THE EXTRATERRITORIAL APPLICATION OF THE FIFTH AMENDMENT PROTECTION AGAINST COERCED SELF-INCRIMINATION*

I. INTRODUCTION

A commentator once observed that the United States produces three major exports: "rock music, blue jeans and United States law."[1] Increasingly, nonresident aliens are being subjected to our criminal laws,[2] and although these laws extend around the world, the degree to which the Bill of Rights apply extraterritorially has yet to be determined.[3]

As the United States government expands its law enforcement activities to combat drug trafficking, terrorism, and other international crimes, the extent to which the Bill of Rights applies extraterritorially becomes a crucial issue to aliens accused of violating United States criminal laws. In *United States v. Yunis*,[4] the issue of whether the Fifth Amendment self-incrimination clause has extraterritorial effect was resolved in favor of a nonresident alien defendant. However, two years ago, the Supreme Court implied in *United States v. Verdugo-Urquidez*[5] that constitutional protections for criminal defendants do not extend past national boundaries.

In *Yunis*, Fawaz Yunis, a Lebanese citizen, was accused of hijacking a Jordanian airplane in 1985. He was later brought to trial in the United States.[6] While the government never contested the application of the Fifth Amendment privilege against compelled self-incrimination to Yunis, a special concurring opinion by Judge Mikva discusses this issue and provides insight into why the full protection of the Fifth Amendment self-incrimination clause should apply to Yunis and other defendants like him.[7]

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* I wish to express my deepest appreciation for the guidance of the Honorable Robinson O. Everett, Chief Judge of the United States Court of Military Appeals (Ret.).

1. V. Rock Grundman, *The New Imperialism: The Extraterritorial Application of United States Law*, 14 INT'L LAW. 257, 257 (1980).

2. *See* United States v. Verdugo-Urquidez, 494 U.S. 259, 279-81 (1990) (Brennan, J., dissenting).

3. *See* 2 RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 721 cmt. b (1987) [hereinafter RESTATEMENT (THIRD) OF FOREIGN RELATIONS].

4. United States v. Yunis, 859 F.2d 953 (D.C. Cir. 1988).

5. *Verdugo-Urquidez*, 494 U.S. at 264-75. The Supreme Court in *Verdugo-Urquidez* considered the question of "whether the Fourth Amendment applies to the search and seizure by United States agents of property that is owned by a nonresident alien and located in a foreign country." *Id.* at 261. The Court held that it does not. *Id.* The Court confined its holding to the Fourth Amendment, but its rationale may be extended to other provisions of the Bill of Rights, including the Fifth Amendment. *See id.* at 265.

6. *Yunis*, 859 F.2d at 954-57.

7. *Id.* at 970-71. The Fifth Amendment states that "[n]o person shall be compelled in a criminal case to be a witness against himself . . . ." U.S. CONST. amend. V.

In addition to Judge Mikva's concerns,[8] other concerns exist. Without the shield of the Fifth Amendment, nonresident alien defendants could be subject to the entire range of abuses against which the Fifth Amendment was designed to guard.[9] By providing an opportunity for these abuses to occur, the courts, in effect, would be approving a shortcut to guilt which has long been disfavored by the law.[10] Furthermore, endorsement of a policy which would not extend constitutional protections to nonresident aliens discriminates against defendants on the basis of their nationality.[11]

This Note argues that the Fifth Amendment protection against compelled self-incrimination should apply to nonresident aliens when they are arrested by United States law enforcement officials and brought to the United States for trial. Part II briefly lays out the factual background of the Fawaz Yunis case and the reasoning of Judge Mikva's special concurrence. Part III provides a brief introduction to minimalism and maximalism, two competing theories in this area of constitutional jurisprudence. Part IV offers both substantive and policy-related reasons to support the extraterritorial application of the Fifth Amendment protection against compelled self-incrimination. Finally, Part V offers some concluding remarks on the likely path the United States Supreme Court will take on this issue.

II. THE CASE OF FAWAZ YUNIS

In 1985, a party of armed men stormed Royal Jordanian Airlines Flight 402 shortly before it left Beirut.[12] The hijackers intended to fly to Tunis, but Tunisian officials denied their request to land and the hijackers were forced to return to Beirut where they released the passengers and crew members unharmed. The hijackers then blew up the plane and escaped into the city.[13]

The Federal Bureau of Investigation (FBI) identified Yunis as the probable leader of the hijackers. In their efforts to obtain jurisdiction

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8. *See* discussion *infra* notes 23-30 and accompanying text.

9. The Fifth Amendment was designed to safeguard defendants against transgressions by the United States Government, such as coerced confessions and forced self-incrimination on the witness stand. LEONARD W. LEVY, ORIGINAL INTENT AND THE FRAMERS' CONSTITUTION 259, 260-65 (1988) [hereinafter LEVY, ORIGINAL INTENT]. *See generally*, LEONARD W. LEVY, ORIGINS OF THE FIFTH AMENDMENT (1986) [hereinafter LEVY, ORIGINS] (an exhaustive historical account of the Fifth Amendment).

10. *See infra* note 129.

11. *See infra* notes 162-65 and accompanying text.

12. *Yunis*, 859 F.2d at 955. The plane carried seventy passengers and crew. Robin Wright, *Younis Is Found Guilty of Air Piracy, Hostage-Taking*, L.A. TIMES, Mar. 15, 1989, at 1. "American citizens were among the passengers on board . . . , and thus the hijacking violated American law." *Yunis*, 859 F.2d at 954.

13. *Yunis*, 859 F.2d at 955.

over Yunis, FBI agents lured him to a yacht anchored in the Mediterranean Sea with promises of a lucrative drug deal. When Yunis boarded the ship, FBI agents arrested him. The yacht then rendezvoused with the U.S.S. Butte, a munitions ship assigned to the Sixth Fleet.[14]

Before Yunis was questioned, he was informed that he would have the assistance of counsel once he was in the United States, and that he would be accorded all the trial rights of a United States citizen.[15] Next, Yunis was given a card with *Miranda* warnings written on it in Arabic, and these rights were read to him through an interpreter.[16] After being interrogated nine times within twelve hours, with periodic interruptions due to recurring seasickness, Yunis confessed to leading the hijacking[17] and later signed a written statement confirming his role in the attack.[18]

A D.C. District Court granted Yunis' motion to suppress the confessions,[19] holding that he did not waive either his Fifth Amendment right against self-incrimination[20] or his Sixth Amendment right to counsel.[21] On appeal by the United States Department of Justice, the D.C. Court of Appeals reversed.[22] Judge Mikva, writing for a unanimous panel, gave special attention to the fact that Yunis and the government stipulated to the application of the Fifth Amendment, and that during the interrogation, FBI agents behaved as though the Fifth Amendment applied to Yunis.[23] However, Judge Mikva expressed doubt as to whether a stipulation by the parties could resolve the Fifth Amendment issue.[24] His skepticism prompted a separate concurrence in which he determined that the Fifth Amendment provisions concerning interrogations applied to nonresident aliens arrested overseas.[25] He relied on *Bram v. United States*,[26] where the Court excluded a confession coerced by foreign agents.[27] Judge Mikva also developed an analogy between Yunis' case and the use of testimony under grants of immunity,[28] noting that the Fifth Amendment protection against

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14. *Id.*
15. *Id.*
16. *Id.* at 956.
17. *Id.* at 956-57.
18. *Id.* at 957.
19. United States v. Yunis, 681 F. Supp. 909, 911, 929 (D. D.C. 1988).
20. *Id.* at 922.
21. *Id.* at 929.
22. *Yunis*, 859 F.2d at 954-55.
23. *Id.* at 954, 957.
24. *Id.* at 957 n.*.
25. *Id.* at 970-71.
26. Bram v. United States, 168 U.S. 532 (1897). In *Bram*, a first officer was accused of murdering his ship's captain. *Id.* at 537. The Supreme Court acknowledged Bram's Fifth Amendment right without issue. *Id.* at 542.
27. *Yunis*, 859 F.2d at 971.
28. *Id.*

compelled self-incrimination focuses on the use of compelled testimony at trial.[29] Judge Mikva, in *Yunis*, wrote:

> If it is true that an alien who is interrogated outside the territorial United States cannot at that point claim fifth amendment rights then he is in much the same position as a grand jury witness who has been granted immunity and therefore has no fifth amendment ground for refusing to testify.[30]

More importantly, Judge Mikva's concurrence marks the first time that the extraterritorial effect of the Fifth Amendment protection against self-incrimination has received direct treatment by the judiciary.

III. THE COMPETING THEORIES OF EXTRATERRITORIAL APPLICATION OF THE BILL OF RIGHTS: MINIMALISM VERSUS MAXIMALISM

Two theories currently vie for dominance in the area of extraterritorial application of the Constitution. The minimalist approach acknowledges little extraterritorial application of the Bill of Rights. In opposition, maximalism acknowledges few, if any, territorial limits.

A. The Era of Minimalism

In re Ross[31] introduced the concept of minimalism. In that case, a United States consular court in Japan convicted John Ross, a United States citizen, of murder. Ross challenged the conviction, arguing that he had been denied his rights to a grand jury indictment and a trial by jury.[32] In sweeping language, the court held that Ross was not entitled to those protections because of his presence abroad.[33] Additionally, the

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29. *Id.* The Supreme Court stated in *New Jersey v. Portash* that testimony under a grant of immunity is essentially coerced testimony. New Jersey v. Portash, 440 U.S. 450, 459 (1979).

30. *Yunis*, 859 F.2d at 971.

31. *In re* Ross, 140 U.S. 453 (1891) (also known as *Ross v. McIntyre*).

32. *Id.* at 461. A necessary part of Ross' argument was that the Constitution had extraterritorial effect. *See id.* at 460.

33. *Id.* at 464.

> By the Constitution a government is ordained and established "for the United States of America," and not for countries outside of their limits. The guarantees it affords against accusation of capital or infamous crimes, except by indictment or presentment by a grand jury, and for an impartial trial by a jury when thus accused, apply only to citizens and others within the United States, or who are brought there for trial for alleged offences committed elsewhere, and not to residents or temporary sojourners abroad. The Constitution can have no operation in another country.

Id. (citation omitted).

court took notice of the practical problems that the government would face if it were required to adhere to the rights of grand jury indictment and trial by jury in a foreign country.[34]

Forty-five years later, in *United States v. Curtiss-Wright Export Corp.*, the Supreme Court reaffirmed the basic principles of *Ross*, but limited its broad dicta.[35] The government indicted Curtiss-Wright for smuggling guns into the United States, contrary to a joint Congressional and Presidential Proclamation. The Court held that "[n]either the Constitution nor the laws passed in pursuance of it have any force in foreign territory unless in respect of our own citizens."[36] Thus, although the Court found only limited extraterritorial application of the Constitution, it did extend the Constitution to reach United States citizens abroad.

Johnson v. Eisentrager[37] also supports the minimalist approach. In *Johnson*, a United States Military Commission[38] convicted twenty-one German nationals, who had never been in United States territory,[39] under the laws of war shortly after the end of the Second World War.[40] On appeal, the defendants argued that their trials, convictions, and imprisonment violated Articles I and III and the Fifth Amendment of the United States Constitution.[41] However, the Supreme Court rejected their arguments noting that resident aliens lose their limited constitutional rights while their nation is at war with the United States.[42] The Court found this reasoning even more cogent when the enemy defendant is a nonresident alien.[43] Furthermore, the Court reasoned that granting the German defendants the protection of the Fifth Amendment and the writ of habeas corpus would unduly "hamper the war effort and bring aid and comfort to the enemy."[44]

On a broader scale, the *Johnson* Court focused on an "ascending scale of rights as [an alien] increases his identity with our society."[45] This analysis appears to reflect the Court's use of social compact theory as the matrix for interpreting the extraterritorial application of the Constitution.

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34. *Id.* at 464-65 ("The requirement of such a body to accuse and to try an offender would, in a majority of cases, cause an abandonment of all prosecution . . . [and] such a requirement would defeat the main purpose of investing the consul with judicial authority.").

35. United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 318 (1936).

36. *Id.*

37. Johnson v. Eisentrager, 339 U.S. 763 (1950).

38. It is important to note that neither the Fifth nor the Sixth Amendments applies in trials before a Military Commission. *See Ex parte* Quirin, 317 U.S. 1, 38-39 (1942).

39. *Johnson*, 339 U.S. at 778.

40. *Id.* at 766.

41. *Id.*

42. *Id.* at 771-72.

43. *Id.* at 776.

44. *Id.* at 779.

45. *Id.* at 770.

Under the social compact theory, citizens establish a government after contracting with one another to form a body politic.[46] Minimalism construes social compact theory to mean that only parties to the compact (i.e., citizens) deserve the Constitution's protections.[47]

B. The Rise of Maximalism

The theory of maximalism is rooted in the Supreme Court decision of *Reid v. Covert*.[48] Several courts have relied on *Reid's* broad interpretation of the extraterritorial application of the Constitution.[49] *Reid* involved the overseas court-martial of two wives accused of murdering their husbands who were military servicemen. The Supreme Court held that military trials were unconstitutional because the defendants received neither the right to grand jury indictment nor trial by petit jury.[50]

In a plurality opinion, the Supreme Court reversed the defendants' convictions. First, Justice Black reaffirmed that the United States government is entirely "a creature of the Constitution. . . . It can only act in accordance with all the limitations imposed by the Constitution."[51] Therefore, if United States government agents act against a United States citizen abroad, they must adhere to constitutional strictures.[52] Furthermore, Justice Black found an intent for the Bill of Rights to travel with the government "when it acts outside of this country, as well as here at home,"[53] in accordance with the language of Article III, Section 2 of the Constitution. He decried picking and choosing between provisions that do and do not apply extraterritorially to government action.[54] Finally, Justice Black strictly qualified *In re*

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46. *See* Donald L. Doernberg, *"We the People": John Locke, Collective Constitutional Rights, and Standing to Challenge Government Action*, 73 CALIF. L. REV. 52, 59-61 (1985). For a discussion of social compact theory, see *infra* part IV.

47. *See, e.g.*, Paul B. Stephan III, *Constitutional Limits on International Rendition of Criminal Suspects*, 20 VA. J. INT'L L. 777, 783-84 (1980) (arguing against extending Constitutional protection to third parties to the social compact).

48. Reid v. Covert, 354 U.S. 1 (1956).

49. Torres v. Puerto Rico, 442 U.S. 465, 476 (1979) (Brennan, J., concurring) (citing *Reid* to support the extraterritorial effect of the Fourth Amendment in Puerto Rico); Examining Board v. Flores de Otero, 426 U.S. 572, 600 (1976) (citing *Reid* to support the extraterritorial effect of the Fourth Amendment); Kinsella v. Singleton, 361 U.S. 234, 261 (1960) (Whittaker, J., concurring and dissenting in part) (*Reid* "makes clear that the United States Constitution extends beyond our territorial boundaries . . . and applies within all foreign areas where jurisdiction is or may be exercised by the United States over its citizens.").

50. *Reid*, 354 U.S. at 1.

51. *Id.*

52. *Id.* at 6 ("[T]he shield which the Bill of Rights and other parts of the Constitution provide to protect his life and liberty should not be stripped away just because he happens to be in another land.").

53. *Id.* at 7.

54. *Id.* at 9.

Ross: "The *Ross* case is one of those cases that cannot be understood except in its peculiar setting; even then, it seems highly unlikely that a similar result would be reached today."[55]

C. *United States v. Verdugo-Urquidez*: A Return to Minimalism

United States v. Verdugo-Urquidez represents an apparent return to minimalism by the judiciary.[56] Mexican officials arrested the respondent, a Mexican citizen residing in Mexico, for drug trafficking. He was brought to the United States border where United States Marshals placed him in custody. Following the arrest, agents from the United States Drug Enforcement Agency (DEA) and the Mexican Federal Judicial Police searched Verdugo-Urquidez's home in Mexico. They found evidence linking Verdugo-Urquidez to narcotics trafficking and to the kidnapping and murder of DEA Special Agent Enrique (Kiki) Camarena Salazar.[57]

Verdugo-Urquidez challenged the validity of the search and seizure under the Fourth Amendment.[58] The Supreme Court, in a 5-4 decision, held that the search of Verdugo-Urquidez's home did not implicate the Fourth Amendment.[59] Chief Justice Rehnquist delivered the plurality rationale in which he distinguished the Fifth Amendment as having a different operation and language than that of the Fourth.[60] Drawing upon the social compact theory, Chief Justice Rehnquist cited the use of the words "the people" in the Fourth Amendment to imply that some protections in the Bill of Rights apply only to United States citizens.[61] Chief Justice Rehnquist read *Reid v. Covert* narrowly as applying abroad only to United States citizens.[62] Finally, Chief Justice Rehnquist read existing cases on the rights of aliens in the United States to apply only if an alien comes to the United States with the intent to reside here, not in situations where they have been detained awaiting trial.[63]

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55. *Id.* at 10. After citing other cases that directly repudiated *Ross*, Black admonished that "[a]t best, the *Ross* case should be left as a relic from a different era." *Id.* at 12.

56. United States v. Verdugo-Urquidez, 494 U.S. 259 (1990). For criticism of the opinion, *see* Abraham Abramovsky, *Extraterritorial Abductions: America's "Catch and Snatch" Policy Run Amok*, 31 VA. J. INT'L L. 151 (1991); Jon Andre Dobson, Note, *A Move Away from the Belief in the Universal Pre-existing Rights of All People*, 36 S.D. L. REV. 120 (1991); Gail T. Kikawa, Note, *How the Majority Stumbled*, 13 HOUS. J. INT'L L. 369 (1991).

57. *Verdugo-Urquidez*, 494 U.S. at 262-63.

58. *Id.* at 263.

59. *Id.* at 274-75.

60. *Id.* at 264-65.

61. *Id.* at 265.

62. *Id.* at 269-70.

63. *Id.* at 271-72.

IV. THE FIFTH AMENDMENT PROTECTION AGAINST SELF-INCRIMINATION SHOULD APPLY ABROAD

There are many reasons to support the extraterritorial application of the Fifth Amendment protection against compelled self-incrimination. As set forth below, the protection against coerced confessions is a natural right and should not be fettered by social compact analysis. Furthermore, the cases supporting the minimalist approach should be read narrowly. Additionally, the Constitution places *a priori* limits on the actions by United States law enforcement agents which should apply equally abroad. The rationales behind the protection against coerced self-incrimination would be undercut if this protection did not apply to nonresident alien defendants. Finally, applying the protection of the Fifth Amendment is in accordance with norms of international law that are recognized throughout the world.

A. Natural Rights Justifications

The proper point of departure for this discussion is to recognize that the right against coerced self-incrimination is one of the many natural rights[64] enumerated in the Bill of Rights. As early as 1776, the Virginia Bill of Rights recognized the privilege against compelled self-incrimination as an inalienable, natural right,[65] stating that "in all capital or criminal prosecutions" no person could be "compelled to give evidence against himself."[66] Furthermore, the Declaration of Independence speaks of "self evident" truths and "unalienable rights."[67] Thus, it follows that the Framers of the Constitution intended to protect

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64. The term Natural Law

> is defined as that self-evident law which, being grounded in an abstract-universal innermost "nature" of things, including man and society, remains essentially . . . independent of convention or tradition; of legislation or judicial action; and of historically developed social institutions or ideologies. . . . Natural Law not only constitutes the *a priori* antecedent of every law or system of laws . . . but also embodies the absolute source of every Positive Law and empirical legal order, as well as the final criterion for testing the "righteousness" or validity of the Positive Law "emanating," as it were, from this ideal law.

Anton-Hermann Chroust, *On the Nature of Natural Law*, *in* INTERPRETATIONS OF MODERN LEGAL PHILOSOPHIES 70, 70 (Paul Sayre ed., reprinted 1981).

65. "[A]ll men are by nature equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity . . . ." VA. CONST. of 1776, BILL OF RIGHTS § 1, *reprinted in* SOURCES OF OUR LIBERTIES 311, 311 (Richard L. Perry ed., 1959) [hereinafter VA. BILL OF RIGHTS].

66. *Id.* § 8, at 312.

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

the rights of all individuals; or such a construction is at least possible and perhaps even necessary.[68]

It may be argued that the Bill of Rights was not conceived as positive law, where society is the source of the people's rights, but as a proclamation of the rights inherent in everyone.[69] "The choice in the Bill of Rights of the word 'person' rather than 'citizen' was not fortuitous; nor was the absence of a geographical limitation. Both reflect a commitment to respect the individual rights of all human beings."[70] The privilege against coerced self-incrimination "reflects the Constitution's concern for the essential values represented by 'our respect for the inviolability of the human personality . . . .'"[71] To restrict the availability of the Bill of Rights to United States citizens, to be miserly with respect to such inalienable rights, would dilute the lofty ambitions of the Framers of the Constitution.

1. *The Text of the Fifth Amendment.* A short textual exegesis reveals the broad scope of Fifth Amendment protections, and thus, that they fully encompass nonresident aliens. The relevant text of the Fifth Amendment says, "[n]o person . . . shall be compelled in any criminal case to be a witness against himself"[72] and the Supreme Court has said that the text "must not be interpreted in a hostile or niggardly spirit."[73] Thus, the text in unequivocal and plain language states that the protection is available "in any criminal case."[74] It does not restrict itself to trials involving citizens nor does it detail any geographical limits, as it could easily have done. Through the use of the language "no person shall," the text states that all persons in a criminal case may invoke the Amendment's protection. The Framers did not limit the right against coerced self-incrimination to citizens or any other distinct group. Therefore, to give the text its plain meaning, we must read "any" as "any" and "no person" as "no person."

2. *The History of the Fifth Amendment.* The history behind the Fifth Amendment supports its characterization as a natural right. When the

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68. "It may be said, in some instances, [the Bill of Rights does] no more than state the perfect equality of mankind. This, to be sure, is an absolute truth, yet it is not absolutely necessary to be inserted at the head of the Constitution." 1 ANNALS OF CONG. 436 (Joseph Gales ed., 1789) (remarks of Madison in the House of Representatives on June 8, 1789).

69. John A. Ragosta, *Aliens Abroad: Principles for the Application of Constitutional Limitations to Federal Action*, 17 N.Y.U. J. INT'L L. & POL. 287, 297 (1985).

70. Louis Henkin, *The Constitution As Compact and As Conscience: Individual Rights Abroad and at Our Gates*, 27 WM. & MARY L. REV. 11, 32 (1985).

71. Tehan v. Shott, 382 U.S. 406, 416 (1966) (quoting Murphy v. Waterfront Comm'n, 378 U.S. 52, 55 (1964)).

72. U.S. CONST. amend. V.

73. Ullmann v. United States, 350 U.S. 422, 426 (1956).

74. U.S. CONST. amend. V.

Framers of the Bill of Rights penned the Fifth Amendment protection against compelled self-incrimination, they were conscious of the history of government oppression of the individual, a history largely forgotten today.[75] Justice Story noted that Roman jurists disapproved of the practice of using torture to coerce confessions,[76] and scholars interpret the Magna Carta to proscribe the extortion of confessions.[77] Additionally, the abolition in 1641 of the Star Chamber in the United Kingdom, which served as the judicial arm of the Privy Council[78] and routinely drew confessions out of the accused by means of torture, set the stage for the adoption of the privilege.[79] By 1776, the privilege against self-incrimination was firmly rooted in our legal system.[80]

B. Social Compact Theory Rejected

In *Verdugo-Urquidez,* Chief Justice Rehnquist used principles grounded in social compact theory to deny constitutional protections to nonresident aliens. However, Justice Story first cast doubt on social compact theory early in the nineteenth century.[81] According to this theory, the populace contract among themselves to create a body politic before they establish a government.[82] Thus, the government is not a party to the original contract.[83] Furthermore, the American citizenry devised a government with limited powers and authority by way of the United States Constitution; a government thereby created cannot exceed

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75. *See* LEVY, ORIGINAL INTENT, *supra* note 9, at 258-59.

76. JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 931 (Melville M. Bigelow, ed., 5th ed. Little Brown & Co. 1891).

77. LEVY, ORIGINAL INTENT, *supra* note 9, at 262-63.

78. LEVY, ORIGINS, *supra* note 9, at 49.

79. *See id.* at 41-42. It has been reported that some tortures involved "whipping, pillorying, branding, nose-slitting and ear-severing." *Id.* at 100. *See also* SOURCES OF OUR LIBERTIES, *supra* note 65, at 137.

80. Perhaps Justice Fortas best described the effect of history on the development of the Fifth Amendment self-incrimination clause in his concurrence and partial dissent in United States v. Wade, 388 U.S. 218 (1967):

> The privilege historically goes to the roots of democratic and religious principle. It prevents the debasement of the citizen which would result from compelling him to "accuse" himself before the power of the state. The roots of the privilege are deeper than the rack and the screw used to extort confessions. They go to the nature of a free man and his relationship to the state.

Id. at 261.

81. Story noted that "there is very strong negative testimony against the notion of [the Constitution] being a compact . . . ." STORY, *supra* note 76, § 158, at 121. He also noted that "the difficulty in asserting [the Constitution] to be a compact . . . is, that the Constitution itself contains no such expression, and no such designation of parties." *Id.* § 365, at 265.

82. Doernberg, *supra* note 46, at 60.

83. *Id.* at 60-61.

those limited grants of power.[84] Thus, in order to determine the extent of governmental authority, recourse should be made to the Constitution, not to a fictional social contract. In other words, since the social contract is silent on the powers of government because it was made between and among the people, it is irrelevant to a determination of the government's authority. "Though useful for understanding the creation of our government, the contract metaphor of the Constitution is incomplete and distorts the true nature of the Constitution."[85] Second, reliance on the social compact theory to determine the extent of governmental authority improperly dilutes the effect of the natural rights doctrine in the development of the Constitution. A revision of the social compact can take away whatever that compact originally granted. "This way lies the danger of downgrading rights to privileges, and that is not what the Bill of Rights was intended to achieve."[86]

Third, restricting the reach of constitutional protections to citizens and resident aliens by applying social compact theory to exclude nonresident aliens ignores people who differ only because they were born outside the United States and choose to reside outside the United States. Assuming *arguendo* that the Constitution itself was part of the social compact, it is not necessarily true that persons who are not parties to a contract, such as nonresident aliens, cannot avail themselves of the benefits of its protection.[87] Furthermore, social compact theory cannot explain why a person who is not a party to the contract cannot seek protection under the United States Constitution.[88] In the debate in Congress over the Alien Act of 1798, James Madison, the father of our Bill of Rights, argued:

> [I]t does not follow, because aliens are not parties to the Constitution, as citizens are parties to it, that whilst they actually conform to it, they have no right to its protection . . . it will not be disputed, that as they owe, on one hand, a temporary obedience, they are entitled in return to their protection and advantage.[89]

Even if social compact theory is applied in *Yunis* as it was in *Verdugo*, nonresident aliens should still receive the benefit of the Fifth Amendment. While construing the reach of the Fourth Amendment

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84. *See* RAOUL BERGER, CONGRESS V. THE SUPREME COURT 13-15 (1969).

85. George E. Collins, *Recent Development*, 30 VA. J. INT'L L. 827, 836 (1990).

86. Vaughan Lowe, *Self-Evident and Inalienable Rights Stop at the US Frontier*, 50 CAMBRIDGE L.J. 16, 19 (1991).

87. The intended beneficiaries of a contract can enforce its provisions even if they are not parties to the original contract. *See* E. ALLAN FARNSWORTH, CONTRACTS § 10.5, at 734-35 (1982).

88. David Hume, *Of the Original Contract*, *in* SOCIAL CONTRACT 208, 223 (Ernest Barker ed., 1948).

89. *Madison's Report on the Virginia Resolutions*, *in* 4 ELLIOT'S DEBATES 546, 556 (2d ed. 1836).

narrowly so as not to apply to nonresident aliens, Chief Justice Rehnquist wrote that the "text, by contrast with the Fifth and Sixth Amendments, extends its reach only to 'the people,'"[90] which Chief Justice Rehnquist equates with citizens and certain resident aliens.[91] To give meaning to that passage, the Fifth Amendment must then apply a broader formulation that necessarily includes nonresident aliens since it refers to "no person."

C. The Cases Underlying the Minimalist Theory Should Be Read Narrowly

In order to give the Fifth Amendment protection against compelled self-incrimination the meaning it deserves, the cases supporting the minimalist approach should be read narrowly. The historical context of several of the major cases in this area has changed significantly, reducing the precedential value of their holdings. The consular court system, from which *In re Ross* arose, is no longer in existence,[92] and the case is plainly at odds with more recent decisions, like *Curtiss-Wright*, that admit at least some extraterritorial application of the Constitution.

Furthermore, *Johnson v. Eisentrager* concerned a special kind of defendant, the enemy alien.[93] The defendants in *Johnson* had violated the laws of war during World War II,[94] and the Court took great pains to dwell on the differences between the rights of enemy and friendly aliens.[95] It was the existence of war between the United States and the alien's homeland, not their alienage, which reduced the enemy alien's rights.[96] This reduction was justified because of the need to ensure war time security.[97] The United States is not presently at war with another nation, and it is when the nonresident alien's nation "takes up arms

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90. United States v. Verdugo-Urquidez, 494 U.S. 259, 265 (1990).
91. *See id.* at 265.
92. Reid v. Covert, 354 U.S. 1, 12 (1956). As Justice Black explained:

> The *Ross* approach . . . is obviously erroneous if the United States government, which has no power except that granted by the Constitution, can and does try citizens for crimes committed abroad. Thus, the *Ross* case rested . . . on a fundamental misconception and the most that can be said in support of the result reached there is that the consular court jurisdiction had a long history antedating the adoption of the Constitution.

Id. (footnote omitted).
93. The Court defined an enemy alien as "the subject of a foreign state at war with the United States." Johnson v. Eisentrager, 339 U.S. 763, 769 n.2 (1950).
94. *Id.* at 765-66.
95. *Id.* at 769-77.
96. *See id.* at 772-73.
97. *See id.* at 774.

against us" that the alien loses the protection of the Constitution.[98] While there may be wars on drugs or terrorism now, such campaigns are not the type envisioned by the holding in *Johnson*.

Finally, *United States v. Verdugo-Urquidez* should not be read broadly because the majority's rationale received only four votes and its discussion of the Fifth Amendment issue only amounts to dicta. Justice Kennedy rejected Chief Justice Rehnquist's use of the social compact rationale in the plurality opinion by stating that the absence of a juridical relationship between the United States and "some undefined, limitless class of noncitizens who are beyond our territory . . . does not depend on the idea that only a limited class of persons ratified" the Constitution.[99] He rejected the entire social compact idea as "irrelevant to any construction of the powers conferred or the limitations imposed" by the Constitution.[100] According to Kennedy, "[t]he force of the Constitution is not confined because it was brought into being by certain persons who gave their immediate assent to its terms."[101]

Justice Stevens explicitly refused to join the plurality's "sweeping opinion"[102] because, although he agreed that the search of Verdugo-Urquidez' home in Mexico did not violate the Fourth Amendment, he rejected the use of social compact theory: "In my opinion aliens who are lawfully present in the United States are among those 'people' who are entitled to the protection of the Bill of Rights, including the Fourth Amendment."[103] Verdugo-Urquidez was lawfully present in the United States because United States agents arrested him under the color of United States law.[104]

There were three dissents in *Verdugo-Urquidez*. Justices Brennan and Marshall delivered a blistering attack in which they opposed the plurality rationale point for point.[105] Justice Blackmun wrote an equally forceful dissent, stating that "the enforcement of domestic criminal law seems to me to be the paradigmatic exercise of sovereignty over those who are compelled to obey."[106]

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98. *Id.* at 771.

99. United States v. Verdugo-Urquidez, 494 U.S. 259, 275-76 (1990) (Kennedy, J. concurring).

100. *Id.* at 276.

101. Justice Kennedy based his concurrence in the judgment on practical considerations. *Id.* at 278.

102. *Id.* at 279 (Stevens, J. concurring).

103. *Id.*

104. Ker v. Illinois, 119 U.S. 436 (1886); Frisbie v. Collins, 342 U.S. 519 (1952). United States courts can exercise jurisdiction lawfully over nonresident alien defendants under the *Ker-Frisbie* doctrine which states that a court's jurisdiction over a defendant "is not impaired by the fact that he had been brought within the court's jurisdiction by reason of 'forcible abduction.'" *Frisbie*, 342 U.S. at 522.

105. *Verdugo-Urquidez*, 494 U.S. at 279.

106. *Id.* at 297.

D. Constitutional Constraints On Government Action

1. *Separation of Powers.* The Constitution grants the branches of federal government their respective power and limits their actions.[107] The Supreme Court recognized this fundamental truth in 1886. "The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances . . . ."[108] In *Ex parte Milligan,* the Court upheld President Lincoln's recision of the writ of habeas corpus, a vital right, during the Civil War. The Court pointed to times of national crisis as a justification for taking such extraordinary action.[109] The Bill of Rights, on the other hand, "generally control[s] the United States government in the conduct of its foreign relations . . . and generally limit[s] governmental authority whether it is exercised in the United States or abroad. . . ."[110] Thus, the Bill of Rights does not condone extraconstitutional action outside of the United States.

Extending the self-incrimination privilege to nonresident alien defendants in United States courts would not raise separation of powers concerns between the judiciary and the executive branch in the area of foreign affairs. While it is recognized that the executive branch is wholly responsible for conducting foreign relations,[111] extending the reach of the protection against compelled self-incrimination does not encroach on its authority. Furthermore, this extension would not affirmatively order the president to do anything; granting the protection against self-incrimination to nonresident alien defendants would only prohibit the use of a coerced confession at trial. It would remain in the government's discretion to risk suppression of a confession by not informing the defendant of his or her rights.

2. *Practicality of Applying the Constitution Overseas.* The practicalities involved in extending the Fifth Amendment protection to nonresident aliens are significant to this discussion.

> [A] constitutional privilege does not disappear, nor even lose its normal vitality simply because its use may hinder law enforcement activities. That is a consequence of nearly all the protections of the Bill of Rights,

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107. "The United States is entirely a creature of the Constitution. Its power and authority have no other source. It can only act in accordance with all the limitations imposed by the Constitution." Reid v. Covert, 354 U.S. 1, 5-6 (1956).

108. *Ex Parte* Milligan, 71 U.S. (4 Wall.) 2, 120-21 (1866).

109. *Id.* at 125.

110. 2 RESTATEMENT (THIRD) OF FOREIGN RELATIONS, *supra* note 3, § 721.

111. United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319 (1936).

> and a consequence that was originally and ever since deemed justified by the need to protect individual rights.[112]

However, where the effect is to chill law enforcement and render it practically impossible, the Supreme Court has refused to extend a provision in the Constitution extraterritorially.[113]

The Supreme Court in *Ross* considered the practicality of extending the rights of grand jury indictment and petit jury trial overseas.[114] It found that an extension of those rights would make prosecution impractical due to the inability to find suitable jurors.[115] Such impracticality would "cause an abandonment of all prosecution" and "defeat the main purpose of investing the consul with judicial authority."[116] The *Johnson* Court also considered the practicalities of extending the right of habeas corpus to enemy aliens.[117] If habeas corpus rights applied to nonresident enemy aliens, the Court reasoned that our military would be forced to transport, house, guard, and feed them.[118] Witnesses, attorneys, and others central to such a defendant's case would also need transport and the United States military would have to provide it.[119] The logistical problems this would impose, especially in the midst of world war, are obvious. "Such trials would hamper the war effort and bring aid and comfort to the enemy."[120] Finally, the Court noted that it was unlikely that enemy states would reciprocate and allow United States prisoners of war the same right.[121]

Issues of practicality also were part of the Fourth Amendment analysis in *Verdugo-Urquidez*.[122] Because many overseas United States government operations might require searches and seizures, extending the Fourth Amendment extraterritorially would have "significant and deleterious consequences for the United States in conducting activities beyond its boundaries."[123] The Court was concerned about potential damages suits against the United States government for violations of the Fourth Amendment overseas.[124]

Furthermore, the Court cited the practical problem of the Fourth Amendment's warrant requirement. A warrantless search requires a

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112. *In re* Cardassi, 351 F. Supp. 1080, 1086 (D. Conn. 1972).
113. *See supra* notes 37-44 and accompanying text.
114. *In re* Ross, 140 U.S. 453, 464 (1891).
115. *Id.*
116. *Id.* at 464-65.
117. Johnson v. Eisentrager, 339 U.S. 763, 778-79 (1950).
118. *Id.*
119. *Id.* at 779.
120. *Id.*
121. *Id.*
122. United States v. Verdugo-Urquidez, 494 U.S. 259, 273-74 (1990).
123. *Id.*
124. *Id.* at 274.

showing of either consent or exigent circumstances.[125] Thus, the ability of United States agents to conduct searches on foreign soil would be limited because of the unresolved issue of which country's magistrates could authorize the search.[126] Justice Kennedy cast the deciding vote in that case, stating that the extension of the Fourth Amendment overseas would be "impractical and anomalous."[127]

The extraterritorial application of the Fifth Amendment would not create the practical problems that generated concern in *Johnson v. Eisentrager* and *Verdugo-Urquidez*. The acts committed in violation of the Fifth Amendment protection against compelled self-incrimination occur when the United States has already exercised jurisdiction over a nonresident alien defendant by way of arresting and detaining him or her. Once the defendant is under the control of United States agents, it should not matter where he or she is. As long as the defendant is under the control of United States agents, the agents should be obligated to to follow the simple constitutional procedures attending the Fifth Amendment protection against self-incrimination.

E. Goals Behind the Fifth Amendment Protection Require Its Extension

Murphy v. Waterfront Commission laid out the basic rationales of the Fifth Amendment protection against compelled self-incrimination.[128] The Court found that the privilege against self-incrimination

> reflects many of our fundamental values and most noble aspirations: our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt; our preference for an accusatorial rather than an inquisitorial system of criminal justice; our fear that self-incriminating statements will be elicited by inhumane treatment and abuses; our sense of fair play which dictates "a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the individual to shoulder the entire load;" our respect for the inviolability of the human personality and the right of each individual "to a private enclave where he may lead a private life."[129]

125. 4 WAYNE R. LAFAVE, SEARCH AND SEIZURE, §§ 6.4-6 (2d ed. 1987).
126. *Verdugo-Urquidez*, 494 U.S. at 278. (Kennedy, J., concurring).
127. *Id.* at 278 (citing Justice Harlan's concurring opinion in *Reid*, 354 U.S. at 74).
128. Murphy v. Waterfront Comm'n, 378 U.S. 52, 55-56 (1964).
129. *Id.* at 55 (citations omitted).

By refusing the nonresident alien protection under the Fifth Amendment, he or she is put in just the "cruel trilemma" that the privilege seeks to avoid.[130]

In addition, refusing Fifth Amendment protection to a nonresident alien undercuts the inherent principles of the United States adversarial system. Protection against compelled self-incrimination is a central feature and a necessary part of the accusatory system.[131] Any denial of this protection would upset the balance of the criminal justice system by not providing adequate disincentives to the government's use of coercion. United States agents acting abroad would not be dissuaded from coercing a confession out of a defendant or using it to gain a conviction at trial. Furthermore, foreign agents could coerce the nonresident alien defendant into confessing which could later be used against him or her in a United States trial. The Fifth Amendment precludes the government from taking these short cuts to conviction.[132] Such short cuts via compelled self-incrimination only erode the integrity of the criminal justice system by substantially easing the government's difficulty in meeting its burden of proof.[133]

District courts have authority to use their supervisory power to deny jurisdiction in egregious cases to avoid becoming "accomplices in the willful disobedience of the law."[134] For example, the Second Circuit refused to exercise personal jurisdiction over an alien defendant when the government acted egregiously.[135] In *United States v. Toscanino*, paid agents of the United States government[136] tortured the defendant, an Italian citizen, in Brasilia, Brazil.[137] The United States government and the United States attorney in charge of the case were aware and received regular reports of the interrogation and torture.[138] The court disagreed with the government's argument that the Bill of Rights does not constrain its overseas actions against aliens saying that the Fifth Amendment "protects 'people' and not 'areas' . . . or 'citizens.'"[139]

Similarly, jurists caution the Executive not to engage in extraconstitutional acts to forward criminal justice. In *Olmstead v. United*

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130. *Id.*

131. LEVY, ORIGINAL INTENT, *supra* note 9, at 260.

132. In *Murphy*, the Court noted the importance of "requiring the government in its contest with the individual to shoulder the entire load . . . ." *Murphy*, 378 U.S. at 55 (citing 8 WIGMORE, EVIDENCE 317 (revised 1961).

133. Robert B. McKay, *Self-Incrimination and the New Privacy*, 1967 SUP. CT. REV. 193, 208-10.

134. United States v. Toscanino, 500 F.2d 267, 276 (2d Cir. 1974) (quoting McNabb v. United States, 318 U.S. 332, 345 (1943)).

135. *Id.*

136. The agents were not United States citizens but were agents of the Montevideo, Uruguay police force. *Id.* at 269.

137. *Id.* at 269-70.

138. *Id.* at 270.

139. *Id.* at 280 (citing Katz v. United States, 389 U.S. 347, 353 (1967)).

States,[140] the Court ruled that wire-tapping did not violate a defendant's Fifth Amendment protection against self-incrimination[141] or Fourth Amendment protection against unreasonable search and seizure.[142] Dissenting, Justices Holmes and Brandeis characterized the use of evidence gained by wire-tapping as illegal.[143] Under this rationale, it can be assumed that these Justices would also find a coerced confession, a violation which reaches to the roots of both the theoretical and historical underpinnings of the Fifth Amendment, to be equally repugnant.[144]

If the United States is serious about upholding the fundamental principles enshrined in the Constitution, its protections against self-incrimination must be afforded to the accused despite his or her nationality. To suggest that the United States, in peacetime, should adjust its respect for a person's dignity according to his or her nationality or place of arrest clearly ignores these principles.

F. International Law as Further Support for Fifth Amendment Extraterritorial Application

Together, the United Nations Charter (Charter),[145] the Universal Declaration of Human Rights (Declaration),[146] the International Covenant on Civil and Political Rights (Covenant),[147] and the International Covenant on Economic, Social and Cultural Rights[148] form the International Bill of Rights.[149] These documents provide evidence that a right against coerced self-incrimination exists in international law.

United States courts are obligated to give effect to international law.[150] The United States is a charter member of the United

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140. Olmstead v. United States, 277 U.S. 438 (1928).

141. *Id.* at 462-66.

142. *Id.* at 464-65.

143. "[T]he Government ought not to use evidence obtained and only obtainable by a criminal act." *Id.* at 469-70 (Holmes, J., dissenting). Reiterating this point in a particularly scathing dissent, Justice Brandeis said, "To declare that in the administration of the criminal law the end justifies the means — to declare that the Government may commit crimes in order to secure the conviction of a private criminal — would bring terrible retribution." *Id.* at 485 (Brandeis, J., dissenting).

144. *See supra* notes 72-80 and accompanying text.

145. U.N. CHARTER.

146. G.A. Res. 217A, U.N. GAOR, 3d Sess., at 71, U.N. Doc. A/810 (1948) [hereinafter Declaration].

147. G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6316 (1966) [hereinafter Covenant].

148. G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 16, at 49, U.N. Doc. A/6316 (1966). This Covenant, however, is not relevant to the present discussion.

149. *See* MYRES S. MCDOUGAL ET AL., HUMAN RIGHTS AND WORLD PUBLIC ORDER 321-22 (1980).

150. As the U.S. Supreme Court said nearly a hundred years ago: "[I]nternational law is

Nations[151] and also voted in favor of the Declaration.[152] Further, the United States has signed the Covenant.[153] Both the Declaration and the Covenant codify and explain the human rights provisions of the United Nations Charter. Together they form a part of the formidable transnational human rights jurisprudence now growing.

Furthermore, international law is part of the federal law of the United States. Thus, it is within the jurisdiction of the federal courts, which are bound to give it effect.[154] In addition to looking to international agreements as a source of international law,[155] courts may look to customary international law, or principles of *jus cogens*,[156] which are norms that are virtually nonderogable.[157]

1. *Self-Incrimination, Jus Cogens, and the Supreme Court.* The protection of human rights is an obligatory legal norm.[158] The United Nations owes its existence in part to a recognition of this norm. The member states joined "to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small . . . ."[159] Thus, the United Nations Charter's "basic provisions, constituting the *jus cogens*, the practically immutable law of the international community, are broad in scope and sufficiently flexible to permit their interpretation to be adjusted to the needs of each generation."[160] In short, human rights and their protection are central features of the United Nations Charter.[161]

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part of our law, and it must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination." The Paquete Habana, 175 U.S. 677, 700 (1900).

151. U.N. CHARTER.

152. Richard B. Lillich, *Invoking International Human Rights Law in Domestic Courts*, 54 U. CIN. L. REV. 367, 371 n. 18 (1985).

153. M.J. BOWMAN & D.J. HARRIS, MULTILATERAL TREATIES: INDEX AND CURRENT STATUS 1967 (1984). The United States Senate recently gave its advice and consent to the Covenant. 138 CONG. REC. S4781 (daily ed. Apr. 2, 1992).

154. 1 RESTATEMENT (THIRD) OF FOREIGN RELATIONS, *supra* note 3, § 111.

155. IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 11 (4th ed. 1990).

156. *Id.* at 4.

157. *See generally id.* at 509-17.

158. Case Concerning the Barcelona Traction, Light and Power Company, Ltd., 1970 I.C.J. 3, 301 (Feb. 5) (citing the South West Africa Cases, 1966 I.C.J. 4, 300 (July 18) (Tanaka, J., dissenting)).

159. U.N. CHARTER pmbl. The Charter later returns to the protection of human rights. U.N. CHARTER art. 55. ("[T]he United Nations shall promote . . . universal respect for, and observance of, human rights and fundamental freedoms for all . . . ."); U.N. CHARTER art. 56 ("All Members pledge themselves to take joint and separate action . . . for the achievement of the purposes set forth in Article 55.").

160. Louis B. Sohn, *The New International Law: Protection of the Rights of Individuals Rather Than States*, 32 AM. U. L. REV. 1, 13-14 (1982).

161. Paul Sieghart, *International Human Rights Law: Some Current Problems*, *in* HUMAN

Through the Declaration and the Covenant, the Charter's provisions on human rights are codified and explained.[162] Article 10 of the Declaration states: "Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him."[163] Here, the Declaration grants a broad right to a fair criminal trial applicable to all people. A distinction based on nationality may not be made without upsetting the Article 10 guarantee of "full equality."

A fair criminal trial is further defined in the Covenant. Articles 14 and 15 offer a comprehensive description of a defendant's trial rights. Article 14 states that in criminal trials "everyone shall be entitled to the following minimum guarantees, in full equality."[164] Article 14(3)(g) explicitly affirms a defendant's right "[n]ot to be compelled to testify against himself or to confess guilt."[165] The right against compelled self-incrimination and the later use of those statements is available to "everyone;" the Covenant does not distinguish between defendants according to their nationality.

The United Nations consistently relies on the Declaration in interpreting the Charter's human rights provisions[166] because it considers the Declaration to be an authoritative and binding interpretation of the Charter.[167] The Declaration has now "become the accepted general articulation of recognized rights."[168] The overwhelming endorsement given to the Universal Declaration by the United Nations, national, and other transnational bodies has led several provisions to have the status of *jus cogens*.[169]

Similarly, the Preamble to the Covenant explicitly refers to both the Declaration and the United Nations Charter.[170] It offers an authoritative and detailed interpretation of Article 10. Those provisions of the Covenant that set forth human rights norms are "to a large extent, declaratory of the law of the Charter."[171] Since Articles 14 and 15 of

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RIGHTS FOR THE 1990S at 24, 27 (Robert Blackburn & John Taylor eds., 1991).

162. BROWNLIE, *supra* note 155, at 699.

163. Declaration, *supra* note 146, art. 10, at 73.

164. Covenant, *supra* note 147, art. 14, at 54.

165. *Id.*

166. United Nations Declaration on the Elimination of All Forms of Racial Discrimination, U.N. GAOR, 18th Sess., Supp. No. 15, at 35 (1963); 2 RESTATEMENT (THIRD) OF FOREIGN RELATIONS, *supra* note 3, § 701 rep. note 4; MCDOUGAL ET AL., *supra* note 149, at 274.

167. BROWNLIE, *supra* note 155, at 570-71; MCDOUGAL ET AL., *supra* note 149, at 325; Jeffrey M. Blum & Ralph G. Steinhardt, *Federal Jurisdiction over International Human Rights Claims: The Alien Tort Claims Act After* Filartiga v. Peña-Irala, 22 HARV. INT'L L.J. 53, 69 (1981).

168. 2 RESTATEMENT (THIRD) OF FOREIGN RELATIONS, *supra* note 3, § 701 rep. note 6.

169. MCDOUGAL ET AL., *supra* note 149, at 274.

170. Covenant, *supra* note 147, pmbl, at 49.

171. M.G. Kaladharan Nayar, *Introduction: Human Rights: The United Nations and United States Foreign Policy*, 19 HARV. INT'L L.J. 813, 817 (1978).

the Covenant can be seen to be based in the United Nations Charter, they provide evidence that they represent norms of *jus cogens*.[172] As these norms can be considered *jus cogens*,[173] which are virtually nonderogable, there is even greater impetus for their incorporation into the United States Constitution.

The foregoing analysis evidences the great degree to which human rights are protected under both the United States Constitution and the United Nations Charter.[174] It is of tremendous assistance in determining the proper scope of the extraterritoriality of the Bill of Rights. It would be "unrealistic to ignore the influence . . . of the Charter [and other authoritative international instruments as factors] in resolving constitutional issues that have hitherto been in doubt."[175] For these reasons, the Supreme Court should recognize these norms and incorporate them into the Constitution.

2. *Customary International Law in United States Courts.* The right against compelled self-incrimination is at least a norm of customary international law and should be enforced in United States courts, notwithstanding the nationality of the defendant and the circumstances surrounding his or her arrest. Although norms of customary international law are more easily derogable than the norms of *jus cogens*, norms of *jus cogens*, like customary international law, are part of the law of the United States.[176]

The Declaration is accepted *in toto* as evidence of customary

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172. *See* Blum & Steinhardt, *supra* note 167, at 70-71 (citing the Vienna Convention on the Law of Treaties, art. 18, 8 I.L.M. 679, 686 (1969)) (The Covenant has its basis in the United Nations Charter, and thus it binds all United Nations members, whether they have ratified or merely signed the Covenant.).
Article 18 of the Convention states:

> A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when:
>
> > (a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty. . . .

Vienna Convention, *supra*, art. 18, 8 I.L.M. at 686. The Restatement of Foreign Relations Law of the U.S. considers the Vienna Convention as a codification of customary international law governing treaties. *See* 1 RESTATEMENT (THIRD) OF FOREIGN RELATIONS, *supra* note 3, § 102 cmt. f.

173. Sohn, *supra* note 160, at 32.

174. Richard B. Lillich, *The United States Constitution and International Human Rights Law*, 3 HARV. HUM. RTS. J. 53, 76 (1990).

175. Lillich, *supra* note 152, at 408. "[A] growing number of federal and state courts have referred explicitly to the U.N. Charter, the Universal Declaration, or other international human rights instruments in order to determine the content and contours of various rights guaranteed by United States law." Lillich, *The United States Constitution*, *supra* note 174, at 76.

176. *See* The Paquete Habana, 175 U.S. 677, 700 (1900).

international law by some commentators.[177] Even the United Nations General Assembly has implied that the Declaration's provisions "constitute basic principles of international law."[178] Because of this broad acceptance of the Declaration as an authoritative interpretation of the United Nations Charter provisions on human rights, the Declaration may be considered "international customary law, binding on all states, not only on members of the United Nations."[179]

Perhaps more importantly, the Declaration is treated as customary international law in practice.[180] It is "cited so often in international resolutions and accords and in learned texts that it is now regarded as part of customary international law."[181] In the forty years since its adoption, neither the Declaration nor its substantive contents have ever been challenged.[182] In fact many nations born since the adoption of the Declaration "have incorporated all or some of [the Declaration's] contents into their national constitutions."[183]

In United States and foreign courts, the Declaration has been drawn upon as a source of customary international law.[184] United States courts decided two notable cases by reference to the Declaration as customary international law. Specifically, in *Fernandez v. Wilkinson*,[185] a Kansas District Court found a prohibition in customary international law against indeterminate detention and stated that the Declaration is "an important source of international human rights."[186] In *Filartiga v. Peña-Irala*,[187] the Second Circuit found a prohibition against torture in customary international law, and cited the Declaration as a source,[188] observing that the Declaration "no longer fits into the dichotomy of binding treaty against non-binding pronouncement, but is rather an authoritative statement of the international community."[189]

Commentators argue that the Covenant is also part of customary international law.[190] While more controversial than the Declaration, the

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177. *See* HUMAN RIGHTS FOR THE 1990S, *supra* note 161, at 29; MCDOUGAL ET AL., *supra* note 149, at 325, 328-30.

178. G.A. Res. 2625 (XXV), U.N. GAOR, 25th Sess., Supp. No. 28, at 121, U.N. Doc. A/8028 (1971).

179. Sohn, *supra* note 160, at 17.

180. Andrew M. Wolfenson, Note, *The U.S. Courts and the Treatment of Suspects Abducted Abroad Under International Law*, 13 FORDHAM INT'L L.J. 705, 713 n.41 (1989-90)(citing NIGEL S. RODLEY, THE TREATMENT OF PRISONERS UNDER INTERNATIONAL LAW 63 (1987)).

181. Jerome J. Shestack, *The World Had a Dream*, HUM. RTS., Summer 1988, at 18.

182. HUMAN RIGHTS FOR THE 1990S, *supra* note 161, at 29.

183. *Id.*

184. BROWNLIE, *supra* note 155, at 570 n.74.

185. Fernandez v. Wilkinson, 505 F. Supp. 787 (D. Kan. 1980).

186. *Id.* at 797.

187. Filartiga v. Peña-Irala, 630 F.2d 876 (2d Cir. 1980).

188. *Id.* at 882.

189. *Id.* at 883.

190. Anthony Clark Arend, *International Law and the Recourse to Force: A Shift in Paradigms*,

Covenant is at least in the process of becoming part of customary international law, and thus, is an important source of those norms.[191] Both *Filartiga* and *Fernandez* cited the Covenant as a source of customary international law.[192] Furthermore, the Covenant is, arguably, an authoritative interpretation of the Declaration which would make its provisions a firm source of customary international law. Finally, Articles 14 and 15 of the Covenant can be read as codifying Article 10 of the Declaration.[193]

V. CONCLUSION

The extraterritoriality of the Fifth Amendment protection against compelled self-incrimination remains to be settled. *In re Ross*, though practically overruled by *Reid v. Covert*, could be resurrected under the auspices of the social compact theory espoused in *United States v. Verdugo-Urquidez*.[194] Or, *Verdugo-Urquidez's* social compact theory could be expanded to further restrict the extraterritorial reach of the entire Bill of Rights. *Reid* could be read narrowly as applying only to citizens overseas, as in *Verdugo-Urquidez*,[195] or it could be overruled outright. Finally, *Johnson v. Eisentrager* could be read expansively to encompass all aliens overseas and not just enemy aliens in time of war. Or, the courts could put hijackers and terrorists into the classification of enemy aliens under *Johnson v. Eisentrager*.

However, it is fundamentally unfair to deny nonresident aliens the protections of at least the rights essential to a fair trial. "The Framers, who fought to protect inalienable rights, could hardly have intended for the government to ignore the Constitution when acting abroad."[196] The protections in our Bill of Rights, like the Fifth Amendment protection against self-incrimination, are norms that cut across national boundaries and rest on the philosophy of natural rights.[197] These protections have lasted for two centuries and should not now be pruned back beyond the intent of the Framers.

The federal government obtains jurisdiction over an alien via the Constitution. However, refusing an alien the benefit of the Fifth Amendment at trial creates an anomaly in which that same Constitution

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27 STAN. J. INT'L L. 1, 42 (1990) (citing Professor Thomas Franck).

191. *See* Thomas M. Franck, *United Nations Based Prospects for a New Global Order*, 22 N.Y.U. J. INT'L L. & POL. 601, 630 (1990).

192. *Filartiga*, 630 F.2d at 884; *Fernandez*, 505 F. Supp. at 797. The Court in *Fernandez* referred to the Covenant's provisions as "indicia of the customs and usages of civilized nations." *Id.* at 797.

193. Covenant, *supra* note 147, arts. 14-15, at 54-55.

194. *See supra* notes 61-63 and accompanying text.

195. *See supra* note 62 and accompanying text.

196. Dobson, *supra* note 56, at 130.

197. *See supra* notes 64-80 and accompanying text.

offers no protective rights. The United States does not give nonresident aliens an opportunity to participate in law-making, yet it is expected that they follow certain provisions of United States laws when they are beyond United States territory.[198] Finally, the human rights protections offered by international law are steadily increasing.[199] The purpose of the United Nations Charter, the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights was to establish a world-wide regime in which certain fundamental human rights apply despite one's nationality and without regard to national boundaries.[200] Extending the Bill of Rights overseas complements the increasing trend in international law to protect the rights of individuals and bring the United States into line with the family of nations.

Once sharp delimiters, national boundaries are becoming increasingly permeable. "The proper reach . . . of the Constitution has far less to do with formalistic notions of territory than with choices regarding the importance attached to the values" that it embodies.[201] While the United States courts are not in a position to secure the rights of all people everywhere, they do have an obligation to respect an individual's rights without regard to nationality.

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198. Dobson, *supra* note 56, at 131.

199. *See* Thomas Buergenthal, *International Human Rights Law and Institutions: Accomplishments and Prospects*, 63 WASH. L. REV. 1, 4 (1988).

200. *See generally* MCDOUGAL ET AL., *supra* note 149, at 179-80.

201. Note, *Constructing the State Extraterritorially: Jurisdictional Discourse, the National Interest, and Transnational Norms*, 103 HARV. L. REV. 1273, 1304 (1990).