is, with respect to *whether* the Warrant Clause applies in Mexico. If there were local judges or magistrates available in Mexico to issue warrants, Mexican conceptions of reasonableness and privacy turned out to be both ascertainable and similar to American ones, and cooperation with foreign officials proved no obstacle, would the constitutional guarantee of a warrant suddenly "apply" in Mexico? Or would it, rather, simply be feasible to issue warrants authorizing searches there—i.e., to *enforce* a warrant requirement? The latter makes sense; the former does not.[167]

And if the Warrant Clause did apply, this would not, as I have argued, rule out the consideration of practical obstacles to its enforcement. Exceptions to the warrant requirement abound domestically, of course, and these exceptions arise out of pragmatic concerns, which remain valid considerations even where the Warrant Clause as a general matter "applies." There is no need for a "functional" approach or a special extrater-

---

163. Id.

164. Id. In Kennedy's somewhat ambiguous phrasing, "the Fourth Amendment's warrant requirement should not apply in Mexico *as it does in this country*." Id. (emphasis added). As his vote to join the Court's holding made clear, by this he meant that the Fourth Amendment's warrant requirement should not apply in Mexico *at all*.

165. Cf. In re Terrorist Bombings of U.S. Embassies in E. Afr. (Fourth Amendment Challenges), 552 F.3d 157, 167–68 (2d Cir. 2008) (noting Rehnquist's opinion in *Verdugo* did not explicitly resolve Warrant Clause issue and holding warrant requirement does not apply extraterritorially).

166. Kennedy did not expressly address reasonableness in his concurrence. Instead, he stated that the Fourth Amendment was not violated in the case, leaving unclear whether he believed that the reasonableness requirement did not apply or that the warrantless search had been reasonable. But his endorsement of the majority opinion, while in tension with his own reasoning, suggests he believed the former.

167. Note that in the absence of practical obstacles, the separation of powers concerns cited by Kennedy earlier in his concurrence would still stand, as would the doubt, noted by Justice Stevens in his concurrence, over whether American magistrates even have the power to authorize searches abroad. *Verdugo*, 494 U.S. at 279 (Stevens, J., concurring in the judgment). For these reasons the Warrant Clause would likely not apply, even if it were feasible (practicable) to enforce it.

ritorial test to resolve analogous issues abroad. Resort to the impracticable and anomalous test fetishizes the idea that a difference in kind exists between the analysis of constitutional provisions at home and abroad, thereby authorizing particular attention to consequentialist considerations in the latter context.

As the impracticable and anomalous test made its way from Harlan's opinion in *Reid,* to the territorial cases, to Kennedy's opinion in *Verdugo,* it evolved in ways clearly responsive to the specific and unusual circumstances in each of these cases, conferring considerable discretion on judges in determining the applicability of constitutional guarantees outside the "United States" on a case-by-case basis. This approach made it possible for courts to be excessively attentive to considerations of governmental convenience, and insufficiently attentive to arguably relevant doctrinal developments at home—which, because they take for granted that the Constitution "applies," tend to pose more vigorous restraints on government action, even as they leave plenty of room to take account of pragmatic concerns.

The test was, as I noted at the outset, the product of improvisation at the margins of the Constitution, and it has proven alarmingly adaptable. Harlan derived it from a dubious reading of the *Insular Cases,* which attributed to them a greater emphasis on practical factors than they themselves placed on those considerations, and he transported his reading of those cases' approach to the Constitution, to the context of a U.S. military base on foreign soil. The territorial cases then reimported the test into the ambiguously domestic context of the unincorporated territories, discarding in the process Harlan's (and White's) emphasis on the proposition that the Constitution is always operative with respect to the federal government, and relying instead on the standard but problematic reading of the *Insular Cases,* according to which the Constitution does not apply outside the United States except for a few fundamental guarantees. Meanwhile these territorial cases replaced Harlan's factors, which focused on the interests of the government, with a set of factors driven by a concern for the protection of cultural minorities. These various elements made appearances in Kennedy's concurrence in *Verdugo,* where the test was now applied with respect to the actions of federal agents (in collaboration with foreign agents) on foreign soil. The proposition that the Constitution is operative always and everywhere with respect to federal government action returned (as Kennedy put it, "the Government may act only as the Constitution authorizes"[168]), but once again was immediately undermined by an analysis in which practical considerations determined *whether* the constitutional provisions that had been invoked were *applicable*—in other words, an analysis in which such practical considerations dictate what "the Constitution authorizes." A vestigial allusion to cultural difference worked its way into the discussion, complete with an

168. Id. at 277 (Kennedy, J., concurring).

attribution to the *Insular Cases*, though here cultural difference served to highlight the unfeasibility of applying the constitutional provision at stake, not to suggest that its application would somehow prove threatening to a foreign culture. In short, it is a malleable test—with its faithful attention to sui generis policy concerns, to be identified on a case-by-case basis—and it easily travels across the permeable boundaries separating different kinds of liminal settings.

By reducing the analysis of the *applicability* of constitutional provisions in the territorial and extraterritorial context to an evaluation of the feasibility of their application, the test has effectively smuggled a version of strict territoriality—precisely the standard it purports to reject—into the jurisprudence through the back door. If the applicability of a given constitutional provision in an extraterritorial context depends on an analysis of "impracticability" and "anomalousness," then extraterritorially, the applicability of constitutional guarantees turns out to be a function of, rather than a constraint upon, what the government can and cannot do, and a version of strict territoriality is indeed structuring the scope of the Constitution's operation.[169]

At the same time, the permeability of the boundaries between the different settings in which the test has been applied gives additional cause for concern. If territory "outside" the United States can include not only foreign territory, but territory over which the United States claims ultimate sovereignty (such as the unincorporated territories), then it is not entirely clear what prevents the unorthodox constitutional methodologies developed in the periphery from working their way back into the constitutional "core" of the United States. Indeed the test has now crossed yet another permeable boundary, finding its way into *Boumediene*, where it was endorsed, and a version of it applied with respect to Guantánamo—yet another place with an ambiguous constitutional status, but one unquestionably subject to not only de facto but exclusive U.S. sovereignty. The *Boumediene* case leaves many questions unanswered concerning the effectiveness of habeas and other rights abroad, to be sure.[170] But it is worth noticing that, to the extent that the *Boumediene* case acknowledged the existence of complete U.S. sovereignty over Guantánamo, the Court's chosen analysis—now endorsed by a majority—crept not further from, but rather closer to, what we think of as "home."

---

169. This criticism has long been leveled at the *Insular Cases*, but as I argued in Part I, with respect to them it is not entirely fair: While the *Insular Cases* played fast and loose with constitutional terminology (for instance, coming up with an unduly narrow definition of the "United States"), they did not rely as wholeheartedly on consequentialist considerations as their progeny have done.

170. As this Article went to press, a federal district court answered one of those questions, holding that certain foreign nationals held by the United States at the Bagram Theatre Internment Facility at Bagram Airfield in Afghanistan may seek habeas in federal court. See Al Maqaleh v. Gates, Nos. 06-1669, 06-1697, 08-1307, 08-2143, 2009 WL 863657, at *23 (D.D.C. Apr. 2, 2009).

III. THE CONSTITUTION THIS SIDE OF THE BORDER

To judge from the literature on constitutional extraterritoriality, questions concerning the applicability of the Constitution within the United States are blissfully straightforward. At home, we are told, the Constitution applies "in full."[171] Things start to come apart across the border; but here, at least, we can rest assured that the "entire" Constitution is in force. This proposition finds expression, implicit and explicit, in arguments representing a spectrum of views on the Constitution outside the United States. Defenders of a more generous interpretation of the role of the Constitution in the territories and abroad complain, for instance, that decisions such as those in the *Insular Cases* have created a two-tier constitutional regime, according to which the Constitution applies fully only in territories within a narrowly defined "United States," which encompasses incorporated territories and states, while none of it except its "fundamental" guarantees applies outside the United States, in unincorporated territories and abroad. The champions of some form of strict territoriality do not ordinarily contest that characterization; rather, they embrace the result, arguing that this is as it should be—i.e., that the Constitution should apply in full only at home.[172]

It is not surprising that questions concerning the Constitution inside the United States would remain largely unexamined in a literature concerned with its force and effect outside the United States. In the literature on extraterritoriality, the statement that the Constitution applies in full at home serves a simple purpose: It is merely a point of departure for the discussion of difficult issues relating to the applicability of the Constitution abroad.

Yet the received wisdom misses the mark by a wide margin. Not only is there a domestic counterpart to the territorial and extraterritorial jurisprudence concerning the scope and content of constitutional guarantees; the question of whether and how the Constitution applies *within* the

171. For a sampling and critique of works making this claim, see Burnett, Untied, supra note 11, at 808 nn.39–40; see also Alvarez González, supra note 86, at 319 n.38 (1990) (describing *Insular Cases* as holding Constitution is "wholly applicable" in incorporated territory while only fundamental provisions apply in unincorporated territory); Laughlin, Cultural Preservation, supra note 73, at 343 (describing White's concurrence as reasoning that Constitution is "fully applicable" in territories incorporated into United States, while only "fundamental rights" apply in unincorporated territory); José Trías Monge, Plenary Power and the Principle of Liberty: An Alternative View of the Political Condition of Puerto Rico, 68 Rev. Jur. U.P.R. 1, 4–5 (1999) (arguing *Downes* adopted view that "the Constitution applied in full only to" territories incorporated into United States). Often the claim is made implicitly, by way of the statement that the *Insular Cases* held that the Constitution does not apply in full in the unincorporated territories. See, e.g., Alex Tallchief Skibine, *United States v. Lara*, Indian Tribes, and the Dialectic of Incorporation, 40 Tulsa L. Rev. 47, 64 (2004) (explaining that *Insular Cases* held that Constitution was "not fully applicable" to unincorporated territories).

172. See, e.g., Boumediene v. Bush, 128 S. Ct. 2229, 2302 (2008) (Scalia, J., dissenting) ("There is simply no support for the Court's assertion that constitutional rights extend to aliens held outside U.S. sovereign territory . . . ."); Kent, supra note 72.

United States lies at the heart of one of the core debates in U.S. Constitutional law: the Fourteenth Amendment incorporation debate.[173] That debate, of course, concerns the question of whether the provisions of the Bill of Rights are "incorporated" into the Fourteenth Amendment (via its Privileges and Immunities Clause and its Due Process Clause) and thereby made applicable against the states.[174] In that context, the proposition that the Constitution applies in full *inside* the United States, in the states of the Union, has elicited vigorous disagreement in the past, and continues to generate debate today.

In this Part, I examine the parallels between the Fourteenth Amendment incorporation cases on the one hand and the territorial and extraterritorial jurisprudence on the other, with a view toward drawing on the former in order to sketch out a revised approach to the latter. I do not argue that any particular methodology that has been advocated in the debate over Fourteenth Amendment incorporation (and as the term "debate" suggests, there are several) can or should be exported wholesale into the territorial or extraterritorial context. But I contend that a comparative look at these areas of jurisprudence, which tend to be treated separately, suggests that a rethinking of the current approach to constitutional extraterritoriality may be in order.

Ultimately, as I have indicated in the preceding discussion, my aim is to challenge the notion that a sharp break occurs at the border, giving courts license to engage in unprecedented approaches to constitutional interpretation outside a narrowly defined "United States." Questions concerning the scope and content of the Constitution arise domestically as well—and not just in the ambiguously situated U.S. territories.[175] They

---

173. As noted above, few scholars have noted the parallels between the Fourteenth Amendment "incorporation" and territorial "incorporation" debates. See supra note 18 and accompanying text. As for parallels between the Fourteenth Amendment cases and the extraterritorial cases, several scholars have drawn attention to these but have not discussed them at great length. See Neuman, Strangers, supra note 9, at 97, 100–03; Baher Azmy, *Rasul v. Bush* and the Intra-Territorial Constitution, 62 N.Y.U. Ann. Surv. Am. L. 369, 410 n.197, 411 (2007) (noting similarity between Black's opinion in *Reid* and "total incorporation" but also stating incorrectly that Frankfurter and Harlan were proponents of "selective incorporation"); Tucker Culbertson, The Constitution, the Camps & the Humanitarian Fifth Amendment, 62 U. Miami L. Rev. 307, 342–61 (2008) (arguing that Fifth Amendment be read to incorporate international law, and drawing attention to similarities in positions of several Justices in *Reid* and Fourteenth Amendment cases); Kermit Roosevelt III, Guantánamo and the Conflict of Laws: *Rasul* and Beyond, 153 U. Pa. L. Rev. 2017, 2048, 2054–56 (2005) (arguing against application of Fourteenth Amendment incorporation principles to extraterritorial context, and proposing developments in field of conflict of laws provide better guidance). Justice Clark noticed the parallel too. See Gideon v. Wainwright, 372 U.S. 335, 348–49 (1963) (Clark, J., concurring) (noting result in *Gideon*, a Fourteenth Amendment case, was "foreshadowed" by Kinsella v. United States ex rel. Singleton, 361 U.S. 234 (1960), an extraterritorial case).

174. As noted above, see supra note 22, it is a mere coincidence that the same term, "incorporation," became the term of art associated with each of these two areas of law.

175. Kal Raustiala proposes the helpful concept of "intraterritoriality" to capture the way in which questions concerning the relationship between law and territory arise not

arise in the states of the Union, as we can see clearly in the jurisprudence on Fourteenth Amendment incorporation. In that context, the courts have not resorted to a "functional" approach, although of course they have not entirely ignored practical considerations. A closer look at the Fourteenth Amendment incorporation jurisprudence, therefore, can inform courts' approach to the territorial and extraterritorial cases. In particular, it reminds us that courts need not focus solely on policy considerations (as Harlan's test allows—not to say encourages—them to do in the territorial and extraterritorial contexts) in order to enjoy some flexibility in constitutional interpretation.

A. *Fourteenth Amendment Incorporation and the Applicability of Constitutional Provisions at Home*

The major Supreme Court decisions dealing with Fourteenth Amendment incorporation feature three basic views: total incorporation, selective incorporation, and non-incorporation.[176] Proponents of "total incorporation," led by Justice Hugo Black, have argued that the Fourteenth Amendment Due Process Clause incorporates the first eight provisions of the Bill of Rights, making all of them applicable to the states in full (i.e., the answer to the question of *whether* a constitutional provision applies here is "yes," and the answer to *how* it applies is "in full"). Black defended this position both as the most accurate interpretation of the intent of the framers of the Fourteenth Amendment, and as a better reading of the Constitution because it properly restrains judges, who, rather than come up with their own judgments with respect to what due process would require in the states, should instead refer to the Bill of Rights as elaborated with respect to the federal government—where there should be no question of its applicability—for their understandings of what due process requires.[177]

---

only extraterritorially but also within national borders. See Kal Raustiala, Does the Constitution Follow the Flag? The Evolution of Territoriality in American Law (forthcoming May 2009) (manuscript at vii, 5, on file with the *Columbia Law Review*). When discussing intraterritoriality, Raustiala focuses not on the state context, but on ambiguously domestic settings such as the territories. See id. at 6–7, 23–25, 59–92.

176. I discuss these cases below. Amar has added to the mix a fourth and influential approach, "refined incorporation," which has gained adherents on the Court. See, e.g., Elk Grove Unified District v. Newdow, 542 U.S. 1, 50 (2004) (Thomas, J., concurring) (agreeing with Amar's argument that Fourteenth Amendment does not incorporate Establishment Clause). For overviews of the debate, see generally Amar, supra note 22, at 137–40; Curtis, supra note 22, at 1–4. Amar's influential work has inspired an enormous amount of controversy. For one recent and insightful discussion and critique, see William Michael Treanor, Taking Text Too Seriously: Modern Textualism, Original Meaning, and the Case of Amar's *Bill of Rights*, 106 Mich. L. Rev. 487 (2007) (examining textualist approach in light of historical evidence).

177. As for the federal context that provides the standard Black had in mind, ironically, the incorporation cases themselves cite, among others, nineteenth century territorial cases (i.e., cases involving the Bill of Rights in the territories prior to the invention of the distinction between incorporated and unincorporated territories). See

Defending his approach against non-incorporation, which Black described (and derided) as a "'natural law' theory of the Constitution," he argued that the cases adopting that theory "degrade the constitutional safeguards of the Bill of Rights and simultaneously appropriate for this Court a broad power which we are not authorized by the Constitution to exercise."[178] With respect to precedent, Black acknowledged the existence of contrary decisions (as he had to), but argued that the clearest opposing precedents were wrong and should be overruled, and that, even before the 1960s, when the major cases in this area were decided, the jurisprudence on the topic had revealed a trend toward incorporation.

Justice William Brennan spoke for selective incorporation, an approach which, as commentators have noticed, left room for the actual end result to be total incorporation.[179] As its name suggests, this approach involves a case-by-case analysis of each provision to determine whether it is incorporated into the Fourteenth Amendment. As for the distinction between the *whether* and *how* questions, Brennan was careful to distinguish between them, but he identified a trend in the cases (to which he seemed sympathetic) in favor of the conclusion that if a provision of the Bill of Rights was deemed incorporated, then "it applied identically in state and federal proceedings."[180] Like Black, Brennan took aim at the due process approach for focusing on a general notion of "fundamental fairness" rather than on the elaboration of specific rights in the federal context; he dismissed the generalized due process approach as "ad hoc."[181] At the same time, he noted that the incorporation and due process approaches could sometimes lead to the same result (as they had, for instance, in *Gideon v. Wainwright*), arguing that "[m]odern critics of incorporation who insist that the doctrine has dealt the principle of fed-

---

Colgrove v. Battin, 413 U.S. 149, 157–58 (1973) (citing Capital Traction Co. v. Hof, 174 U.S. 1 (1899), and American Publishing Co. v. Fisher, 166 U.S. 464 (1897), for proposition that jury means jury of twelve, though dismissing proposition as dicta); Johnson v. Louisiana, 406 U.S. 366, 369–70 (1972) (Powell, J., concurring) (agreeing that unanimity not required in state jury trials, and citing Thompson v. Utah, 170 U.S. 343 (1898), abrogated by Williams v. Florida, 399 U.S. 78, 92 (1970), as first in long line of precedents holding that "unanimity is one of the indispensable features of federal jury trial"); id. at 370 n.5 (citing *Fisher* and Springville v. Thomas, 166 U.S. 707 (1897), only, for proposition that unanimity is required in civil jury trials under Seventh Amendment); id. at 382 (Douglas, J., dissenting) (citing *Fisher* on same point); see also Apodaca v. Oregon, 406 U.S. 404 (1972) (companion case to *Johnson*).

178. Adamson v. California, 332 U.S. 46, 70 (1947) (Black, J., dissenting), overruled in part by Malloy v. Hogan, 378 U.S. 1 (1964).

179. See William J. Brennan, Jr., The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights, 61 N.Y.U. L. Rev. 535, 542 (1986). In *Malloy*, 378 U.S. at 4–6, Brennan's reasoning seems sympathetic to total incorporation.

180. Brennan, supra note 179, at 545–47.

181. Id. at 542.

eralism a 'politically violent and constitutionally suspect blow' ignore this significant fact."[182]

Non-incorporation found an important defender in Justice Felix Frankfurter, whose own approach to the question of what rights applied against the states looked at whether a right was "implicit in the concept of ordered liberty," and who criticized "total" and "selective" incorporation separately.[183] Against total incorporation, he argued that the text of the Fourteenth Amendment simply did not support the theory. He dryly observed:

> The short answer to the suggestion that the provision of the Fourteenth Amendment, which ordains 'nor shall any State deprive any person of life, liberty, or property, without due process of law,' was a way of saying that every State must thereafter initiate prosecutions through indictment by a grand jury, must have a trial by a jury of twelve in criminal cases, and must have trial by such a jury in common law suits where the amount in controversy exceeds twenty dollars, is that it is a strange way of saying it.[184]

As for precedent, Frankfurter pointed to a line of cases following the adoption of the Fourteenth Amendment that rejected the theory that the Amendment incorporated the Bill of Rights.

Against selective incorporation, Frankfurter made an argument reminiscent of Black's reasoning against non-incorporation, insisting that it was selective incorporation, and not a natural law approach, that lacked clear standards and gave too much discretion to judges:

> There is suggested merely a selective incorporation of the first eight Amendments into the Fourteenth Amendment. Some are in and some are out, but we are left in the dark as to which go in and which stay out. If the basis of selection is merely that those provisions of the first eight Amendments are incorporated which commend themselves to individual justices as indispensable to the dignity and happiness of a free man, we are thrown back to a merely subjective test.[185]

---

182. Id. at 546. Brennan was here responding to an address by then-Attorney General Edwin Meese to the American Bar Association on July 9, 1985, in which Meese strongly criticized incorporation and expressed the hope that the Court would soon begin to scale back those decisions. See William W. Van Alstyne, Foreword, *in* Curtis, supra note 22, at vii, vii–viii (describing Meese's criticisms and Brennan's response).

183. See Rochin v. California, 342 U.S. 165, 169 (1952) (citing Palko v. Connecticut, 302 U.S. 319, 325 (1937), overruled by Benton v. Maryland, 395 U.S. 784, 794 (1969)); Felix Frankfurter, Memorandum on "Incorporation" of the Bill of Rights into the Due Process Clause of the Fourteenth Amendment, 78 Harv. L. Rev. 746 (1965) (critiquing incorporation and collecting and commenting on cases rejecting proposition that Fourteenth Amendment incorporates Bill of Rights).

184. Adamson v. California, 332 U.S. 46, 63 (1947) (Frankfurter, J., concurring), overruled in part by Malloy v. Hogan, 378 U.S. 1.

185. Id. at 65.

These, of course, were the same criticisms that Black leveled at what he called Frankfurter's "natural law" approach; but Frankfurter defended "natural law" theories, arguing that "[i]n the history of thought 'natural law' has a much longer and much better founded meaning and justification than such subjective selection."[186]

Frankfurter's last published work reiterated the argument against incorporation, but acknowledged the possibility of "absorption," i.e., the gradual evolution of understandings of the Bill of Rights such that some of its guarantees might come to be understood as applicable against the states (and in that sense required by the Fourteenth Amendment). "The concept of 'absorption' is a progressive one, *i.e.*, over the course of time something gets absorbed into something else. The sense of the word 'incorporate' implies simultaneity."[187] Discussing a line of Supreme Court cases holding the First Amendment applicable against the states via the Fourteenth Amendment, Frankfurter described the process whereby this had happened as "absorption" over time, rather than a one-time act of "incorporation."[188] What he resisted, in other words, was not the possibility that understandings of the Constitution might evolve to a point where state definitions of due process in particular circumstances would coincide with federal ones, but the idea that the Fourteenth Amendment had, from one moment to the next, rendered applicable against the states some or all of the Bill of Rights.

The debate among proponents of these views reached a fever pitch in the 1960s. Between 1961 and 1969, the pro-incorporation view prevailed on the Court. Together, the proponents of total and selective incorporation held numerous provisions of the Bill of Rights applicable against the states via the Fourteenth Amendment (and in that sense, selective incorporation won the day, for the provisions were applied one by one, on a case-by-case basis). The list of cases reads, as one scholar puts it, like a roster of the Court's "greatest hits."[189] They include *Mapp v. Ohio* (prohibition against unreasonable searches and seizures), *Malloy v. Hogan* (privilege against self-incrimination), *Duncan v. Louisiana* (right to a trial by jury), *Benton v. Maryland* (prohibition against double jeopardy), and so on.[190] Even the opponents of incorporation joined the holdings in some of these cases, but based their reasoning on due process grounds.

As this brief overview suggests, the Fourteenth Amendment incorporation cases, like the territorial and extraterritorial cases, concern the

---

186. Id.

187. Frankfurter, supra note 183, at 747–48.

188. Id. The *Boumediene* opinion includes a statement to the effect that, by now, the status of the Constitution in the territories addressed by the *Insular Cases* may well have changed, thus articulating a view reminiscent of Frankfurter's "absorption." See Boumediene v. Bush, 128 S. Ct. 2229, 2255 (2008).

189. Amar, supra note 22, at 138.

190. Benton v. Maryland, 395 U.S. 784, 787 (1969); Duncan v. Louisiana, 391 U.S. 145, 161–62 (1968); Malloy v. Hogan, 378 U.S. 1, 6 (1964); Mapp v. Ohio, 367 U.S. 643, 655 (1961).

scope and content of federal constitutional guarantees—a live question not only abroad, but also at home. In other words, "the Constitution," as such, does not apply "in full" anywhere—even domestically. The proposition that certain constitutional provisions apply under certain circumstances, and others under other circumstances, is true even here, inside the boundaries of the United States. By reviewing the Fourteenth Amendment incorporation cases, we can see that the question of which provisions apply under what circumstances arises in a range of settings, on both sides of the border, as well as in ambiguous in-between places: not only in the territories, not only abroad, but right here, at home, in the states.

Closer attention to the parallels between these various jurisprudential lines reveals clearly—more clearly than an examination of any one of them in isolation can do—that questions concerning the force and effect of the Constitution do not arise only outside of a narrowly defined "United States." Yet despite these obvious parallels, the unexamined assumption that questions of constitutional applicability arise elsewhere, while inside the United States, all constitutional guarantees apply "in full," has become entrenched in the scholarship on territorial and extraterritorial jurisprudence, and has had the unintended effect of exaggerating the government's freedom of action abroad.

Once we remember that domestic constitutional law deals with essentially the same issues of constitutional scope and content that arise in the territorial and extraterritorial cases, we are in a better position to plumb each of these areas of jurisprudence for insights that might be useful across a range of settings. In particular, the domestic jurisprudence sheds light on the difference between what I have been calling the *whether* and *how* questions, i.e., the question of whether a constitutional provision applies versus the question of how it should be given effect or enforced—a distinction that, as we have seen, has been obscured in the extraterritorial jurisprudence. Attention to this distinction sheds light on the shortcomings of the "impracticable and anomalous" test—demonstrating that it treats what ought to be "whether" questions as "how" questions instead—and raises a red flag with respect to the domestic implications of the trend (evident in *Boumediene*) toward greater acceptance of the so-called functional approach.

B. *Insights from the Fourteenth Amendment Cases*

The Fourteenth Amendment incorporation cases do not entirely ignore practical considerations: far from it. Nevertheless, they draw a clearer line than their extraterritorial counterparts do between two questions—that of *whether* a constitutional provision applies, and that of *how* the provision applies. As Brennan put it some years after the major cases in this jurisprudence had been decided:

> Two questions recurred throughout this period of change. The first was whether the Bill of Rights should be selectively or fully

> incorporated . . . . Second, assuming that a particular guarantee in the Federal Bill should be applied to the states, there remained the question of the scope or extent of its application.[191]

As we will see below, those cases addressing the second question exemplify an approach pursuant to which practical considerations are reserved, on the whole, for the *how* phase of the analysis.

The same distinction between *whether* and *how* should play a central role in the territorial and extraterritorial cases. But those cases tend not to distinguish adequately between these two stages of the analysis. Instead (as we saw above in Harlan's *Reid* concurrence), in the territorial and extraterritorial cases the *how* stage tends to collapse into the *whether* stage. Even those who concede that the Constitution is "operative" beyond domestic borders (as Harlan did in his *Reid* concurrence), and identify the constitutional guarantees relevant to a given set of facts (in *Reid*, those governing the rights to a grand jury and a jury trial), will then go on to conclude that the constitutional prohibitions at issue do not "apply" after all (as Harlan concluded with respect to noncapital cases) rather than examining *how* provisions already determined to be applicable can be given effect in an unusual or difficult set of circumstances. At a stage in the analysis in which a court should be endeavoring to sort out how best to enforce an applicable provision, this approach instead asks, yet again, whether the provision applies. A comparison with the Fourteenth Amendment cases helps bring to light this flaw in the territorial and extraterritorial cases, and points toward a better way of handling the *whether/how* distinction.

The cases decided between 1961 and 1969 consistently held that those provisions that were incorporated against the states were also applicable there in full, i.e., that the rights in question had the same content with respect to state and federal governments. In those cases, if the answer to the *whether* question was "yes," the answer to the *how* question turned out to be "in full." But beginning in 1970, the Court decided a series of cases concerning the precise content of the right to a trial by jury, which distinguished between the essential and incidental aspects of that right.[192] These decisions assumed that the right in question applied

---

191. Brennan, supra note 179, at 540. A terminological clarification: The reader will note that Brennan's phrase here ("scope or extent") is not to be understood as synonymous with, or even parallel to, the phrase I have settled on to characterize the proper analysis ("scope and content"). With "scope or extent," Brennan is referring to the second part of a two-part inquiry, whereas I use "scope and content" to specify the two parts of the inquiry. In my formulation, the question of whether a constitutional guarantee applies is a question concerning its *scope*. The question of how an applicable guarantee may be enforced is a question concerning its *content*.

192. Apodaca v. Oregon, 406 U.S. 404, 406 (1972) (approving non-unanimous 11-1 or 10-2 jury verdicts); Johnson v. Louisiana, 406 U.S. 356, 362 (1972) (same for 9-3 verdict); Williams v. Florida, 399 U.S. 78, 86 (1970) (permitting jury of fewer than twelve members). But cf. Burch v. Louisiana, 441 U.S. 130, 134 (1979) (holding non-unanimous six person jury unconstitutional); Ballew v. Georgia, 435 U.S. 223, 239 (1978) (holding jury of fewer than five persons unconstitutional).

against the states, but they addressed as a separate matter the question of whether it necessarily encompassed features that had long been considered a part of it: In the case of the right to a trial by jury, the Court dispensed with the requirements of a twelve member jury and the unanimous verdict, and in the case of double jeopardy, the Court applied a more relaxed standard.

Most of the Justices in these cases did not go so far as to endorse the proposition that the same rights had different content in federal and state contexts. Though these cases held that neither the twelve member requirement nor the requirement of unanimity was essential to a trial by jury, the Justices who joined these holdings reached this conclusion by interpreting the *federal* right in a diluted manner, and on this ground upholding state procedures deviating from those traditional requirements (that is, without questioning the applicability of the Sixth Amendment jury trial right against the states via the Fourteenth Amendment). To them, as well as to the dissenting Justices in these cases (who believed that the federal right required twelve members and unanimity, and who would therefore have struck down the challenged state procedures), the answer to the *whether* question remained "yes," and the answer to the *how* question was still "in full," although a disagreement arose as to specifically what "in full" included.

However, Justice Powell's concurring votes in *Apodaca v. Oregon* and *Johnson v. Louisiana*, cases dealing with the unanimity requirement, took a different tack. Powell adopted the view that the Sixth Amendment right to a trial by jury, while applicable against the states, had different content there. As he put it, "due process does not require that the States apply the federal jury-trial right *with all its gloss*."[193] On this reasoning, a trial ending in a verdict by nine out of twelve jurors was still a trial by jury, and therefore fulfilled the Sixth Amendment's requirement, applicable against the states via the Fourteenth, that a criminal defendant be afforded a jury trial—even if in a federal court that right would require a verdict by a unanimous jury of twelve.

One need not embrace this approach in the Fourteenth Amendment context to recognize that it might be of some use in the territorial and extraterritorial contexts. The key to understanding how it could be of use lies in seeing the critical difference between Powell's due process analysis in *Johnson* and *Apodaca*, on the one hand, and Harlan's reasoning in *Reid* on the other. Powell asked whether *the right to a trial by jury* as afforded by the defendant states satisfied due process requirements. Harlan, in turn, asked whether *whatever criminal process a court martial provided*—even if it could not plausibly be described as a jury trial—satisfied due process requirements. As a result, the upshot of Harlan's analysis in *Reid* was, "It isn't a trial by a jury, but it's fair." But in Powell's analysis, an answer that began with "It isn't a trial by a jury" would have been decisive,

193. *Johnson*, 406 U.S. at 371 (Powell, J., concurring) (emphasis added).

even if followed by "but it's fair." Powell, in other words, assumed that under the Constitution, due process in the criminal context must include a trial by a jury, but he reasoned that a trial by a jury might depart somewhat from the federal standard without ceasing to be a trial by a jury. Harlan in *Reid* relied instead on a generalized notion of "due process" dependent on what seemed fair, thus allowing the government to dispense with a jury trial altogether, despite the requirement in the constitutional text.

Articulated in terms of the *whether/how* distinction, Powell's analysis answered the *whether* question affirmatively, and then handled the *how* question by allowing for variations that altered the content of the right in light of the particular circumstances, without eliminating the right altogether. While Powell did not embrace the non-incorporationist view defended by Frankfurter and Harlan, he too took due process as his point of departure. Elaborating on his approach, Powell observed that there had been a change of emphasis in the Court's incorporation cases over time. As he saw it, the Court had previously focused on the question of "whether a system of criminal justice might be imagined in which a fair trial could be afforded in the absence of" a particular right or prohibition.[194] But recently, the inquiry had turned instead to the question of the "fundamentality" of a given right or prohibition "viewed in the context of the basic Anglo-American jurisprudential system common to the States."[195] The latter approach, Powell continued, "readily accounts both for the conclusion that jury trial is fundamental and that unanimity *is not*."[196] The former approach, of course, would allow for the elimination of both the jury trial and unanimity, since one can easily imagine, not to mention find plenty of examples of, criminal justice systems without either.

Powell was not quite right with respect to the chronology of the shift in the Court's emphasis: The concept of fundamentality in the Anglo-American context figured prominently in several of the earliest cases concerning the applicability of federal rights against the states, while in the territories, analogous references to the "general spirit" of the Constitution appeared early as well.[197] But he was right in observing that

194. Id. at 372 n.9.

195. Id.

196. Id.

197. See Twining v. New Jersey, 211 U.S. 78, 102 (1908) (holding federal right against self-incrimination inapplicable against states, reasoning that "there are certain immutable principles of justice which inhere in the very idea of free government which no member of the Union may disregard," but that right against self-incrimination was not one of them (internal quotation marks omitted) (quoting Holden v. Hardy, 169 U.S. 366, 389 (1898))), overruled in part by Malloy v. Hogan, 378 U.S. 1, 6 (1964); Maxwell v. Dow, 176 U.S. 581, 586, 590–91 (1900) (holding right to trial by twelve-person jury applies against federal government but not against states because it is not "fundamental"), abrogated by *Williams*, 399 U.S. at 92 (rejecting *Maxwell*'s dictum that federal jury must consist of twelve persons); Hurtado v. California, 110 U.S. 516, 535 (1884) (holding federal right to indictment by

the two approaches could lead to different results, as the example of the jury trial itself makes clear—an observation with consequences for territorial and extraterritorial cases.

The approach that looks at fundamentality with reference to domestic constitutional traditions imposes obvious and familiar constraints. The emphasis on established elements of constitutional interpretation is clear in the Fourteenth Amendment incorporation cases, which argue at length about the language of the relevant constitutional provisions, the relationship between them, and the history of the application (or non-application) of federal rights against the federal government and the states—in addition to looking at practical considerations. The total incorporation approach imposes the most obvious constraints of all, by simply transferring understandings from the federal context (e.g., a federal court in a domestic setting) unchanged into state contexts. The proponents of this approach, as noted earlier, criticize non-incorporation as standardless: As Black complained of the non-incorporationist view, concepts like "totality of the circumstances" and "shocks the conscience" and "fundamental fairness" simply make way for judges to decide cases based on their own predilections (although Frankfurter directed the same criticisms at selective incorporation, as noted above).[198] But even Powell's more flexible approach interprets the relevant concepts with reference to domestic constitutional traditions. That approach, even without simply adopting the federal definition of a constitutional provision, closely anchors itself in the constitutional text and in doctrinal developments that provide more substantial guidance to courts than a generalized notion of fairness, elaborated with respect to an unusual or unfamiliar setting, could ever do.

In contrast, the approach that asks whether *any* system can be imagined that excludes certain rights or prohibitions does not rely on nearly so obvious a set of constraints. It is not clear what the constraints are at all.[199] This approach, to which Neuman has referred (critically) as

---

grand jury inapplicable against states, reasoning that Fourteenth Amendment "[d]ue process . . . refers to that law of the land in each state which derives its authority from the inherent and reserved powers of the state, exerted within the limits of those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions," and that these limits did not include right to grand jury indictment (a decision that still stands)).

198. See Adamson v. California, 332 U.S. 46, 89 (1947) (Black, J., dissenting) ("I fear to see the consequences of the Court's practice of substituting its own concepts of decency and fundamental justice for the language of the Bill of Rights."), overruled in part by *Malloy*, 378 U.S. at 1; id. at 65 (Frankfurter, J., concurring) ("If the basis of selection is merely . . . those provisions . . . which commend themselves to individual justices as indispensable to the dignity and happiness of a free man, we are thrown back to a merely subjective test."). Frankfurter made this point in addition to his textual argument against both selective and total incorporation.

199. As noted above, in its most moderate incarnation it uses international law as its floor, and as I argued above, that approach, while it has its merits, still leaves something to be desired. See supra notes 147–152 and accompanying text.

"global due process" (and which includes Harlan's "impracticable and anomalous" test), fell out of favor in the domestic context even as it took hold in the territorial and extraterritorial cases, and it offers a much easier target than any of the approaches to Fourteenth Amendment incorporation for the criticism of standardlessness: It allows for the replacement of considerations of text, structure, history, and precedent with an investigation of whatever strikes a court as appropriate considerations in any given case.

To be sure, what strikes a judge as reasonable is often, on its face, perfectly reasonable. Constitutional requirements aside, it arguably makes sense to ask whether it would be costly or difficult to provide jury trials for civilian dependents on military bases abroad, or whether it would erode the local culture of the Northern Marianas to prohibit racial restrictions on the alienation of land. Of course, it arguably makes sense—constitutional requirements aside—to ask whether it would be costly or difficult or whether it would erode local culture to enforce equal voting rights (say) within the United States. Indeed there are those who have made and continue to make such arguments. But few would accept that these practical factors should have a decisive role in constitutional analysis in a domestic context. The dubious approach that places these functional considerations at the center of the analysis has, instead, been reserved for marginal people in marginal places.

The challenge lies in coming up with reasonable solutions to the problems posed in the territorial and extraterritorial cases without brushing aside constraints in place in the domestic setting. In that setting, judges disagree about precisely what the Constitution demands, but the applicability of constitutional provisions has not been left to depend entirely on pragmatic considerations; those considerations have instead informed the issue of enforceability. Yet in the territorial and extraterritorial context, the "impracticable and anomalous" test has subordinated constitutional guarantees to functional considerations, even as it has paid lip service to the notion that the Constitution does not stop at the border.

C. *Exporting Incorporation?*

What, then, should the analysis of the scope and content of constitutional guarantees outside the United States look like?[200] As one takes up

200. It is interesting to note that a relatively recent series of cases dealing with Puerto Rico has essentially imported the basics of Fourteenth Amendment incorporation jurisprudence into the territorial context without expressly alluding to it. These cases have held several constitutional limitations applicable against Puerto Rico's government, either directly or through the Fourteenth Amendment, without deciding which one of these two is the relevant constitutional source. See Torres v. Puerto Rico, 442 U.S. 465, 471 (1979) ("We conclude that the constitutional requirements of the Fourth Amendment apply to the Commonwealth . . . [but] we have no occasion to determine whether the Fourth Amendment applies to Puerto Rico directly or by operation of the Fourteenth Amendment."); Examining Bd. of Eng'rs v. Flores de Otero, 426 U.S. 572, 601 (1976) (holding due process and/or equal protection guarantees applicable without deciding

this question, it is worth recalling one more time White's observation in *Downes* regarding questions of the scope and content of the Constitution, and taking note in particular of a phrase that tends to be overlooked: "In the case of the territories, *as in every other instance*, when a provision of the Constitution is invoked, the question which arises is, not whether the Constitution is operative, for that is self-evident, but whether the provision relied on is applicable."[201] My goal in bringing the Fourteenth Amendment incorporation cases to bear in the discussion of constitutional extraterritoriality has been precisely to emphasize the point made in the italicized language: that it is true *in every instance*, and not just in the territorial or extraterritorial context, that the Constitution is operative with respect to the federal government but that not every provision is applicable. When we enter the territorial and extraterritorial context, we do not enter a constitutional vacuum.

Whatever the context, then—domestic, territorial, or extraterritorial—the *whether* stage will consist of a determination of what constitutional provisions authorize the power being exercised, and what constitutional provisions limit it. (In *Reid*, for instance, the answer was: Congress's power to regulate the land and naval forces and the grand jury and jury trial provisions of Article III and Amendments V and VI.) When the *whether* question has been answered affirmatively and the relevant constitutional provisions identified, a court should determine *how* a provision that has been held applicable at the *whether* stage shall be vindicated or given effect under a particular set of circumstances (at least to the extent necessary to do so in a given case; sometimes the *how* will have to be worked out in subsequent litigation).[202] Functional considerations will usually be relevant at this stage.

In *Boumediene*, this analysis would not change the result, but it would alter the reasoning. The *Boumediene* Court did not need to resort to a functional approach at all at the *whether* stage, i.e., in order to reach the conclusion that the Suspension Clause applies in Guantánamo and the writ of habeas corpus must therefore be available to detainees there. All it needed was its analysis of the nature of sovereignty over Guantánamo, of the text of the Suspension Clause and the other relevant constitutional provisions (relating to the President's and Congress's wartime powers),

---

whether via Fifth or Fourteenth Amendment); Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 669 (1974) (holding same with respect to due process); see also Montalvo v. Colon, 377 F. Supp. 1332, 1342 (D.P.R. 1974) (holding that federal privacy rights apply in Puerto Rico either because they are fundamental or because Puerto Rico is "viewed as a 'state' for purposes of the Fourteenth Amendment" or because "perhaps" the Bill of Rights applies in Puerto Rico in full after all). Chief Justice Rehnquist's dissent in one of these cases challenges the "either-or" approach, arguing that it is more likely that neither the Fifth nor the Fourteenth Amendment applies to Puerto Rico. See *Examining Bd.*, 426 U.S. at 606–09 (Rehnquist, C.J., dissenting).

201. Downes v. Bidwell, 182 U.S. 244, 292 (1901) (White, J., concurring) (emphasis added).

202. Needless to say, if it has been held inapplicable, there will be no *how* stage.

and of the history of the extraterritorial application of the writ. Its conclusions with respect to these matters (the United States exercises de facto sovereignty over Guantánamo; the Suspension Clause itself does not contain a geographical limitation and constitutional wartime powers must be read in light of the right to habeas; the history of the extraterritorial extension of the writ is inconclusive but there is evidence that it applied extraterritorially) sufficed for purposes of answering the *whether* question, in this case affirmatively.

Indeed one might ask, if what matters is de facto sovereignty, whether the constitutional issues here belong under the rubric of "extraterritoriality" at all. Guantánamo is technically abroad (because the United States does not claim titular sovereignty over it) but it is not in fact abroad (because the United States exercises what amounts to sovereignty, and exclusive sovereignty at that, over the base), as the *Boumediene* Court correctly concludes.[203] As the Court itself puts it, "Guantanamo . . . is no transient possession."[204] Of course the Suspension Clause applies—even if its precise content depends on a range of circumstances, just as it does domestically.

But putting aside that objection, there remains the question of the troublesome appearance of the "impracticable and anomalous" test in *Boumediene*. Rather than decide the *whether* question based on the considerations identified above, the *Boumediene* Court treated these matters as preludes to the application of a functional analysis (citing, among other precedents, Harlan's test). It then turned to a functional approach in a continuation of its answer to the *whether* question. The good news is that *Boumediene*'s version of the test did not reduce matters entirely to functional or policy considerations. The bad news is that the choice of factors added unnecessary layers to the analysis, including considerations more relevant to the *how* question. The Court's approach thereby displayed the troubling malleability of the functional test, and in the process confused matters.

The *Boumediene* Court identified "at least three factors" that are "relevant in determining the reach of the Suspension Clause": first, "the citizenship and status of the detainee and the adequacy of the process through which that status determination was made"; second, "the nature of the sites where apprehension and then detention took place"; and third, "the practical obstacles inherent in resolving the prisoner's entitlement to the writ."[205] I consider these in turn.

---

203. The question of when precisely the territory of California became part of the "United States" raised similar difficulties. See Cross v. Harrison, 57 U.S. (16 How.) 164, 197 (1853) (identifying ratification of treaty of cession as moment when California became part of United States); Gary Lawson & Guy Seidman, The Constitution of Empire: Territorial Expansion and American Legal History 151–67 (2004) (closely analyzing different stages of territorial annexation at issue in *Cross*).

204. Boumediene v. Bush, 128 S. Ct. 2229, 2261 (2008).

205. Id. at 2259.

Although the status of the detainee and the adequacy of the process whereby that status was determined no doubt should be at the heart of any habeas proceeding—indeed they are what is at stake—it is unclear how they figure in the decision concerning whether the Suspension Clause extends to Guantánamo. The Court's discussion of this factor in the *Boumediene* case contrasts the treatment of the Guantánamo detainees with that of the detainees in *Eisentrager*, who did not contest their status as "enemy combatants" and who were placed in that category as a result of a "rigorous adversarial process."[206] All of this certainly seems relevant to the question of whether the Guantánamo detainees have been offered an adequate opportunity to contest their designated status (and as the *Boumediene* Court goes on to say, the hearings they have had "fall well short of the procedures and adversarial mechanisms that would eliminate the need for habeas corpus review").[207] But none of this helps us determine whether the Suspension Clause applies to Guantánamo in the first place.[208]

Turning to the nature of the sites where detention and apprehension took place, the *Boumediene* Court here restates its analysis of U.S. sovereignty over Guantánamo, explaining that the naval base there differs in critical ways from Landsberg Prison, the site of detention in *Eisentrager* (in which the Court held that enemy combatants held in a jointly administered prison in Germany after World War II did not enjoy the right to habeas). Without question, sovereignty is central to the analysis—the *Boumediene* opinion itself had already devoted a great deal of attention to it. The Fourteenth Amendment cases exemplify this as well: There, federalism concerns lie at the heart of the debate, and everything turns on one's view of the way in which the Fourteenth Amendment altered sovereign relations between the federal government and the states. But it is curious and a bit confusing to see sovereignty return to the discussion in *Boumediene* as part of a multi-factor functional test, after having been discussed at length (and persuasively) as part of a discussion that should have settled the question of whether the Suspension Clause applies. To the extent that the issue involves the precise forms that the exercise of sovereignty takes and its effect on the ways in which a constitutional guarantee may realistically be enforced—for instance, whether it is exclusive or shared; whether the federal government acts jointly with a foreign government—sovereignty may reenter the analysis, but it should do so at the *how* stage.

---

206. Id.

207. Id. at 2260.

208. As for citizenship, the petitioners' lack of U.S. citizenship in this case turned out not to matter. The same day it decided *Boumediene*, the Court handed down its opinion in Munaf v. Geren, 128 S. Ct. 2207 (2008), which dealt with the habeas rights of U.S. citizens. The *Munaf* Court held that the habeas statute extends to U.S. citizens detained in Iraq, but denied the petitioners in that case relief. Id. at 2213.

Finally we come to "practical obstacles." These too belong in the analysis—but again, not at this stage. They should not inform the question of whether the right to habeas applies in Guantánamo. Instead, they too should inform the question of how to give effect to that applicable right in these circumstances. In its otherwise persuasive discussion of these practical considerations, the *Boumediene* Court recognizes that there are costs to conducting habeas corpus proceedings abroad but concludes that that these are not insurmountable, and rejects the government's contention that its military mission would be compromised by allowing the Guantánamo detainees to bring habeas claims. All of this sheds light, in my view, on what Congress could do to give effect to the right to habeas and on why the substitute procedures enacted by Congress fall short of the requirements of habeas—not on whether the Suspension Clause applies in Guantánamo in the first place.

When practical considerations do enter at the *how* stage, they should not enter alone. As the preceding discussion suggests, the *Boumediene* Court's functional analysis itself points toward some of the other considerations that should come into play at the *how* stage, including the content of the writ of habeas corpus as it has been traditionally interpreted (which informs the *Boumediene* Court's comparison of the "rigorous adversarial process" in *Eisentrager* with the paltry procedures in Guantánamo, as it should, though it does so at the *whether* stage), and the precise form that a collaboration between federal and foreign agents takes, if relevant (here, it is not, since federal sovereignty is exclusive). In *Boumediene*, the Court went only so far at the *how* stage as to conclude that the procedures Congress supplied in the Military Commissions Act of 2006 do not suffice to fulfill habeas requirements, and left consideration of the question to further litigation.[209] In that subsequent litigation, the content of the writ as it has been interpreted over time (domestically, as it happens) should be the baseline against which practical considerations will be weighed. The goal should be the vindication of a right recognizable as the right to the writ of habeas corpus, while giving due consideration to the realities of the situation—including, most importantly, the Administration's assertion of wartime powers and the associated risks of implementing full-fledged habeas review under those circumstances.

Turning to earlier decisions, both the extraterritorial and the territorial jurisprudence offer examples of cases in which a revised approach would be appropriate, and might well alter the result. In the extraterritorial context, *Verdugo*, for instance, would have relied on a different analysis. There, the answer to the *whether* question would likely have been "yes"—specifically, the Fourth Amendment reasonableness requirement applies—because: the suspect in the case was being held for purposes of a federal criminal proceeding; federal agents initiated and participated in

209. See Military Commissions Act of 2006, 28 U.S.C.A. § 2241(e) (West Supp. 2008) (restricting habeas); *Boumediene*, 128 S. Ct. at 2275 (limiting holding to validity of § 2241).

the search of his home in Mexico; the Fourth Amendment contains no geographical or citizenship limitation; and the governmental intrusion in *Verdugo* was of the sort with which the prohibition has historically been concerned.[210] Attention to practical considerations would have been unnecessary to reach this result. The warrant requirement specifically would be inapplicable, a conclusion that could properly rest (as discussed above) on separation of powers considerations and on magistrates' lack of power to issue warrants effective abroad; no real need to delve into practicability considerations there either. The *how* stage of the analysis would then have sought to determine whether the search was reasonable, and in the process the Court would have endeavored to vindicate a right recognizable as the right against unreasonable searches, while taking into account, as part of the analysis, the difficulties of enforcing the right in a collaborative effort with foreign authorities on foreign territory.

As for the territorial context, a case like *Wabol* would feature a different analysis as well. One would actually have to turn the clock rather far back to accommodate what I would consider a constitutionally sound approach in the territorial cases, since that approach would rule out Congress's governance of territories under the Territory Clause except in cases of territories intended for statehood.[211] (Relationships with places like Guam and the Northern Mariana Islands, for which statehood does not appear to be in the cards, would take the form of "free association" arrangements and fall under the rubric of foreign relations.)[212] The analysis of the applicability of constitutional provisions to territories would require attention to the text of the Territory Clause and its location next to the Admission Clause. The Territory Clause gives Congress the "[p]ower to dispose of and make all needful Rules and Regulations respecting the Territor[ies]."[213] Broad as the definition of "needful"

---

210. Verdugo was being held in the United States, too, though in my view this is not relevant; that he was being held by federal authorities for a federal criminal proceeding is relevant.

211. I do realize that the last time a Court cared about these textual and structural features of the analysis of Congress's power over the territories, it produced Chief Justice Roger Taney's opinion in the *Dred Scott* case (hence his unequivocal stand that the Bill of Rights applied with full force in the territories). Scott v. Sandford, 60 U.S. (19 How.) 393, 449–51 (1857). On the awkward relationship between the Dred Scott case and anti-imperialist arguments, see Levinson, Installing, supra note 31, at 129–30. The government's briefs in Fourteen Diamond Rings v. United States, 183 U.S. 176 (1901) and Goetze v. United States, 182 U.S. 221 (1901), chided the plaintiffs for relying on *Dred Scott*, a case that the government asserted had been reduced to "a byword and a hissing." See Albert H. Howe, The *Insular Cases*: Comprising the Records, Briefs, and Arguments of Counsel in the *Insular Cases* of the October Term, 1900, in the Supreme Court of the United States, Including the Appendixes Thereto, H.R. Doc. No. 56-509, at 212 (1901) (quoting John Norton Pomeroy, An Introduction to the Constitutional Law of the United States § 499, at 407 (10th ed. 1888)).

212. These are the "political alliances" and "military outposts" to which *Wabol* refers when it reads Congress's power to exempt itself from constitutional requirements in the CNMI broadly.

213. U.S. Const. art. IV, § 3, cl. 2.

would be, it would still serve as a constraint on congressional action, insofar as it would be interpreted in light of the ultimate goal of statehood.[214] The relevant precedents would be those interpreting constitutional guarantees in the territories in the nineteenth century, which as noted above were ambiguous with respect to whether the Constitution applied in territories ex propio vigore or by means of statutory extension, but which at least did not part from the premise of the inapplicability of all but the "fundamental" provisions of the Constitution. Cases concerning the applicability of constitutional guarantees against the states would not be treated as irrelevant (as *Wabol* treated them), but rather as persuasive authority.[215] The result might not be the identical enforcement of applicable rights in states and territories, but the presumption would not be that these two lines of jurisprudence have nothing to say to each other.

If, however, one were not to adopt this view (that the power to govern territories must be read in light of the ultimate goal of statehood), the analysis in the territorial cases would still take a different route than the "impracticable and anomalous" test. The question of sovereignty would not be an easy one to resolve: More than twenty years after the adoption of the Covenant between the United States and the CNMI, for example, it remains unclear whether the CNMI is an unincorporated territory of the United States or a separate sovereign in association with the United States via a mutually binding Covenant.[216] If it is the former, and the CNMI is an unincorporated territory (contrary to the view of the

---

214. Cf. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 356 (1819) (explaining that words "necessary and proper" mean same thing as "needful and adapted," and elaborating that "[t]o make a law constitutional, nothing more is necessary than that it should be fairly adapted to carry into effect some specific power given to Congress"). For an allusion to its potential as a constraint in the territories, see Levinson, Installing, supra note 31, at 130.

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

216. Compare Northern Mariana Islands v. Atalig, 723 F.2d 682, 691 n.28 (9th Cir. 1984) (reasoning that CNMI is not unincorporated territory because, under Covenant, United States does not exercise sovereignty over CNMI, and because Covenant guarantees self-government to CNMI by way of "mutual consent" provisions), and Marianas Political Status Comm'n, Section-by-Section Analysis of the Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America (1975), reprinted in Hearing to Approve "The Covenant to Establish a Commonwealth of the Northern Mariana Islands," and for Other Purposes, Subcomm. on Territorial and Insular Affairs of the H. Comm. on Interior and Insular Affairs, 94th Cong. 381, 629 (1975) (same), with S. Rep. 94-596, at 2 (1976) (explaining that while the CNMI is "commonwealth," its relationship to United States is "territorial in nature with final sovereignty invested in the United States . . ."). See generally Leibowitz, supra note 111; Jon M. Van Dyke, The Evolving Legal Relationships Between the United States and Its Affiliated U.S.-Flag Islands, 14 U. Haw. L. Rev. 445 (1992). My own view is that the CNMI is a territory, and that because it has not been incorporated into the United States, it is an unincorporated territory. Those who reject this view object to it in part because of the colonial connotations of "unincorporated" status. While I agree that the status has colonial features, I think they arise out of the territorial condition, with its lack of federal representation, and not so much out of the "unincorporated" condition, which at least preserves the option of self-determination and independence. For that reason I do not consider it as problematic as others do to say that a U.S. territory is "unincorporated."

Wabol court), the CNMI exercises powers delegated to it by the United States, in which case the answer to the *whether* question is clearly "yes": Equal protection guarantees apply and racial restrictions on the alienation of land should be subject to strict scrutiny. If it is the latter, and the CNMI has a sovereign-to-sovereign compact with the United States (consistent with the view of the *Wabol* court), the Covenant would be conceived instead as a form of treaty (despite its codification in the U.S. Code as well, albeit in the form of a "Note").[217] If the racial restrictions on the alienation of land represent a form of local action by the CNMI government, then the modified version of the equal protection guarantee to which they have chosen to subject themselves, as set forth in the Covenant with its explicit exception for these racial restrictions, would govern (as opposed to the federal guarantee as "applied" via the Covenant), and the restrictions would presumably survive. If they represent a form of federal action by the United States government, then once again equal protection guarantees apply and strict scrutiny would ensue. That is because the federal government does not have the power to exempt itself from constitutional prohibitions by way of negotiations, whether with a territorial government subject to U.S. sovereignty or with a foreign government exercising its own sovereignty.[218]

To be sure, the inquiry into whether the federal government has a "compelling interest" in protecting CNMI culture would offer an opportunity to take practical considerations into account, and might well yield different results depending on which theory of sovereignty (over the CNMI or shared with it) one adopts. That is, if the CNMI is an unincorporated territory, the government's interest in the protection of CNMI culture might well be less compelling than if the CNMI is a separate sovereign with a binding relationship to the United States. It is worth noting, however, that accepting the latter view of the CNMI's relationship with the United States itself requires a substantial amount of constitutional improvisation. The CNMI Covenant, as noted above, includes a provision purporting to extend Section 1 of the Fourteenth Amendment itself, Equal Protection Clause and all, to the CNMI. Meanwhile, as we have seen, a separate Covenant provision authorizes racial restrictions on the alienation of land. (Yet another Covenant provision apportions representation in the CNMI Senate equally to three islands with very different population numbers, "notwithstanding" federal constitutional provisions applicable to the CNMI under the Covenant, which would forbid such apportionment in a state of the Union on one-person, one-vote grounds.) All of this was done by way of a negotiation between the United States and the Northern Marianas (while the NMI was a trust territory)—as if Congress and the NMI could decide, together, which constitutional provisions were applicable to their relations. These features

217. See supra note 136.

218. In the CNMI's case, its sovereignty would have been in abeyance during the negotiations.

form part of an arrangement that confers upon the CNMI yet another version of the ambiguously domestic status that unincorporated territories have: technically "domestic," though actually foreign for some purposes and domestic for others.

All of this might well be a perfectly reasonable way of creating a mutually advantageous relationship between the CNMI and the United States. But to craft such an arrangement by way of negotiation is a curious and risky way to handle constitutional provisions: curious because it rests on the assumption that the United States has the power to exempt not just the CNMI but itself from otherwise applicable constitutional limitations on its own power; risky because if such a dubious interpretation of the Constitution is permissible in the CNMI, it might well prevail elsewhere—closer to home.

In short, the racial restrictions in *Wabol* should have been subject to strict scrutiny. Indeed another court, addressing the issue of similar racial restrictions in American Samoa (which is undisputedly an unincorporated territory), followed this route. In *Craddick v. Territorial Registrar of American Samoa*, which involved a challenge to similar racial restrictions on the alienation of land, the High Court of American Samoa held that due process and equal protection guarantees were fundamental and in force in American Samoa.[219] It then applied strict scrutiny to the restrictions and upheld them, in a rare though not unknown instance of strict scrutiny not being "fatal in fact."[220] Its strict scrutiny analysis identified the protection of American Samoa's culture as a compelling governmental interest and determined that the challenged restrictions were narrowly tailored to achieve the end of cultural protection.[221] Again, one could argue over whether the protection of local culture should constitute a compelling governmental interest in a U.S. territory; in my view it is a closer question than the High Court of American Samoa allowed.[222] Nevertheless, the *Craddick* court's chosen approach was basically sound—more persuasive, and more protective of the integrity of constitutional interpretation, than the "impracticable and anomalous" inquiry.

---

219. Craddick v. Territorial Registrar of Am. Samoa, 1 Am. Samoa 2d 10, 12 (1980).

220. Id. at 14.

221. Id. at 13–14.

222. One could raise other objections about the *Craddick* court's analysis, e.g., with respect to the unsettling paternalism that suffuses the opinion, which upholds restrictions on Samoans' alienation of their own land because it is in their own "best interests." Id. at 13 (quoting Am. Samoa Const. art. I, § 3). Paternalism is a feature shared by Wabol v. Villacrusis, 958 F.2d 1450, 1461, 1462 n.21 (9th Cir. 1992). The *Wabol* court wrote:

> The land alienation restrictions are properly viewed as an attempt, albeit a paternalistic one, to prevent the inhabitants from selling their cultural anchor for short-term economic gain, thereby protecting local culture and values and preventing exploitation of the inexperienced islanders at the hands of resourceful and comparatively wealthy outside investors. . . . [F]ree alienation is impractical in this situation not because it would not work, but because it would work too well.

Id.

I suspect that the analysis in *Wabol* and other territorial cases would look rather different if the jurisprudence on the role of the Constitution in the territories did not occupy such a marginal place in U.S. constitutional law—a place far from that of its domestic counterpart, which looms large on the U.S. constitutional landscape. As Akhil Amar has pointed out, questions concerning Fourteenth Amendment incorporation

> have framed a debate that, in the words of Judge Henry Friendly, "go[es] to the very nature of our Constitution" with "profound effects for all of us." Professor Van Alstyne has written that "it is difficult to imagine a more consequential subject," an assessment confirmed by the extraordinary number of twentieth-century legal giants who have locked horns in the debate—Hugo Black, Felix Frankfurter, William Brennan, Henry Friendly, William Crosskey, Louis Henkin, Erwin Griswold, and John Ely, to name only a few. Perhaps even more extraordinary has been the willingness of Supreme Court justices to reinforce their judicial pronouncements on the issue with extrajudicial elaborations.[223]

The contrast with the debate on the status of the Constitution in the territories could not be starker. That debate has increasingly drawn the interest of a number of first-rate legal scholars, to be sure, producing much valuable scholarship.[224] Nevertheless, it is primarily a marginal de-

---

223. Amar, supra note 22, at 137–38 (internal citations omitted); see also Gary J. Jacobsohn, Book Review, 81 Am. Pol. Sci. Rev. 278, 278 (1987) (reviewing Curtis, supra note 22) (noting Fourteenth Amendment incorporation has "long been the subject of intense scholarly and judicial interest," and that at the time Curtis's book was published, "the legal community [could] still be heard buzzing over the remarks of the attorney general to the effect that the Bill of Rights does not apply to the states"). The remarks in question were those of Edwin Meese, to whom, as we have seen, Brennan responded in his second article on incorporation. See supra note 182 and accompanying text.

224. The leading constitutional scholars who have taken an interest in the subject include T. Alexander Aleinikoff, Sarah Cleveland, Sanford Levinson, and Gerald Neuman, among others. See T. Alexander Aleinikoff, Semblances of Sovereignty: The Constitution, the State, and American Citizenship 5, 7, 74–94 (2002) (discussing contested issue of sovereignty in U.S.-Puerto Rico relations); Cleveland, supra note 21, at 163–250 (describing evolution of doctrine of plenary power over territories); Levinson, Installing, supra note 31, 121–139 (arguing *Insular Cases* belong in constitutional law canon); Sanford Levinson, Why the Canon Should Be Expanded to Include *The Insular Cases* and the Saga of American Expansionism, 17 Const. Comment. 241, 241–66 (2000) (same). Owen Fiss's authorship of Volume VIII of the History of the Supreme Court led him to write about the topic as well. See Owen M. Fiss, The American Empire? *in* 8 History of the Supreme Court of the United States: Troubled Beginnings of the Modern State 1888–1910, at 225 (2006). As for judges' extrajudicial statements on the topic, these include several leading lights as well, though fewer of them take a strong stand on the matter one way or another. See Torruella, Supreme Court, supra note 21, at 117–265 (describing and critiquing the *Insular Cases* and their consequences); José A. Cabranes, Some Common Ground, *in* Burnett & Marshall, supra note 4, at 39, 39–43 (discussing term "colonialism" and arguing for its usefulness in understanding U.S.-Puerto Rico relations); Juan R. Torruella, The Insular Cases: The Establishment of a Regime of Political Apartheid, 29 U. Pa. J. Int'l L. 283, 285–87, 346–47 (2007) (criticizing *Insular Cases* as "unabashed reflection of contemporary politics"); William H. Rehnquist, The Supreme Court in the Nineteenth Century, Annual

bate about marginal places—so much so that Sanford Levinson's earliest contribution to it, in 1998, consisted of a confession that in several decades of studying and teaching constitutional law, he had never heard of the *Insular Cases* (which he then argued deserved to be considered part of the constitutional canon).[225] The *Insular Cases* were the subject of intense debate and widespread attention at the time they were decided, but once they settled the question of whether the United States could hold colonies indefinitely (taking sides, as we have seen, with the imperialists), interest in them quickly faded. Indeed when Levinson began to study them, he concluded that "[a]t the present time, few cases can be said to be *less* canonical, regardless of criterion, than *Downes* (or any of the *Insular Cases*)."[226] Levinson himself deserves much of the credit for raising the profile of the *Insular Cases* and of the study of the Constitution and American expansion more generally. But the debate over the status of the Constitution in the U.S. territories has, at least until now, remained a debate that rages primarily in those territories.

If the Covenant between the United States and the Northern Marianas had been the subject of debate among the "legal giants" of the twentieth century—if any of them thought that U.S.-CNMI relations, like Fourteenth Amendment incorporation, went "to the very nature of our Constitution" and had "profound effects for all of us"; if they found it "difficult to imagine a more consequential subject";[227] if the subject of U.S.-CNMI relations were not considered a marginal episode of latter-day decolonization, but were rather recognized as a topic at the core of constitutional jurisprudence—the negotiations leading to the Covenant would have been subject to far more exacting scrutiny by constitutional lawyers and scholars.[228] No one can say what the result would have been under those circumstances, but I suspect the selective "extension" of diluted constitutional provisions by negotiation between Congress and emergent political entities would have raised an eyebrow, if not the collective dudgeon of American jurists.

The question of the status of the Constitution extraterritorially has periodically received greater attention, though again not of the sort that Fourteenth Amendment incorporation has received. But the revival of concerns over the extraterritorial applicability of the Constitution in the context of the war on terror, and the reliance that *Boumediene* places on the *Insular Cases* in a high-profile context, have brought the issue of the

---

Lecture at the Supreme Court Historical Society 13 (June 4, 2001) (using *Insular Cases* as example of transience of constitutional doctrine).

225. Levinson put his money where his mouth was by revising his constitutional law casebook to include a section on the *Insular Cases* in the fifth edition. See Processes of Constitutional Decisionmaking 385–98 (Paul Brest et al. eds., 5th ed. 2006).

226. Levinson, Installing, supra note 31, at 122.

227. Amar, supra note 22, at 137–38.

228. See Gerald Neuman, The Abiding Significance of Law in Foreign Relations, 2004 Sup. Ct. Rev. 111, 148 n.150 (observing that "every law student should learn" what *Insular Cases* are, "but most do not").

Constitution outside a narrowly defined "United States" to the fore of current legal debates and scholarship. This development presents a valuable opportunity to reexamine the assumptions that have led courts and scholars alike to draw sharp but ultimately unwarranted distinctions between issues of constitutional scope and content at home and elsewhere. Even among those who reject strict territoriality and endorse the proposition that the Constitution is operative outside the boundaries of the United States, there are some who have turned to the "impracticable and anomalous" test—a test they would not be so quick to embrace within domestic borders. But now that the war on terror has turned the status of the Constitution beyond domestic borders into a high-stakes issue, Harlan's test, heretofore limited to shaping a creative constitutional jurisprudence in out-of-the-way places, has suddenly taken center stage in an important Supreme Court decision. A heretofore marginal and marginalized jurisprudence will be subject to more exacting examination. One hopes that this development will secure a more prominent role in this jurisprudence for the Constitution itself.

CONCLUSION

My aim in this Article has been to propose a new way of thinking about constitutional extraterritoriality in light of the Supreme Court's decision in *Boumediene v. Bush*. I have argued that the *Boumediene* decision got it right when it held that the Constitution is in force outside the United States (where "outside the United States" means both the U.S. territories and abroad) as long as the United States either exercises sovereignty (whether de jure or de facto) or participates substantially in a challenged governmental action. But I have contended that the Court took a wrong turn when it endorsed a "functional" approach to the determination of precisely which constitutional provisions apply when and where—an approach also known as the "impracticable and anomalous" test because it looks at whether it would be "impracticable" and/or "anomalous" to apply constitutional provisions under specific circumstances outside the United States. I have shown that this test places undue reliance on policy considerations; that it evaluates these considerations at the wrong stage of the analysis (that of determining *whether* a constitutional guarantee applies rather than *how* it ought to be enforced); and that it has been encouraged by the flawed assumption that a sharp break occurs at the border between the foreign and the domestic, which in turn gives courts license to invent sui generis (and questionable) approaches to the analysis of the role of the Constitution in places outside a narrowly defined "United States." I have challenged the idea that there should be two separate and unrelated ways of handling questions of constitutional scope and content, one for the domestic setting and another abroad. I have illustrated the point with a review of the Fourteenth Amendment incorporation cases, which concern essentially the same questions that the jurisprudence on constitutional extraterritoriality confronts. Drawing on

the domestic jurisprudence, I have proposed a revised approach to questions of constitutional extraterritoriality: one that would evaluate questions of constitutional scope and content abroad with an eye on how the same questions have been dealt with at home—and that would pay appropriate, but not exaggerated, attention to practical considerations, including those related to the territorial or extraterritorial setting. This approach, I conclude, commends itself for the simple reason that it is more faithful to established constitutional standards and more likely to impose reasonable constraints than the purely functional approach.

Once we recognize that questions of the Constitution's scope and content arise at home as well as elsewhere, the notion that the Constitution does not "apply" outside the United States will become more difficult to sustain. Abroad, the conclusion that a particular constitutional provision does not apply in a particular situation will not be so easy to translate into the proposition that the Constitution stops at the border. The "impracticable and anomalous" test as conducted by Harlan in *Reid*, by courts dealing with territorial cases, and by Kennedy in *Verdugo* (and given an approving nod in *Boumediene*) would not survive this transition intact. Consequentialist considerations would instead occupy the subsidiary place that belongs to them: affecting not *whether* constitutional provisions apply, but playing a role, along with other factors, in the analysis of *how* their guarantees can most effectively be vindicated.

As noted above, the reaction to *Boumediene* has focused largely on its unresolved implications outside Guantánamo—places where the United States cannot be described as the exclusive sovereign either de facto or de jure—places like Bagram Air Base in Afghanistan, which is foreign in a way that Guantánamo is not, and near a zone of ongoing hostilities.[229] The United States has been holding large numbers of detainees for years at Bagram and elsewhere.[230] It is not clear how *Boumediene* will affect habeas petitions originating in these places: Some parts of its reasoning (e.g., the rejection of strict territoriality) apply to these places; other parts (e.g., the proposition that "Guantánamo is no transient possession") do not.

What should be kept in mind as these issues are resolved, though, is that the "extraterritorial" status of such places should bear far less weight in the analysis than another matter—that of how to understand the "war" in "war on terror." The *Boumediene* Court alluded to this lingering chal-

229. See, e.g., Lyle Denniston, Does *Boumediene* Reach to Bagram?, SCOTUSblog, Jan. 4, 2009, at http://www.scotusblog.com/wp/does-boumediene-reach-to-bagram/ (on file with the *Columbia Law Review*) (discussing pending cases considering this question). A federal district court issued a decision involving Bagram as this article went to press. See Al Maqaleh v. Gates, Nos. 06-1669, 06-1697, 08-1304, 08-2143, 2009 WL 863657 (D.D.C. Apr. 2, 2009); see also supra note 170.

230. See Bending the Rules: The High Cost of Guantanamo Bay, Winning or Losing?, Economist, July 19–25, 2008, at 9 (noting that "650-odd" prisoners are being held at Bagram in Afghanistan and "roughly 21,000" are being detained by American forces in Iraq).

lenge, observing that because of the limited duration of past conflicts, until now "it has been possible to leave the outer boundaries of war powers undefined," but that if "terrorism continues to pose dangerous threats to us for years to come," it may no longer be possible to postpone drawing these boundaries.[231] To judge from history and from the state of the current debate on the rights of detainees, it will be tempting in that line-drawing process to rely on extraterritoriality as a reason for enhancing the already large powers that the state wields in times of emergency, in a classic example of bad facts making bad law. But the issues of extraterritoriality and of war should be recognized as distinct. Much stronger arguments exist for suspending certain constitutional protections under certain circumstances during wartime than for suspending them simply because the challenged government action occurred abroad.[232]

A case like *Atamirzayeva v. United States* helps to drive home this point.[233] The facts in *Atamirzayeva*, decided by the Federal Circuit just over a month before *Boumediene* came down, were simple and, compared to the heady issues of war and terror, mundane. The plaintiff, Zoya Atamirzayeva, owned a "cafeteria" near the U.S. Embassy in Tashkent, the capital of Uzbekistan. According to her allegations:

> [I]n December 1999 officials at the U.S. Embassy made a verbal demand to local authorities in Tashkent that they destroy Ms. Atamirzayeva's cafeteria in order to increase the security of the U.S. Embassy. The following day, local authorities forcibly expelled Ms. Atamirzayeva from her cafeteria, then destroyed it while officials from the U.S. Embassy oversaw the demolition. Ms. Atamirzayeva sought compensation from local authorities and from the U.S. Embassy, but those efforts were unsuccessful.[234]

Atamirzayeva's lawsuit, alleging an unconstitutional taking of her property and seeking compensation, failed as well. The Federal Circuit rejected her claims in part by applying the "substantial connection" test set forth by the Court in *Verdugo*—a vestige of the strict territoriality regime that had long lost the support of a majority of the Court by the time of *Reid*, and which has been even more resoundingly repudiated in *Boumediene*—and in part by applying the "impracticable and anomalous" test.[235] Although the *Atamirzayeva* court cited the concurrences in *Reid*

---

231. Boumediene v. Bush, 128 S. Ct. 2229, 2277 (2008).

232. Indeed the arguments for suspending certain constitutional protections under certain circumstances during wartime include the text of the Suspension Clause itself. See U.S. Const. art. I, § 9, cl. 2 ("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.").

233. 524 F.3d 1320 (Fed. Cir. 2008).

234. Id. at 1321.

235. Id. at 1328. The "substantial connection" test set forth by the majority in *Verdugo* deviated from the trend against strict territoriality; in light of *Boumediene*, it will now hopefully go down as the last gasp for that approach. Id. at 1324–25, 1328. In applying the functional test, the *Atamirzayeva* court relied in part on Harlan's suggestion in *Reid* that grand jury and jury trial rights would not apply to trials for noncapital offenses for civilian

and *Verdugo* in support of its reliance on the functional approach, it then mentioned only one factor: the fact that the claim had been brought by a noncitizen abroad.[236] Once again, then, the "impracticable and anomalous" test allowed the court to select whatever consideration struck it as relevant in the case before it.

I draw attention to this decision because it may be easier to evaluate the relevance of extraterritoriality and the merits of the functional test with calm detachment when the government declares war not on drugs or on terror, but on a more or less hapless Uzbeki cafeteria owner. The *Atamirzayeva* court upheld government action that on its face looks rather like a blatant violation of the Takings Clause, and one caused substantially by agents of the federal government. The bulk of its analysis was devoted to an explication of a line of cases either adopting or (as interpreted by the Federal Circuit) supportive of the proposition that the Constitution does not apply to noncitizens abroad—a version of strict territoriality—but the court threw in the "impracticable and anomalous" test for good measure, as an alternative rationale, using it as another opportunity to introduce into the analysis a citizenship-based limitation (by identifying citizenship as a criterion relevant to impracticability and anomalousness).[237] If this case produced the correct result, surely it did not do so on the correct grounds. Free of the fog of war, we can see clearly the arbitrariness of the distinction between territory to which "the Constitution" applies "in full" (i.e., domestic territory) and territory to which it does not apply (i.e., foreign territory); the tenuousness of the suggestion that the distinction between citizens and noncitizens matters when it comes to constitutional rights and prohibitions; and the manipulability of the "impracticable and anomalous" test. In Bagram, these things might not be so easy to see.

And at "home"? We have already seen how the "impracticable and anomalous" test made its way from the unincorporated territories, to a U.S. base abroad, to the foreign country of Mexico, to the U.S. naval base

---

dependents abroad—thus overlooking Kinsella v. United States ex rel. Singleton, 361 U.S. 234 (1960), which held the opposite. *Atamirzayeva*, 524 F.3d at 1324, 1328. The *Atamirzayeva* court distinguished Turney v. United States, 115 F. Supp. 457, 463 (Ct. Cl. 1953) (applying the Takings Clause to a claim brought by a Philippine corporation for property taken in the Philippines after independence), on the ground that the plaintiffs in that case had "substantial connections" to the United States. See *Atamirzayeva*, 524 F.3d at 1327–28. Although the *Atamirzayeva* court also noted that "the Philippine government 'readily complied' with the United States' request to place an embargo on" the property at issue in the *Turney* case, Atamirzayeva's lack of substantial connections to the United States trumped the Uzbeki authorities' ready compliance with the U.S. Embassy's request with respect to her property. Id.; cf. Russian Volunteer Fleet v. United States, 282 U.S. 481, 489 (1931) (applying Takings Clause to taking of resident alien's property in United States); Chi., Burlington & Quincy R.R. Co. v. Chicago, 166 U.S. 226, 233–34 (1897) (applying Takings Clause against states); Wiggins v. United States, 3 Ct. Cl. 412, 422–23 (1867) (applying Takings Clause to taking of U.S. citizen's property abroad).

236. *Atamirzayeva*, 524 F.3d at 1328.

237. Id. at 1322–26, 1328.

in Guantánamo, to the perimeter of the U.S. Embassy in Uzbekistan. And we have seen as well that questions concerning whether and how the provisions of the Bill of Rights apply against the states of the Union themselves have been the subject of intense debate for a long time—and far from the subject of an undisturbed consensus that the Constitution applies "in full" within the United States (as the literature on constitutional extraterritoriality would have it). What if *Boumediene* popularizes the "impracticable and anomalous" test?[238]

It has already started to happen: People who like the result in *Boumediene* seem to like the functional approach. They tend to be the same people who dislike the idea of strict territoriality. Do they dislike strict territoriality enough that they would be willing to see the functional test applied to constitutional rights in the states? One suspects not. The best defense against that eventuality lies not in drawing a line between the foreign and the domestic and hoping it stays in place. Rather, it lies in dispensing with this false dichotomy altogether, and with the notion that there is any such thing as an extraconstitutional zone.

238. Consider the still-live question of the Second Amendment. The decision in District of Columbia v. Heller, 128 S. Ct. 2783 (2009), has sparked scholarly debate over whether the Fourteenth Amendment incorporates the Second Amendment. Can we imagine courts deciding this issue based on whether it is "impracticable and anomalous" to apply the Second Amendment against the states?