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THE EVOLUTION OF TERRITORIALITY:
INTERNATIONAL RELATIONS & AMERICAN LAW

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The Evolution of Territoriality: International Relations & American Law

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*Miles Kahler & Barbara Walter, eds, TERRITORIALITY AND CONFLICT IN AN AGE OF
GLOBALIZATION* (forthcoming, Cambridge University Press)

Assumptions about territory permeate legal systems. American law is no exception. Territoriality is a defining attribute of the Westphalian state, the model upon which the framers of the US Constitution based their aspirations for a new nation. Under Westphalian principles the scope of a sovereign's law corresponds to the geographic boundaries of the sovereign's territory: what Miles Kahler, in his introduction to this volume, calls "jurisdictional congruence."

Yet it is increasingly common to assert that Westphalian territorial sovereignty is archaic---that we are entering a borderless world, in which international forces permeate the

¹ I thank participants in workshops at Princeton, UCLA, Temple, Harvard, Hofstra, Columbia, UC San Diego, and Chicago for comments on earlier drafts. In particular I want to thank Alex Aleinikoff, David Currie, Michael Doyle, David Golove, Miles Kahler, Eugene Kontorovich, Andy Moravcsik, Gerry Neuman, Eric Posner, Beth Simmons, Anne-Marie Slaughter, Detlef Vagts, Barbara Walter, and John Yoo for helpful discussions and Tom Hale and Lindsey Carlson for excellent research assistance.

once-hard shell of the state.² Globalization, many argue, is rapidly eroding the significance of territorial boundaries.³ Capital, labor, goods, and ideas are said to move largely without regard for political borders, and these processes are radically transforming our polities and economies. These claims are controversial and have spawned fierce debate in economics and political science. Within legal scholarship, by contrast, the domestic impacts of globalization have received less sustained attention.⁴ Yet legal rules and practices provide an important and overlooked window on the alleged impacts of globalization, particularly with regard to territoriality.

All legal systems presuppose some relationship between law and territory. I call these rules of *legal spatiality*. This chapter charts the evolution of legal spatiality in the US, and offers several causal arguments about this evolution and its connections to shifts in international security and economics. Broadly speaking, in the 19th century the dominant rule of legal spatiality was strict territoriality.⁵ Law and land were understood to be tightly and fundamentally linked. The general though uneven trajectory over the last century has been to loosen these geographic restraints and increasingly assert domestic law beyond sovereign borders. To be sure, Westphalian territoriality is not dead. Territoriality is broadly respected today for all states, whereas in the past only a handful of Western powers enjoyed

² The “hard-shell” metaphor is from John Herz, *The Rise and Demise of the Territorial State*, 9 *World Politics* (1957).

³ Eg Kenichi Ohmae, *The Borderless World*; David Held et al, *Global Transformations*; Saskia Sassen, *Territory and Territoriality in the Global Economy*, 15 *Int’l Sociology* (2000).

⁴ Exceptions include Symposium, *Globalization and Governance*, *Indiana J of Global Leg Stud* (2003); Paul Berman, *The Globalization of Jurisdiction*, *U Pa L Rev* (2002); Peter Spiro, *Globalization and the (Foreign Affairs) Constitution*, 63 *OHIO ST. L J* (2002)

⁵ As Johnson and Post argue, “We take for granted a world in which geographic borders--lines separating physical spaces--are of primary importance in determining legal rights and responsibilities.” David Johnson and David Post, *Law and Borders--The rise of cyberspace*, 48 *Stan. L. Rev.* 1367 (1995-6) at 1368.

full territorial sovereignty. Spatial location also continues to be a critical rule of decision in some areas of the law, as the continuing litigation over noncitizen detainees in held in the American naval base at Guantanamo makes clear.⁶ Even citizens within the sovereign territory of the US but outside the 50 states—such as residents of Puerto Rico—enjoy less robust constitutional rights simply because they are located in a different *kind* of American territory.⁷

Despite these areas of persistence, it is indisputable that territoriality is decreasingly important as a jurisdictional principle. US domestic rules of jurisdiction long ago deemphasized strict territoriality in favor of more flexible, functional concepts such as “interests analysis” and “minimum contacts.” Since the 1940s, federal statutes in a wide range of areas—antitrust, securities, criminal law, intellectual property, to name just some—have been frequently understood to have extraterritorial effect. Similarly, the protections of the Bill of Rights, once believed to apply only within US territory, now extend across the globe with regard to US citizens. In short, territoriality has been slowly unbundled from sovereignty.

What explains the evolution of legal spatiality? The second-image reversed tradition in political science argues that international relations play an important and understudied causal role in domestic institutional and political change.⁸ Most work in this tradition looks at domestic political rather than legal factors. Even there, however, “the degree and character of influence exercised by international factors on American political development

⁶ The 2004 Supreme Court decision in *Rasul v. Bush* held that spatial location is immaterial for the habeas rights of noncitizens, but only as a statutory matter.

⁷ As the Supreme Court once asserted, Puerto Rico is “foreign in a domestic sense.” This phrase, almost a Zen koan, neatly captures the paradoxes of colonial territoriality.

⁸ Peter Gourevitch, *The Second-Image Reversed: The International Sources of Domestic Politics*, Int’l Org. (1978)

remains remarkably unprobed."⁹ The impact of world politics on domestic law is, by comparison, nearly untouched.¹⁰ In this chapter I explore how international factors have shaped the transformation of legal spatiality in the US. While internal, doctrinal evolutions in discrete areas of the law are undoubtedly an important factor in this shift, I argue that legal rules, like other domestic policies, are influenced by the constraints and opportunities presented by the international system. This is especially likely for doctrines of jurisdiction, since jurisdictional notions draw so deeply from international concepts such as sovereignty and statehood.

My primary claim is that the existing pattern of legal spatiality reflects the contingencies of history, but it chiefly reflects power and interest. As strict territoriality has relaxed, US courts, litigants, Congress, and the Executive have all engaged in instrumental assessments of the benefits and detriments of a reliance on territorial location as a legal principle in particular instances. As world politics has changed, these benefits and detriments have also changed. One such change is a foci of this volume: globalization. While globalization is often said to reduce the centrality of territory to states, I argue that globalization *vel non* cannot adequately explain the decline of territorial doctrines of jurisdiction. Globalization was highly significant during the 19th century--the height of jurisdictional congruence. Rather, it is the particular nature of the postwar wave of globalization, coupled to the rise of the modern regulatory state, has increased the incentives for states—in particular the US--to assert their domestic law beyond their sovereign borders.

Equally if not more important are major changes in global security structures which have facilitated such assertions. The US is far more powerful today than in 1904. While in

⁹ Ira Katznelson, *Rewriting the Epic of America*, in Katznelson and Shefter, eds, *SHAPED BY WAR AND TRADE* (2002) at 4.

¹⁰ One prominent exception is Mary Dudziak's work on the desegregation cases of the 1950s. Dudziak, *Desegregation as a Cold War Imperative*, 41 *Stan L Rev* (1989). See also JOHN FABIAN WITT, *COLUMBUS' NOTARY: GLOBAL HISTORIES OF AMERICAN LAW* (forthcoming, Harvard University Press).

the past rules of legal spatiality reflected the fear that extraterritorial claims could provoke significant conflict with other states, three features of the postwar era—the extent of US hegemony, the strengthening of the democratic peace, and the decline of territorial wars—have dampened these fears considerably. Likewise, the unprecedented forward projection of American force in the Cold War raised the stakes of maintaining a spatially-delimited constitutional jurisprudence. While these factors help to account for the transformation of rules of legal spatiality, territoriality exhibits persistence in several areas of the law. Most notably, concerns about the negative effects of interdependence—concerns heightened after the attacks of Sept 11th—have strengthened assertions of territoriality with regard to aliens abroad, with the detention of foreign nationals in overseas American bases the most prominent example.

This chapter is organized as follow. I first describe the conceptual linkage between law and territory, and chart the broad evolution of US doctrines of spatiality from the mid-19th century to today. I next show that the period of strict territoriality in US law in fact coincided with an early, strong wave of globalization. As a result, simplistic causal connections between globalization and legal spatiality are not tenable. But there are important differences between the current wave and the earlier wave that do help account for the decline of territoriality in US law. Moreover, there are important differences in the broader international context that play important roles as well. I close with four broad hypotheses about the evolution of legal spatiality in the US and its connection to broad trends in the international system. These reflect the broader claim that rules of legal spatiality in American law derive from configurations of power and interest, not from any overarching normative theory of legal geography.

WESTPHALIA & TERRITORIALITY

The Treaty of Westphalia commonly, if mythically, denotes the birth of territorially-based state sovereignty.¹¹ The medieval order, broadly characterized, comprised multiple, layered power centers as well as diverse sources of legitimation, allegiance, and status.¹² The Westphalian conception of the state represented a break with past because it drew all legitimate power into a single sovereign, who controlled absolutely a defined territory and its associated population. The Westphalian idea of statehood is thus predicated on territoriality. These ideas in turn provided the bedrock principles for the development of international law in the post-Westphalian era. As Herz writes, territoriality begat "the concepts and institutions which characterized the interrelations of sovereign units, the modern state system...only to the extent that it reflected their territoriality and took into account their sovereignty could international law develop. For its general rules and principles deal primarily with the delimitation of the jurisdiction of countries."¹³ State power was rendered territorial in the Westphalian revolution, so as to limit conflict and clearly demarcate sovereign power. Thus territoriality can be seen as a response to conflict—an attempt to cabin it by delimiting jurisdiction. Jurisdictional concepts in turn flow from territory; as Holmes famously stated, "the foundation of jurisdiction is physical power."¹⁴

Westphalian territorial sovereignty became supreme in Europe throughout the 18th and 19th centuries, and spread slowly and unevenly to the rest of the globe. Each sovereign state, according to the 19th century view of international law, possessed and exercised "exclusive sovereignty and jurisdiction throughout the full extent of its territory...No state

¹¹ STEPHEN KRASNER, *SOVEREIGNTY: ORGANIZED HYPOCRISY* (1999).

¹² HENDRIK SPRUYT, *THE SOVEREIGN STATE AND ITS COMPETITORS* (1995); *THE EXPANSION OF INTERNATIONAL SOCIETY* (Hedley Bull and Adam Watson, eds., 1984;

¹³ Herz, *supra* at 480-1.

¹⁴ *McDonald v. Mabee* 243 US 90, 91 (1917), cited in Ralf Michaels, *Territorial Jurisdiction After Territoriality*, in *GLOBALISATION AND JURIDICION* (PJ SLOT AND M BULTERMAN, EDS, 2004)

can, by its laws, directly affect, bind, or regulate property beyond its own territory, or control persons that do not reside within it, whether they be native-born subjects or not.”¹⁵ International law thus contained rules about jurisdiction—technically, prescriptive jurisdiction—that limited the reach of a sovereign's law to its territorial base. In short, Westphalia introduced a conception of legal spatiality that was no longer status-based but instead place-based. Legal rules primarily corresponded to places, not to people.

Empire and Extraterritorial Courts

In the 19th century not all polities were sovereign. The “standard of civilization” kept out of international society many political entities. One important manifestation of the divide between sovereign states and other political units was imperialism. Ascendant in the 19th century, imperialism was fueled by many factors, but one was the desire to control valuable territory. In an era in which tangible resources—rather than human capital and intellectual property—determined wealth and power, territory was often thought worth fighting for and formed the basis of much conflict in this period. This stands in marked contrast with the current era, in which territorial conquest is virtually nonexistent.¹⁶ Sometimes domestic legal systems were fully extended through empire (French colonies are departments of France), but often not (the Philippines were US territory through 1946 but Filipinos were not full citizens, only US nationals). 19th century international law aided the process of imperialism. A leading treatise of the time asked “Is there a uniform law of nations? There certainly is not the same one for all the nations and states of the world. The public law, with slight exceptions, has always been, and still is, limited to the civilized and Christian people

¹⁵ Wheaton, *Elements of International Law*, Sec. 78 (8th ed, 1866).

¹⁶ Marc Zacher, *The Territorial Integrity Norm: International Boundaries and the Use of Force*, International Organization 55 (2001);

of Europe or to those of European origin.”¹⁷ This viewpoint made the coercive acquisition of territory easier to accept while simultaneously illustrating the profound divide that many in the West believed lay between them and the rest of the globe.

Though not an expression of imperialism in the strict sense, as great powers increasingly traded with non-Western entities they created extraterritorial courts in these “uncivilized” nations. These courts, discussed below, had jurisdiction over disputes involving Westerners in nations such as China and Turkey, nations that were too powerful to colonize but nonetheless provided rich commercial opportunities. As a result US citizens were not subject to local law, but instead to an array of American laws. While seemingly inconsistent with then-prevailing norms of legal spatiality, these courts actually reflected the limited nature of the circle of sovereign states. They existed in precisely those polities that were not sovereign, precisely because they did not meet the “standard of civilization.”¹⁸ The practice of extraterritorial jurisdiction reinforced the centrality of territory to the Westphalian conception of sovereignty. Extraterritoriality in this form was a vestige of the personal, status relations that marked the feudal era. Sovereign states, of course, did not permit extraterritorial courts on their territories. Thus extraterritorial courts reinforced the norm that strict territoriality prevailed among juridical equals.

These courts can also be understood as products of the first wave of globalization. 19th c extraterritorial courts were reactions to the growing presence of merchants and missionaries in foreign jurisdictions and the felt need to protect those citizens from barbaric, arbitrary, discriminatory, and unfamiliar legal systems. Imperialism entailed conquering foreign territory and ruling it; extraterritoriality meant doing nearly the same, though the sovereignty of polities like China—such as it was—remained nominally present. In some

¹⁷ Cited in Antony Anghie, "Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law," 40(1) *Harvard International Law Journal*, 1-81 (1999) at 23.

¹⁸ GERRIT W. GONG, *THE STANDARD OF 'CIVILIZATION' IN INTERNATIONAL SOCIETY* (1984).

cases, even that was missing: so-called international zones, such as the International Zone of Tangier, were created by treaty and carved out of non-Western territory.¹⁹ At the turn of the last century the US established extraterritorial jurisdiction in many non-Western countries. In China, Congress went so far as to create the “US District Court for China.”²⁰ (It similarly established a court for the Panama Canal Zone). By the 1940s the normative backdrop that permitted extraterritorial courts had changed. Ideas of sovereign equality, self-determination, and anti-imperialism brought extraterritorial courts to an end.²¹

A vestigial version of extraterritorial jurisdiction continues for armed forces members stationed abroad, via the various “Status of Forces Agreements,” or SOFAs, negotiated with host states. Typically SOFAs decree that certain infractions will be handled by US military courts, and even when local courts take command, some special rules may apply. The SOFA with Japan, for instance, requires the US to hand over American servicemembers to Japanese authorities only after they have been charged with a crime, a right Japanese citizens do not enjoy.

The Dominance of Jurisdictional Congruence

In short (these unusual assertions of extraterritoriality aside) prior to the 20th century jurisdiction was “defined in international law exclusively in territorial terms.”²² American law drew on this tradition. The notion that US territory could not be subject to the control of another sovereign was strongly held; as Chief Justice Marshall wrote at the time of the War

¹⁹ The Tangier Zone was established in 1926. David Bederman, *The Souls of International Organizations*, Va J Int’l L (1996).

²⁰ EILEEN SCULLY, *BARGAINING WITH THE STATE FROM AFAR* (Columbia University Press, 2001).

²¹ The last example of US consular jurisdiction ended in 1956.

²² Currie et al, *CONFLICTS OF LAWS*, pg 732.

of 1812, “the jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself.”²³

Even during the height of strict territoriality the geographical scope of US law was not perfectly coterminous with sovereign borders. “Anomalous zones” exist: geographic locations that are treated differently from other American territory.²⁴ Puerto Rico and Guam, for example, come fully within the sovereignty of the US, yet are constitutionally distinct from the mainland. Military bases as well as embassies and occupied territories are yet another manifestation of the complex pattern of legal spatiality.²⁵ And overlaying the Westphalian conception of territoriality embodied in the US Constitution has often been a distinction between insiders—non-citizens—and outsiders. As I describe more fully below, the rights of aliens, unlike those of citizens, remain quite dependent on spatial location even today.

TERRITORIALITY AND SOVEREIGNTY IN THE 19TH CENTURY

The dominant assumptions of legal spatiality have been challenged and transformed over the last century. Jurisdictional congruence has given way to a more layered approach to the connection between sovereignty and territory. This uneven evolution is charted below.

Constitutional Rights Abroad

²³ *Schooner Exchange v. M’Faddon*, 11 US (7 Cranch) 116, 136 (1812).

²⁴ Gerald Neuman, *Anomalous Zones*, *Stanford Law Review*

²⁵ Aside from the recent occupation of Iraq, officially terminated on June 28, the US militarily occupied parts of West Berlin until 1990 and Okinawa until 1971.

In 1880, on an American ship docked in Yokohama Bay, a sailor named John Ross killed a crewmate.²⁶ Ross was convicted of murder by an extraterritorial US court in Japan, and later challenged his conviction before the US Supreme Court. Ross' case directly raised the question of the geographical reach of the Constitution and the rights of US citizens abroad at a time when the US' connection to foreign markets was rising rapidly. US extraterritorial courts did not employ the full panoply of protections guaranteed by the Constitution. There was no indictment by a grand jury, and no trial by a petit jury. Ross challenged the constitutionality of his conviction by such a court. More specifically, Ross argued that "that so far as crimes of felonious character are concerned, the same protection and guarantee against an undue accusation or an unfair trial, secured by the Constitution to the citizens of the United States at home, should be enjoyed by them abroad."²⁷

Reflecting the prevailing conception of legal spatiality, the Supreme Court rejected Ross' argument. The view that the Constitution was unfettered by territorial boundaries was incorrect. As the majority wrote,

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...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.²⁸

²⁶ In re Ross, 140 US 453 (1890)

²⁷ Id 463

²⁸ Id at 464

In this passage the Court laid out a clear vision of legal spatiality, one that claimed to respect other sovereigns in their respective territories and limited the Constitution's reach to US territory. Of course, the very extensive jurisdiction of the American extraterritorial court was a "violation" of Westphalian sovereignty. But, since Japan was not yet a fully sovereign member of international society, this was not seen as aberrational.

Ross is frequently held to be a defining case for the strict territoriality of the 19th century.²⁹ The decision's language—that the Constitution can have no force outside the territory of the US—is forceful, blunt, and widely cited. 70 years later the Supreme Court would overrule *Ross* and its conception of legal spatiality, calling the case "a relic from another era."³⁰

The Reach of the Regulatory State

Just as constitutional rights were seen as territorially-delimited, ordinary statutes were generally believed to correspond to a state's geographic borders. An influential example involved the early efforts of American antitrust regulation. While the primary focus of the Sherman Act was the anticompetitive activities of US firms in US markets, in 1909 the American Banana Company sued the United Fruit Company, arguing that it had been injured by actions undertaken at the behest of United Fruit. The twist was that these actions had occurred in Panama. This case raised a similar question to that in *Ross*: did statutes like the Sherman Act apply beyond US territory?

The Supreme Court in *American Banana* argued that US courts lacked jurisdiction over such acts because US law did not and could not reach into the territories of other sovereign states. The majority said that "no doubt in regions subject to no sovereign, like the high seas, or to no law that civilized countries would recognize as adequate, such countries

²⁹ See e.g. Neuman, *Strangers to the Constitution* at 4.

³⁰ *Reid v. Covert* at 12.

may treat some relations between their citizens as governed by their own law, and keep to some extent the old notion of personal sovereignty alive.”³¹ The court thus argued that extraterritorial courts—like the one that convicted Ross—were distinguishable because they involved uncivilized countries and inadequate law. In such aberrant situations a state could extend its law into the territory of another sovereign. But, the Court said,

The general and almost universal rule is that the character of act as lawful or unlawful must be determined wholly by the law of the country where the act was done...For another jurisdiction, if it should happen to lay hold of the actor, to treat him according to its own notions rather than those of the place where he did the acts, not only would be unjust, but would be an interference with the authority of another sovereign, contrary to the comity of nations, which the other state concerned justly might resent.³²

This statement encapsulates the legal spatiality of the period. The Sherman Act did not apply to the actions of the United Fruit Company, the Court held, simply because those actions took place outside the territorial borders of the US and hence beyond the geographical reach of American law.

Colonies and Possessions

The US was expansionist for most of its history—devastatingly so, to the native tribes of North America—but it was not a colonial power in the traditional sense. The US did acquire new territories on the continent, but these were geographically contiguous rather than overseas possessions and were generally settled and granted statehood quickly. That pattern

³¹ 356

³² At 356

changed dramatically in the 1890s, when the US rapidly acquired extensive overseas territories. The US annexed Hawaii in 1898. Then the defeat of Spain in 1898 left Puerto Rico, Cuba, and the Philippines in the hands of the US. "Abroad as well as at home...1898-99 marked the emergence of the United States as a great power."³³

This new-found empire raised difficult questions about the spatial scope of American law. Did the Constitution apply to these new and distant territories? The former Spanish colonies had tropical climates which many believed made them unsuitable for immigration by peoples of Northern European descent. They would likely remain non-Anglo-Saxon indefinitely. Many Americans were thus chary about embracing these new territories as their own, and opposed to statehood for them. But the fever for imperialism was high in 1898, and granting them immediate independence was unpopular.

Legally, the important question was what the precise status of these new possessions was. It did not take long to come before the Supreme Court, and when it did it capped a surprisingly heated and bitter controversy. The rapidity with which the US embraced the European practice of empire may have partly accounted for the utter confusion over how to integrate these colonies into the constitutional framework. But in a series of cases running through the early 1920s, known as the *Insular Cases*, the Supreme Court laid down the principle that some American territory is distinct from other American territory.³⁴ The notion they used was "incorporation." For territory that was acquired with the intent of incorporating into the union--that is, territory destined for statehood--the Constitution operated much as it did in the states. But territories not so incorporated--in other words, colonies intended to held as such indefinitely--were distinctive. Only "fundamental constitutional rights" applied in this territory, despite US sovereignty being absolute. This

³³ May, *American Imperialism*, 1991 at ix.

³⁴ CHRISTINA BURNETT AND BURKE MARSHALL, EDS, *FOREIGN IN A DOMESTIC SENSE: PUERTO RICO, AMERICAN EXPANSION, AND THE CONSTITUTION* (DUKE UNIVERSITY PRESS 2001).

holding has proved critical to much of the jurisprudence of legal spatiality throughout the 20th century. Despite seeming increasingly archaic, it remains the law to this day.

THE DECLINE OF STRICT TERRITORIALITY

The *Insular Cases* demonstrated conclusively that there was daylight between the Constitution and the sovereign territory of the US. The Constitution followed the flag but, as Elihu Root quipped, never quite caught up. The Constitution had full force within the confines of the various states. But territories could be held by the federal government, as California was, and ruled by a military government. And colonies could be held, as Puerto Rico was, without the Constitution applying fully. This set of beliefs was consistent with the prevailing 19th century Westphalian vision which took territoriality seriously, accepted conquest as legitimate, and paid obeisance to the notion that one sovereign's laws could not intrude in the space of another.

This worldview began to change in the mid-20th century. Change in legal spatiality was exhibited in several contexts. Within the US, the law governing the jurisdiction of a state over non-residents underwent marked change, increasingly permitting the assertion of personal jurisdiction against actors that caused harm from outside state borders. Second, the regulatory laws that governed the growing administrative state were increasingly found to have extraterritorial effect. While US courts maintain to this day a doctrinal "presumption against extraterritoriality," that presumption is easily rebutted in several key regulatory areas. Third, at the height of the Cold War the Supreme Court reconsidered the extraterritorial scope of the Constitution itself. In the landmark case of *Reid v. Covert*, which involved the trial of an American in the UK by US military authorities, the Court held that the full panoply of constitutional rights applied to Americans abroad, notwithstanding any treaty to the contrary. In so doing it directly overruled *Ross*.

The Rise of Extraterritoriality: Regulatory Law

American Banana, decided at the height of the first wave of globalization, laid down a rule of jurisdictional congruence clearly in line with that of *Ross*. Like *Ross*, this decision would be overturned during the 20th century, but in the case of statutory extraterritoriality change came much more quickly. Several cases in the 1920s and 1930s chipped away, in perhaps inadvertent but ultimately significant ways, at the view that US statutes were territorially-bounded. In *Bowman v. US* the Supreme Court held that “criminal statutes which are, as a class, not logically dependent on their locality for the Government’s jurisdiction” do not run afoul of any presumption against extraterritorial application.³⁵ *Bowman* involved a fraud claim relating to an international steamship company (and thus an example of how increasing global trade challenged the functionality of strict territoriality). For regulatory law the signpost in the doctrinal evolution is the 1945 case of *US v. Aluminum Co of America*. With *Alcoa*, the federal courts began in earnest to move to an “effects” test for asserting prescriptive jurisdiction. This was seen as a “startling projection” of existing doctrine by European observers.³⁶ Under an effects test, the spatial location of the underlying activity was not the key criterion: the location of economic impact was.

Alcoa in part reflected larger moves afoot in American law. Federalism had led to numerous domestic jurisdictional rules that reflected territoriality, and indeed flowed directly from Westphalian principles. But across a range of areas of the law assumptions of legal spatiality were undergoing transition by the 1940s. 1945, when *Alcoa* was decided, was also the year of *International Shoe*, which decisively rejected the strict territorial

³⁵ 260 US 94 (1922) at 98.

³⁶ See eg. RY Jennings, Extraterritorial Jurisdiction and the US Antitrust Laws, 33 Brit Yb of International L. (1957) at 165

underpinning of the law of personal jurisdiction in the US.³⁷ In *International Shoe*, the notion of minimum contacts with the forum state as sufficient for personal jurisdiction "displaced the entire conceptual structure of the strict territorial theory."³⁸ As the US economy nationalized, it became increasingly dysfunctional to rely on the older territorial theories of jurisdiction. Growing international interdependence created similar incentives. Reliance on functional interests such as the effects of activities on local markets, rather than the spatial location of the actors or acts, was soon accepted in a number of areas of the law. By the 1950s, for example, the Supreme Court applied the effects-based justification for extraterritoriality of *Alcoa* to trademark law and maritime law.³⁹ By the 1970s, extraterritorial applications of regulatory law were common.

A "presumption against extraterritoriality" remained, however, as a canon of statutory construction and reappeared occasionally—making for a complex, even inconsistent pattern of caselaw involving the territorial reach of the law. Federal courts were particularly eager to invoke assumptions of territoriality in cases involving the reach of American labor laws, for example. In 1991, the Supreme Court held that the Civil Rights Act did not apply to American employers operating overseas. That case treated the presumption against extraterritoriality as quite strong and seemed to find the notion that Congress meant to extend civil rights law abroad implausible. In so doing the Court, in Larry Kramer's words, "slipped back to the 19th century, seemingly unaware that it was doing so."⁴⁰ But such cases were the exception—and Congress quickly acted to rewrite the statute to make clear that it did apply extraterritorially. In most regulatory areas, especially antitrust regulation, both the executive branch and the courts rapidly embraced the idea that US law applied globally.

³⁷ Rutherglen, *International Shoe and the Legacy of Legal Realism*. 2001 Sup. Ct. Rev. 347.

³⁸ *Id.*

³⁹ *Steele v. Bulova Watch*, 344 US 280 (1952); *Lauritzen v. Larsen* 345 US 571 (1953).

⁴⁰ Kramer at 202.

The DOJ aggressively pursued cartels abroad. Where firms were located was irrelevant; what mattered was whether they impacted US markets.

Deterritorializing the Constitution

In 1956 an American civilian killed her husband, a US military officer, at an airbase in England and was convicted by a court-martial of murder. She argued that she had been denied the full protection of the Constitution. (Courts-martial do not follow the procedures that ordinary criminal trials do). The Supreme Court had upheld courts martial for military dependents just a few years before, in *Madsen v. Kinsella*,⁴¹ a case also involving the murder abroad of a US soldier by his wife. In *Madsen* the murder occurred in postwar Occupied Germany; *Reid v. Covert*, by contrast, involved peaceful forward deployment in the UK. The Eisenhower Administration argued that the Constitution could not possibly have effect in the UK, citing the principles of legal spatiality declared in *Ross*. Now, however, the Supreme Court rejected jurisdictional congruence, arguing that "when the Government reaches out to punish a citizen who is abroad, the shield which the Bill of Rights and other parts of the Constitution provide...should not be stripped away just because he happens to be in another land."⁴²

To make the point sharply, the Court heaped scorn on the *Ross* vision of territoriality, calling it a "relic from another era."⁴³ To Justice Black, the US consular court that convicted Ross blended powers in a manner that represented "the very acme of absolutism."⁴⁴ *Ross*, the Court said, could not be understood outside its peculiar setting. That setting was a 19th century world divided into civilized and uncivilized states, with great

⁴¹ 343 US 341

⁴² Reid at 5-6.

⁴³ Reid 12.

⁴⁴ Reid at X

power war frequent, conquest endemic and imperialism at its height. The mid-20th century—and the Cold War—were clearly different.

In deciding *Reid* the Court also sought to discredit the underlying notion that the Constitution did not fully follow the flag. *Reid* was nearly as dismissive of the *Insular Cases* as it was of *Ross*. The decision did not challenge the existence of status of forces agreements that guaranteed US servicemembers greater protections abroad in nations hosting US bases than US civilians in the same nation would enjoy. Extraterritorial in a sense—they mandated practices common to the US, though often uncommon to the local jurisdiction—these agreements typically offered more, rather than less, protection than local law did. Likewise *Reid* did not question the right of the US to try service members in a parallel justice system that offered weaker constitutional protections—regardless of where these individuals physically were located. Rather, it made clear that the US government cannot, as far as civilians are concerned, distinguish its treatment of them based on *where* that treatment occurs. Geography, in the view of the majority, did not determine justice.

Reterritorializing the Constitution

Reid involved an American citizen. It is important to underscore that the global view of legal spatiality enunciated in *Reid* did not straightforwardly extend to non-citizens. Yet in the postwar period aliens were increasingly in contact with US officials abroad. And the US continued to have a major military presence abroad throughout the Cold War, including the occupation of Berlin. The unusual *Tiede* case grew out of this occupation. *Tiede* was a criminal proceeding that arose in the US Court for Berlin. The question in *Tiede* was, as in *Reid*, the right to a jury trial; the larger question the applicability of the Constitution to a proceeding against a noncitizen by the US government beyond the territorial bounds of the US. The US argued bluntly that the US presence in Berlin “grows out of conquest, *not the*

*consent of the governed.*⁴⁵ Consequently, the government argued, whatever rights the defendant had stemmed not from the Constitution, but from an affirmative grant by the Executive. This argument was rejected wholesale by the Berlin court. It is a “first principle of American life—not only life at home but life abroad—that everything American public officials do is governed by, measured against, and must be authorized by the US Constitution.”⁴⁶ The Court nonetheless took care to limit the impact of its ruling:

This Court does not hold that jury trial must be afforded in occupation courts everywhere and under all circumstances; the Court holds only that if the United States convenes a United States court in Berlin, under the present circumstances, and charges civilians with non-military offenses, the United States must provide the defendants with the same constitutional safeguards found in any other United States court.⁴⁷

Tiede, while fascinating, was on all dimensions an aberrational case—and not only because it declared that noncitizens abroad had constitutional rights. Much more common were cases involving US agents acting against criminals abroad. The expansion of policing across sovereign borders raises many issues related to the geographic scope of constitutional protections, both on the high seas and in foreign territory. As global markets for licit goods grew, so did global markets for illicit goods.⁴⁸ Narcotics trafficking was the most salient

⁴⁵ *Tiede* at 239

⁴⁶ *Id* at 244.

⁴⁷ *Id* at 260.

⁴⁸ Kal Raustiala, *Law, Liberalization, and International Narcotics Trafficking* 32 *NYU J International Law and Policy* (1999).

example, and in the postwar period the US increasingly prosecuted the drug war abroad as well as at home.

US v. Verdugo-Urquidez, decided in 1990, involved drug trafficking and illustrates the continuing power, and even retrenchment, of territorial assumptions with regard to non-citizens. *Verdugo* concerned the search by US agents of a suspected Mexican drug smuggler's home in Mexico. The defendant challenged the search as a violation of his 4th Amendment right against unreasonable search and seizure. The Supreme Court rejected, holding that the 4th Amendment does not apply to searches of non-citizens abroad. Citing the *Insular Cases*, the Court maintained that spatial distinctions were permissible and citizens and aliens distinct. Outside the borders of the US the Constitution applies to each in dramatically different ways. The interesting twist was that in *Verdugo* the defendant was actually *within* US territory at the time of the search. Having been arrested and detained in San Diego, he was nonetheless unquestionably within the border. His property, however, was not. For the court this spatial fact was critical. Had the property been in San Diego, but he in Mexico, there is no doubt a warrantless search would have run afoul of the 4th Amendment. It was the location of Verdugo's home, not his person, that ultimately determined the outcome of the case—despite the (incorrect) claim by the Court that previous cases “establish only that aliens receive constitutional protections when they have come within the territory of the [US] and developed substantial connections with this country.”⁴⁹ The “substantial connections” principle predicts that a first-time visitor, in the US only briefly, would enjoy the barest minimum of protection by the 4th Amendment. Yet that is not the result: a Japanese tourist stopping over in Seattle en route to Canada enjoys the full protections of the 4th Amendment. The rationale for this protection is simply spatial: location within the US is deemed fully sufficient to invoke the 4th Amendment. A pure spatiality principle—rather than a substantial connections principle—is also reflected in both *Eisentrager* and *Quirin*—

⁴⁹ At 271.

the precedents upon which the US relied in the recent Guantanamo litigation. Both suggest that even enemy aliens captured abroad but brought back to the US for detention and trial would enjoy access to US courts on territorial principles alone.⁵⁰

The verdict in *Verdugo* was significant because US law has long held that aliens in the US enjoy many of the same rights as citizens. To be sure, US law at times looks to formal entry into the US rather than pure spatial location. And the exact location of the territorial borders of the US is occasionally unclear. In 1950 for example, the Supreme Court held that “harborage on Ellis Island is not an entry into the United States,” despite the fact that Ellis Island is incontrovertibly American territory.⁵¹ The rationale for the continuing commitment to strict territoriality for aliens is unclear. But it is perhaps best understood as a combination of two ideas: a vestigial commitment to jurisdictional congruence—held over from the 19th century era of strict territoriality—coupled to the idea that the alien is a sort of guest when she is within the borders of the US. As a result, aliens enjoy the constitutional protection while within the borders of the US, but only while within those borders. Prior to the decision in *Reid* the guest theory made more sense, since for all individuals—citizen or alien— the Constitution was spatially-delimited. Post-*Reid*, continued adherence to a guest theory is on far weaker ground.

Rehnquist’s opinion in *Verdugo* was bolstered by an extensive discussion of the policy consequences of a territorially-unbounded jurisprudence. According to the Chief Justice extraterritorial constitutional protection for aliens

would have significant and deleterious consequences for the United States in conducting activities beyond its boundaries...The US frequently employs Armed

⁵⁰ In other words, it is not the place of the capture but rather the place of *detention* that is germane to the habeas claim.

⁵¹ *Mezei*, 345 U.S. 206, 213.

Forces outside this country—over 200 times in our history—for the protection of American citizens or national security. Application of the Fourth Amendment to those circumstances could significantly disrupt the ability of the political branches to respond to foreign situations involving our national interest....For better or for worse, we live in a world of nation-states in which Government must be able to “function effectively in the company of sovereign nations.”⁵²

The vision of international relations is one of Hobbesian conflict and anarchy. “Situations threatening to important American interests may arise halfway around the globe, situations which in the view of the political branches of our Government require an American response with armed force.”⁵³ In this dangerous setting, the court claimed, US law enforcement agents, no less than US armed forces, cannot be fettered by constitutional restrictions that other states lack and that, moreover, were intended for a setting of relative peace and community.

In short, since *Reid* spatial location has been irrelevant to the constitutional rights of American citizens. But that principle has not been extended to non-citizens. Indeed, the Bush Administration recently called “extraordinary” and “unfounded” the claim that “aliens captured outside this country’s borders and detained outside the territorial sovereignty of the United States can claim rights under the US Constitution.”⁵⁴ To be sure, a handful of cases have argued that non-citizens abroad enjoy certain protections of the Constitution. The 9th Circuit has held that the 5th Amendment due process clause applies to aliens prosecuted for

⁵² 273-275

⁵³ 275

⁵⁴ DOJ Motion to Dismiss in DC Circuit at 1. Note that the DOJ specifically refers to aliens “captured outside our borders”—as if aliens captured *inside* our borders, but moved beyond them later, somehow might have constitutional rights “stick” to them.

drug smuggling on the high seas.⁵⁵ Most recently, a federal court held that foreign suspects interrogated abroad by the FBI must receive *Miranda* warnings.⁵⁶ These cases are outliers, however, and to date their reasoning has not been endorsed by the Supreme Court.

GLOBALIZATION, TERRITORIALITY, AND THE INTERNATIONAL SYSTEM

The preceding sketched the contours of the evolution of legal spatiality in American law. In this account territoriality--a defining attribute of the Westphalian state--gradually weakened and legal jurisdiction was increasingly understood in non-spatial, functional terms. Casual empiricism suggests that globalization has driven the US to relax doctrines of legal spatiality as interdependence has risen in the postwar era. Globalization is frequently said to produce an "unbundling" of the relationship between sovereignty, territoriality, and state power."⁵⁷

Globalization reflects "the sense that activities previously undertaken within national boundaries can be undertaken globally or regionally--to some extent 'deterritorialized.'"⁵⁸

Looked at more closely, however, the relationship between globalization and the evolution of territoriality in American law appears problematic.

Though contemporary globalization is often framed as an unprecedented development, in fact the world has seen at least two waves of globalization. The first ran from the late 19th c through 1914. The pre-WW I world was in several ways more tightly integrated than it is today.⁵⁹ In an oft-cited passage, John Maynard Keynes wrote that

⁵⁵ US v. Klimavicius, 144 f2d 1249 (1998). Other cts disagree: see Suerte, 5th Circ 2002.

⁵⁶ Bin-laden, SDNY

⁵⁷ Held et al, Global Transformations at 8

⁵⁸ N. Woods, political econ of globalization at 5. See also Agnew, territorial trap

⁵⁹ Baldwin and Martin, supra at 1; see also Hirst and Thompson, The Global Economy: Myths and Realities, International Affairs (1997); Held et al, 1999 at 5.

What an extraordinary episode in the progress of man that age was which came to an end in August 1914!...The inhabitant of London could order by telephone, sipping his morning tea in bed, the various products of the whole earth...he could at the same time and by the same means adventure his wealth in the natural resources and new enterprise of any quarter of the world...he could secure forthwith, if he wished it, cheap and comfortable means of transit to any country or climate without passport or other formality..."⁶⁰

Overall trade levels were high. As a share of GDP, exports from the US were roughly the same in 1989 as they were in 1889.⁶¹ Inventions such as the telephone and transoceanic cables linked markets at breathtaking speed, and financial movements intensified enormously. The gold standard made currency risk minimal and capital highly mobile.⁶² Immigration levels were as high or higher than today. With regard to financial liberalization and mobility—two allegedly signal aspects of contemporary globalization—it has been said that "the only real debate among informed observers is whether we have returned to 1914-levels of financial integration."⁶³ In short, across many dimensions the pre-Great War era was as globalized as our own.

This historical pattern raises an empirical puzzle: why does the current wave of globalization correlate with a decoupling of territory from sovereignty in American law, while the first wave correlates with the height of legal spatiality?

⁶⁰ Keynes, 1919, quoted in Sachs and Warner 1995.

⁶¹ Irwin at 43

⁶² Baldwin and Martin at 23

⁶³ B and M At 7-8

International Influences on the Decline of Strict Territoriality

The evolution of legal spatiality has not been previously studied in a systematic fashion.⁶⁴ Nor have scholars theorized about the causes of this evolution even in the discrete areas of the law that have been examined. Existing causal claims have largely revolved around doctrinal changes within particular legal rules, idiosyncratic statutory developments, and the like.⁶⁵ These local, specific factors are undoubtedly important. My claim in this chapter, however, is that the broad evolution of legal spatiality, because it is intrinsically tied up with conceptions of the Westphalian territoriality, cannot be understood solely through reference to domestic causal factors. Rather, broad shifts in international relations, both economic and political, have influenced legal conceptions of territoriality in the US. Shifts in globalization and in interstate conflict have both shaped territorial conceptions of domestic law. Nonetheless, the influence of these changes cannot be crisply demonstrated and thus my arguments are suggestive rather than conclusive.

Below I present four broad hypotheses about the connection between the evolution of the international system and the evolution of spatiality in US law. Each is consistent with a core argument: that rules of legal spatiality reflect American power and interests rather than normative ideals. When claims of jurisdictional congruence benefit important US interests, Congress, the president, and the judiciary cling to, or revive, older territorial principles. When functional pressures demand a more global approach, spatiality has been altered in favor of extraterritoriality. As US power has grown, and the scope of US interests abroad has grown, the US has been increasingly willing and able to assert its law extraterritorially. Adherence to principle is an allegedly signal aspect of the legal process. But adherence to principle is conspicuous by its absence here. With few exceptions extraterritoriality has been asserted to benefit the US and spatial limits to the law have been used to limit the rights and

⁶⁴ An exception is Neuman, *supra* [book]

⁶⁵ E.g. Kramer, *supra*, (explaining extraterritorial assertions of regulatory law in terms of changes in conflicts doctrine).

powers of outsiders. I offer four arguments about why this uneven evolution in legal spatiality has occurred.

Globalization Past and Present

I have already cast doubt on the simple claim that globalization is the key force eroding legal spatiality. The first wave of globalization correlates with the high point of strict territoriality in US law. However, the first wave of globalization and the second, while sharing important similarities, also exhibit major differences. Considering these differences sheds light on what precisely about the process of globalization has influenced changes in territorial doctrines.

One difference is the rise of the regulatory state during the 20th century and the distinctive nature of contemporary trade. *Greater scope and scale of domestic regulation creates more scope for divergence and hence greater incentives for unilateral extraterritorial assertion. The current era of globalization promotes such assertions because it exhibits more extensive intra-industry trade and multinational production chains.* Because domestic firms are more likely to be directly competing with foreign firms facing differential regulatory terrain, the rise of intra-industry trade creates greater political incentives to use domestic law extraterritorially to regulate economic activities abroad.

It is indisputable that we have a much more elaborate domestic regulatory apparatus today than in 1900. And unlike the pre-1914 era, contemporary societies expect government intervention in the economy and punish leaders who fail to deliver growth and stability. This is the “compromise of embedded liberalism,” in John Ruggie’s famous phrase. Greater intervention is true throughout the advanced industrial democracies. Extensive intervention yields extensive rules, and one result is cross-national divergence in specific regulatory rules. While many efforts at regulatory harmonization exist, and global convergence in regulatory policy is certainly occurring, important differences remain. These differences create incentives for extraterritorial assertions: if regulatory rules were globally uniform, as long as each state enforced their rules even-handedly (e.g. provided national treatment) there would

be little incentive for State A to assert its law against actors located in State B. Regulatory rules are not uniform, however, and thus states often have good reasons to seek to enforce their laws against extraterritorial actors who effect their markets. These firms have, due to increased liberalization and openness, the ability to access markets that were once closed or were at least more delimited. Extraterritorial assertions of jurisdiction thus follow increases in regulation coupled to economic liberalization. The spread of American multinationals adds to this dynamic. As former deputy Secretary of the Treasury Kenneth Dam testified before Congress, "as more American firms have established more subsidiaries and branches abroad, the possibility arises that they will enter into conspiracies with local firms concerning local markets. Since those conspiracies, even where they concern local production in that country, could be found to affect U.S. exports, there is a surface argument for sustaining U.S. jurisdiction over them."⁶⁶

A second key difference between the two waves of globalization is the rise of intra-industry trade. Pre-World War I integration was characterized by *inter*-industry trade: that is, trade of one kind of good (steam engines) for something completely different (rubber). Contemporary globalization is distinctive in that we see items such as disk drives constructed in many different countries: firms based in the US assemble the devices in Thai factories with precision parts coming from Japan. This multinationality of production is new and a product itself of the tremendous decline in transportation costs, as well as the large inequalities in local labor costs that make such production patterns profitable. The current wave of globalization is also distinct in that firms from many states now directly compete in tightly integrated markets. Japanese cars vie with German, American, Swedish, and Korean cars for dominance in the global market. These varied firms thus face a direct incentive to demand "level playing fields" for their competitors. One way to achieve such a level playing

⁶⁶ October 12, 1995 http://www.ftc.gov/opp/global/dam_kw.htm

field is to negotiate global rules through new international agreements. Another is to lower domestic law to match the more lax standards of competitor states—the so-called race to the bottom. A third is to assert domestic law extraterritorially. The first is a multilateral, consensus-based solution; the second and third unilateral solutions. While multilateralism is often favored, extraterritorial extensions of regulatory law—particularly for powerful states—can also be effective. As a state’s relative economic power rises, moreover, unilateralism will be more available and hence, all else equal, more likely to be used.

This broad explanation for the rise of extraterritoriality requires further research, but is consistent with some aspects of the empirical record. The rise and consolidation of the regulatory state in the first half of the 20th century created the potential for regulatory conflict, conflict which was realized as the global economy progressively integrated in the postwar era. As intra-industry trade rose, firms increasingly sought to export their home regulatory frameworks through multilateral, but also unilateral, action. It is noteworthy that antitrust and securities law have been two of the most intensive areas of extraterritorial assertion. Both lack broad multilateral legal frameworks. Attempts at multilateral solutions have been made in the area of antitrust in particular, but these attempts have been blocked by the US, which prefers to extend its regime unilaterally and extraterritorially rather than compromise its rules multilaterally. The economic dominance of the US in the postwar era made this strategy viable. The fact that US regulatory extraterritoriality peaked in the 1970s is consistent with my argument: the American share of global GDP declined over the postwar era as Europe and Japan rebounded from the devastation of the war.

One problem with this argument is its comparative reach. The US was a pioneer in regulatory extraterritoriality. Only in recent years have its chief economic competitors, particular the EU, begun to embrace extraterritoriality aggressively. Given the broad incentives to assert regulatory law against foreign actors, why did only the US do so consistently and strongly until the last decade? It is not that European powers lacked legal doctrines permissive of extraterritoriality—indeed, French law permits French plaintiffs to

sue anyone in French courts whether or not the dispute has any connection with France.⁶⁷ One answer is suggested by the earlier characterization of extraterritoriality as a unilateral solution to regulatory divergence. US economic dominance in the postwar era—especially in the 1950s and 1960s—was overwhelming. Hence the US had the greatest economic power to act unilaterally. Most importantly, the US possessed the functional ability to enforce its laws against foreign firms because those firms were often trading in US markets or had seizable assets in US markets. The current wave of extraterritorial assertions by the EU is consistent with this argument: as the EU's economic strength has grown, the EU has been more willing to assert its law extraterritorially.

But why did European states not assert extraterritoriality vis-à-vis each other (or against middle powers such as Canada or Australia) as Europe gained economic power during the 1960s and 1970s? The same question arises with regard to Japan. This pattern remains a puzzle. It is possible that a concern with rule consistency played a role, making it difficult for courts and regulators to countenance assertions of extraterritoriality against an economically weak state but not against a strong one. Courts and regulators may have been inhibited from asserting domestic laws outside their territories by the difficulty of keeping such assertions from impacting relations with the US. Only once the EU approached economic parity with the US could Europe embrace the US' assertive extraterritoriality. Indeed, this hypothesis is supported by the evidence that EU assertions of extraterritoriality only began in earnest in the 1990s.⁶⁸

The Liberal Peace & the Decline of Territorial War

⁶⁷ Friedrich Juenger, Judicial Jurisdiction in the US and the EC: A Comparison, 82 Mich. L. Rev. 1205 (1983-4).

⁶⁸ cite to David Gerber.

One of the more striking findings in the study of international relations is the liberal peace: the existence of a general state of peace among liberal or democratic states.⁶⁹ While often disputed in the details, the claim that liberal states rarely wage war on one another—though they do wage war on non-liberal states—has proved fairly robust. Liberal states enjoy a distinct politics among one another, one in which raw military power is present but rarely utilized. What Karl Deutsch termed “a pluralistic security community” now seems emergent among the advanced industrial democracies of the West.⁷⁰ The US and Canada, for example, share the longest unprotected border in the world. Germany twice in 25 years waged total war on France, but these states now share not only a supranational legal and political system but also a common currency and central bank. While economic competitors, the advanced industrial democracies are not significant security competitors; indeed, the West has largely ceded unchallenged military supremacy to the US, which spends more on defense than the next 15 states combined. These varied changes are striking when compared to the state of affairs among Western nations a century ago.

What are the implications of these considerations for changes in legal spatiality? Reduction of military conflict does not mean the reduction of conflict; it instead can enable increased economic conflict. This yields a second argument about the causes of change in legal spatiality: *the US is less constrained in asserting extra-territorial jurisdiction vis-à-vis economic competitors in the postwar era because conflict with other Western states is less dangerous and thus less troubling.* Westphalian territorial sovereignty—a consequence of the bloody Thirty Year’s War—was predicated on the need to inhibit warfare by sealing off states from one another’s rule and jurisdiction. This conflict-minimization rationale animated the

⁶⁹ John Oneal and Bruce Russett, The Kantian Peace, *World Politics* 52, 1 (1999); Joanne Gowa, *Ballots and Bullets: The Elusive Democratic Peace* (1999); Michael Doyle, "Kant, Liberal Legacies and Foreign Affairs: Parts 1 and 2," *Philosophy and Public Affairs* 12, nos. 3-4, Summer and Fall, 1983, pp. 205-54, 323-53.;

⁷⁰ Emmanuel Adler and Michael Barnett, eds, *Security Communities* (1998)

development of sovereign territoriality throughout the subsequent centuries. Yet the risk of spillover—of economic or legal conflict leading to military conflict—has been at an historic low with regard to other advanced industrial democracies since the end of World War II. In this low risk environment, Congress, the executive branch, and the courts face stronger incentives to assert extraterritoriality even in the face of strong opposition from other states (or, alternatively, face weaker incentives to refrain) because the risks of deep conflict are low. These extraterritorial assertions are most likely to arise with regard to regulatory laws because of the deep economic links that developed among these states, particularly as contemporary globalization has accelerated.

By contrast, in the 19th century extraterritorial assertions of law were frequently seen as dangerous incursions into the sovereignty of another state. This was true even if in particular cases—such as *American Banana*—the sovereigns in question hardly posed a threat, because the *principle* could not be readily contained such that it only applied to weak states. As the Supreme Court wrote in that case: “For another jurisdiction, if it should happen to lay hold of the actor, to treat him according to its own notions rather than those of the place where he did the acts, not only would be unjust, but would be an interference with the authority of another sovereign, contrary to the comity of nations, which the other state concerned justly might resent.”⁷¹ The implication is that this resentment may well give rise to international conflict, conflict which juridical notions like comity were meant to forestall. The federal courts in the US understood sovereignty through the 19th century prism of conflict-minimization. Sovereignty was total: “The very meaning of sovereignty is that the decree of the sovereign makes law.”⁷² An extraterritorial assertion of jurisdiction over acts taking place on another states territory was truly an interference with another sovereign’s prerogative. Given the propensity in this era for war among great powers, interference with

⁷¹ banana at 358

⁷² banana at 358

the authority of another sovereign was readily and unsurprisingly viewed as no trifling matter. As the Supreme Court stated as late as 1963, the presumption against extraterritoriality was designed “to protect against unintended clashes between our laws and those of other nations which could result in international discord.”⁷³

Starting in the Cold War the need for such protection against clashes—or at least the concern on the part of the US about the implications of clashes—diminished markedly. European states huddled under the US nuclear umbrella, knit together both by the paramount Soviet threat and by rising levels of economic interdependence. At the same time, formerly warlike Europe embarked on a novel project of integration. The West coordinated policies extensively through such forums as the OECD and NATO and through a diverse array of multilateral agreements and institutions. International relations became highly institutionalized. In this setting, the likelihood of economic conflict spilling over to military conflict is markedly diminished.

The effects of the liberal peace are magnified by the marked decline in territorial wars in the postwar world. Territorial conquest was legion in the pre-World War II period; in the postwar era only two plausible examples exist: South Vietnam and Kuwait. The reasons for this shift are contested, but it is clear that in the contemporary economy, where human capital and innovation are primary engines of economic growth, control over territory is no longer as economically advantageous as it once was.⁷⁴ Indeed, some states prosper with

⁷³ [*McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 20-22, 83 S.Ct. 671, 9 L.Ed.2d 547 \(1963\)](#)).

⁷⁴ “When barriers to international trade are high, the benefits of national economic integration are relatively large. In those circumstances, states have an incentive to expand their internal market by increasing the area and population they control. When barriers to international trade fall, the benefits of national economic integration decline, relative to other political goals, and the state can be expected to shrink.” Kahler and Lake, *Globalization* volume, at 19.

virtually no territory at all, Singapore being an extreme example.⁷⁵ Regardless of cause, it is uncontested that territorial war underwent a strikingly-rapid decline during the 20th century.⁷⁶ This phenomenon, unlike the liberal peace, applies to all types of states, though it is arguably more robust among liberal states.

Thus shifts in conflict can yield shifts in territoriality. States, most strikingly the US, have embraced more aggressive extraterritoriality in response to the reduction in the prevalence of inter-state war among the advanced industrial democracies. That decline has eliminated one of the key rationales of the 19th century for constraints on extraterritorial assertions: the fear that such acts will be seen as belligerent and hence dangerous encroachments on state sovereignty. To be sure, extraterritorial assertions of legal jurisdiction by the US have continued to deeply upset other states, leading to the enactment of blocking and claw-back statutes and significant diplomatic protests from allies. But the US can be reasonably secure that this conflict will not fundamentally rupture relations--and after several decades, and many provocations by the US, it has not. In short, today there is much less need for deference to the territorial jurisdiction of other sovereigns when those sovereigns are part of the broad liberal peace. This creates a permissive cause of the expansion of opportunistic extraterritorial jurisdiction, especially in areas characterized by economic competition.

Global Power Projection and the Territoriality of Rights

A third argument similarly relates to changes in international security, but focuses instead on the uneven evolution of spatiality with regard to constitutional rights. Here the particular nature of military conflict influences changes in rules of territoriality. One of the

⁷⁵ State size has on average been shrinking in the postwar era. See David Lake and Angel O'Mahoney (this volume)

⁷⁶ Zacher, *supra*.

signal facts of the postwar period was that the US became a superpower with global reach. The US' superpower status—and the totalizing conflict of the Cold War --meant that the US actively projected force around the world. One result was a tremendous increase in US troop deployments abroad as the policy of containment was implemented. These troops brought many dependants. *The vastly larger number of US citizens stationed abroad in the mid-20th century, compared to the 19th century, made the costs of maintaining strict territoriality with regard to civil rights far larger.*

Reid v. Covert radically changed the territorial scope of constitutional rights in American law. Until 1957 the US maintained a rigidly-territorial conception of constitutional rights. The 1880 *Ross* decision clearly articulated a Westphalian vision. And the early 20th century *Insular Cases* made clear that the Constitution did not necessarily or fully follow the flag, even when US sovereignty over its imperial acquisitions was unquestioned. Yet *Reid* decisively overturned the rule that the Bill of Rights was spatially-bound for citizens. Why this abrupt change in the understanding of territoriality? The Cold War plainly presented a radically different context for the decision the Supreme Court faced in *Reid*--which was, on its facts, quite similar to that faced 75 years earlier in *Ross*. In 1957 nearly 1 million US military personnel were stationed around the globe in some 63 countries.⁷⁷ With them were over 250,000 dependent civilians. This represented a massive deployment of military force and of civilian dependents, one without historical precedent. Perhaps most striking, on average there were 435 trials a year of dependent civilians in the 1950s--nearly one a day. The large number of trials meant that the *Ross* precedent was not subject simply to occasional invocation. Rather, it might arise persistently and in a wide array of cases.

Consequently, reinforcement of territorial limits on constitutional rights would have denied those rights indefinitely to a quarter of a million citizens --*simply as a result of their*

⁷⁷ See the oral argument in *Reid I*, in *Landmark Briefs*. The 63 figure comes from the US government's oral argument in *Reid II*.

presence on foreign soil. By comparison, prior to the Iraq war and occupation the US had less than one quarter of the number of troops stationed outside US territory, despite an overall population twice the size. Thus a large fraction of the citizenry of the time was implicated by the decision in *Reid*, either directly or through familial ties. Moreover, there was no reason in 1957 to believe that the global projection of US military power would decrease. If anything, the Soviet threat seemed to be growing. (Indeed, Sputnik was launched in October of 1957, the year *Reid* was decided). In short, for the US as a society an unprecedented number of citizens were living abroad. Continued territorial limits on rights would have a major and unparalleled impact on civil liberties.

Reid was decided by the Warren Court, and undoubtedly rising civil rights consciousness in the US played an important role here as well as in subsequent decisions extending the *Reid* framework. But in the Cold War context of enormous troop deployment by the US military, it is highly implausible that the Court was not influenced by the recognition that extensive extraterritorial justice meted by the US government was now going to be a fact of life for the US. As the US Government itself argued in the case,

In the troubled circumstances of our time our national security requires that we station in many foreign nations large military and naval establishments. Sizable civilian contingents closely accompany, live with, and form integral parts of these establishments...equally significant to the armed forces is the need to sustain the morale of troops stationed in many and remote corners of the earth—morale which, even apart from the calls of humanity, promotes stability of the complement by permitting longer periods of overseas assignments and encourages reenlistments. To this end, the services have transported at military expense hundreds of thousands of dependents...⁷⁸

⁷⁸ Brief in *Reid* I, at 98.

In other words, given the vast numbers of citizens abroad, there would be many future Clarice Coverts.

Of course, it is hardly the case that the US failed to engage in extraterritorial justice in the era of *Ross*—as the creation of the US District Court for China makes clear. But the number of individuals who fell within the China court’s jurisdiction was small, on the order of a few hundred.⁷⁹ In addition to stark numerical differences, the Justices in *Reid* may also have viewed the situation of the defendant differently than had the *Ross* court. US citizens hauled before the US District Court for China were usually present in China for economic gain (missionaries were the other large category). Women like Clarice Covert were accompanying their husbands to the frontlines of the Cold War. This was, as the US government conceded, not for their pleasure but for the assistance and morale of the troops.⁸⁰

The justices in *Reid* never presented a theory of legal spatiality that explained why the Constitution was to be read globally for citizens, but not for aliens. And to be sure, some members of the court worried about how the decision to extend constitutional protections for citizens extraterritorially might inhibit our new role as superpower. One justice noted that "Our far-flung foreign military establishments are a new phenomenon in our national life, and I think it would be unfortunate were we unnecessarily to foreclose...our future consideration of the broad questions involved in maintaining the effectiveness of these national outposts, in the light of continuing experience with these problems."⁸¹ Nonetheless the tenor of the decision was unequivocal. Previous territorial limitations on

⁷⁹ Personal communication, Eileen Scully, May 2004.

⁸⁰ In the oral argument in *Reid II* the government noted that “the dependents are not sent overseas with these various forces in 63 countries throughout the world today for their own pleasure. It’s because of the need, both in morale and in assistance and aid to the men in services, that they are included in the manner that they are.” At 824.

⁸¹ *Reid* at 1261

constitutional protections are outdated in the new postwar world of global military struggle—"relics from another era."⁸²

Territoriality, Aliens, and Transboundary Bads

Despite the varied changes described above, territory retains great importance in some areas of US law. This is particularly true with regard to such transboundary "bads" such as narcotics and terrorists. The great increases in technology of travel associated with globalization have rendered states far more vulnerable and sensitive to transboundary flows of persons and goods—the attacks of September 11th being a salient example. One result is strong assertions by the executive and judiciary in the US of territoriality in areas involving potentially dangerous influences from abroad: what might be called the dark side of globalization. Most notable are military and police actions by US agents against overseas aliens. In these areas that the executive branch, Congress, and the courts are most willing to renew or revive older conceptions of legal spatiality. Thus *security threats by aliens give rise to strong assertions of traditional territoriality*.

For example, the Bush Administration chose to place foreign enemy combatants in Guantanamo Bay and not a military base on the US mainland primarily for legal reasons. The Administration asserted—and many lower courts endorsed—the claim that foreign nationals held abroad lacked any constitutional rights. *Rasul v Bush*, the 2004 case in which the Supreme Ct held that the federal habeas statute permitted aliens abroad to challenge their detention in federal court, did not squarely reject this claim, though it did cast some doubt on it.⁸³ Similarly, the Supreme Court's decision in *Verdugo*, which held that the 4th Amendment did not apply to an alien's property outside the US, is replete with language suggesting that we continue to live in a dangerous world with serious threats lurking beyond

⁸² Reid at

⁸³ Indeed, the Bush Administration continues to argue that the detainees held in Guantanamo and other locations abroad lack any *constitutional* rights whatsoever.

our borders. The claim seems to be that the protections of the Constitution, though well-designed to safeguard liberty at home, cannot realistically be extended abroad without endangering the US. While *Verdugo* reinstates jurisdictional congruence for the 4th Amendment, what is perhaps most striking about the case is a feature that receives little attention: the fact that US government agents were engaged in criminal search and enforcement actions within the sovereign territory of Mexico. Increasingly the US is projecting both its police forces and its military forces abroad in an effort to stanch the flow of narcotics into American territory. Policing across borders is on the rise precisely because globalization has made it far easier for all goods—licit and illicit—to move rapidly and easily around the globe.⁸⁴ Thus the US is extending not only its criminal law but also its criminal law enforcement apparatus extraterritorially. But it refuses to extend extraterritorially the protections that ordinarily accompany that domestic criminal law and procedure.

Terrorism, narcotics, weapons, and refugees move rapidly around the world and across US borders. In these situations, the world of today appears more, rather than less, dangerous than the world of the 19th century. Hence the executive branch, and the courts, frequently argue that relatively strict territoriality needs to be maintained, not dismantled. Both the executive branch and the judiciary have sought to maintain traditional territorial limitations on constitutional rights for aliens, even as—arguably especially as—US substantive law is increasingly wielded abroad. The result is that spatial location has been deemed constitutionally irrelevant for citizens, but highly relevant aliens.

Power and Purpose

The preceding section presented four broad claims about the relationship between the international system and change in legal spatiality. Globalization is undoubtedly an

⁸⁴ Ethan Nadelmann, *Cops Across Borders: The Internationalization of US Criminal Law Enforcement* (Penn State Press, 1993).

important driver of the erosion of jurisdictional congruence in American law, just as economic integration among the states of the US heralded the demise of strict territoriality in personal jurisdiction as a matter of domestic law. But economic change is not the sole driver of jurisdictional change. Rather, military conflict--which has diminished in some areas of the globe but continues in others--has also driven the articulation and rearticulation of legal rules about sovereignty and territory. The striking reduction in conflict among liberal states has facilitated assertions of extraterritorial jurisdiction as the fear of spillover from legal to military conflict has abated. At the same time, the persistence of conflict during the Cold War led to extensive projection of force abroad by the US, which in turn helped sway the Supreme Court to extend constitutional protections for citizens globally. And continued conflict over the dark side of globalization--sex traffickers, drug smugglers, money launderers, and especially terrorists--has only bolstered the willingness of Congress, the courts, and the executive branch to fortify the principle that aliens abroad lack constitutional protections against the US government even as they increasingly are held to fall within American prescriptive jurisdiction. (The federal courts have nonetheless never offered a satisfactory account of how constitutional rights written with regard to "persons" can apply globally to citizens and not to aliens.)

What explains the broad evolution of legal spatiality I have sketched? Legal scholars sometimes claim that law evolves towards normative principles oriented around conceptions of justice, and reflects principled commitments within a society and a legal tradition. Legal rules are also said to change as the result of discrete doctrinal developments that accrete over long stretches of time. Does the evolution of legal spatiality--away from jurisdictional congruence and toward more flexible understandings of jurisdiction--reflect clear normative commitments grounded in our constitutional theory? It is difficult to see how. The jurisdictional congruence of the 19th did rest on an overarching principle--strict territorial sovereignty. The application of strict territoriality was fairly, though not wholly, consistent in this era. Even the major exception--the extraterritorial courts of the time--did not so

much undermine the principle as support it, by highlighting the centrality of the principle for sovereign states (who never had to face extraterritorial jurisdiction in their own territories). The evolution of legal spatiality over the last century, however, reflects no clear set of principles. The persistent disjuncture in the constitutional rights accorded aliens and citizens abroad, for example, has never been explained in a manner consistent with the strong protection of alien's rights within the sovereign borders of the US. There is no overarching normative principle that can fit this pattern.

A more compelling account of the development of rules of legal spatiality looks to the broad interests and power of the US. This account is instrumental and power-based, and argues that the rule evolution I have charted tracks shifts in underlying political incentives and capabilities. Territorial sovereignty delimits American legal rules when such limits are useful to US policymakers, but leaves rules geographically unfettered when that too is useful. US regulatory and criminal law, for example, has been held to apply globally because in a globalized economy the US generally benefits from the extension of its law abroad. During the 20th century the incentives to extend US law abroad grew as clashes developed between emerging regulatory systems and rising inter-industry trade created political pressure to ensure level playing fields. The evolution of legal doctrine reflects these incentives. American power—both economic and military—made it possible for the US to assert such claims. Legal protections that would constrain the exercise of US power, however, have rarely followed such substantive extensions.

This account is broadly consistent with power-based theories of state behavior. Over the last century, executive actions, judicial decisions, and congressional lawmaking with regard to territoriality have all reflected the perceived interests of the US in the field of foreign relations and, of course, the direct interests of the litigants that appear before the federal courts. In many of the relevant cases the US government was the key litigant. The executive branch thus was well positioned to argue that particular conceptions of territoriality would aid or hinder particular geopolitical aims. Federal judges are not immune

to political and economic context. Particularly in the field of foreign relations law, US courts are notoriously deferential to the executive branch, which faces direct incentives to seek the most advantageous legal rules regarding extraterritoriality.⁸⁵ It thus no surprise that the evolution of territoriality in American law reflects shifting assessments of American interests toward jurisdictional congruence and, most fundamentally, the shifting geopolitical and economic contexts that give rise to these new assessments. In a time in which US unilateralism is receiving increasing attention and censure, it is worth noting that extraterritoriality—particularly the *a la carte* extraterritoriality of the last 50 years—is equally unilateralist.

Conclusion

Over a decade ago John Ruggie declared that it is "truly astonishing that the concept of territoriality has been so little studied within international relations."⁸⁶ This statement is equally true with regard to legal doctrines of territoriality. It is within law—both international and domestic—that conceptions of territory are most clearly and strikingly instantiated. Thus rules of legal spatiality present an unparalleled window on the evolution of territoriality. As this chapter has shown, conceptions of territoriality have changed radically over the last century. Once tightly fettered to sovereign soil, law is increasingly disconnected from land.

Change in legal rules and institutions is rarely considered in light of international influences. My contention is that we can understand the broad path of American legal doctrine regarding territory not by looking within the law, narrowly, but by looking without: at the far-reaching economic and military shifts that have transformed world politics during

⁸⁵ On the extent of deference see Thomas Franck, *Political Questions/Judicial Answers: Does the Rule of Law Apply to Foreign Affairs?* (Princeton University Press, 1992)

⁸⁶ Ruggie, *supra* at 174.

the 20th century. While globalization plainly has influenced territorial doctrines, the influence is less direct than commonly supposed. It was only as the nature of globalization itself changed--as well as the nature of the state and its place in the national and global economy--that extraterritoriality became an increasingly attractive legal principle. Yet, as this chapter has made clear, not all states embraced extraterritorial jurisdiction at once or evenly. The US was the leader, both due to a hegemonic economic and political role but also because of its unique military reach. Increasingly, however, other states are asserting domestic laws extraterritorially, leading to numerous legal conflicts and complex jurisdictional questions.

Yet these conflicts are less numerous than they might be, because there are clear alternatives to extraterritorial assertions of substantive law: most commonly, multilateral treaties and institutions but also, increasingly, transgovernmental networks and "soft law."⁸⁷ Both traditional multilateralism and contemporary transgovernmentalism permit states with diverse regulatory and constitutional regimes to harmonize or mutually recognize the rules of other states. Extraterritoriality remains possible, but it is not always the optimal choice. But extraterritorial assertions of domestic law have the virtue of unilateralism: states need not engage in the often nettlesome process of compromise demanded by multilateral negotiations. As resistance to new efforts at regime negotiation persists, extraterritoriality will undoubtedly continue to seem attractive to policymakers facing an ever-more interdependent and complex world.

⁸⁷ Anne-Marie Slaughter, *A New World Order* (Princeton Univ Press, 2004); Kal Raustiala, *The Architecture of International Cooperation*, *Virginia J of International Law* (2002).