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TERRITORIALITY AND EXTRATERRITORIALITY IN AMERICAN LAW

by

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Preface

This book is about the way that geography shapes legal rules and understandings -- and how fundamental changes in American power and in world politics have challenged and sometimes altered the traditionally territorial system of American law. Do the laws of the United States stop at the water's edge? If not, do they operate differently beyond American territory? At one level these questions are narrow and lawyerly, and there is indeed a large legal literature on these topics. At another level, however, the nature of the connection between law and land raises profoundly significant political, economic, and social questions.

Many of us have watched footage of Cuban refugees swimming ashore in Florida, desperately trying to reach land before American officials can grasp them. Under what is known as the "wet foot-dry foot" policy, touching the territory of the United States—the dry soil itself—is critical to the legal determination of their status: the difference between a new life in the United States and a forced return to Cuba. This is a dramatic example of the power of territory, but not an unusual one. The laws of Japan differ from those of the United States, and hence even in a supposedly "flat" and globalizing world Americans in Japan expect to be subject to Japanese law. The spatial dimension of law even exists within the United States: Nevada permits acts banned in Utah, and thus crossing the state line alters what is and is not legal. In a deep sense legal power is defined territorially, and has been since the sovereign state came into being in 17th century Europe. The basic jurisdictional principle is a simple one: where you are determines what rules you are governed by.

Yet, perhaps precisely *because* this principle of territoriality is so commonplace, it is rarely examined and surprisingly ill-defended. Unlike sovereignty--the subject of yards of

shelf space in any good library--territoriality has not been the topic of much debate outside of geography departments. Writing in the mid-1990s, John Ruggie declared that "it is truly astonishing that the concept of territoriality has been so little studied by students of international politics."ⁱ Fifteen years later it remains little studied.

This is one reason events that force attention to the territorial nature of legal rules cause so much disagreement and confusion. Consider the current debate over the rights of suspected terrorists held in the American naval base in Guantanamo Bay, Cuba. In recent years the federal courts have grappled with the question of whether these detainees have any constitutional rights at all, or whether instead they are, as critics charge, trapped in an offshore "legal black hole."

The answer turns very much on how we understand the fundamental geography of American law. As I will demonstrate, such questions are not new and they surface more frequently than one might imagine. Whether U.S. law applied in occupied Mexican cities, federal territories in the West, "Indian country," or offshore consular courts; whether it restricts law enforcement abroad, regulates foreign stock manipulators, or governs military dependents in overseas bases -- these and other issues have repeatedly arisen throughout American history. The complex, interdependent world we live in today has simply multiplied and deepened the challenges to territoriality; it has not created them.

This book has several aims. The first is to explain why territoriality is a significant concept and why the American legal system, like other legal systems, has traditionally been presumptively territorial. I say "presumptive" because territoriality is not an ironclad principle, nor is it unchanging. But it is essential to the understanding of sovereignty that has, *mutatis mutandis*, been in place more or less since the Treaty of Westphalia in 1648. Territoriality grounds political power in control over space. Because jurisdiction is a foundational concept in law, legal rules are an excellent window on the evolution of territoriality. I focus in this book on American legal rules not because the paradigm of territoriality is unique to the United States--territoriality is a fundamental principle of international order--but because the United States is enormously significant and because, as an American professor of law, it is the legal system I know best.

My second aim is to trace, in very broad brushstrokes, the evolution of territoriality in American law from the founding era to today. Territoriality has always been an important principle, but as a practice as well as a principle it has a complicated past (and an even more complicated present). It arises in myriad ways, such as whether the

ⁱ John Gerard Ruggie, "Territoriality and Beyond: Problematizing Modernity in International

Environmental Protection Agency can regulate polluters in Canada, whether U.S. antitrust law applies to foreign firms affecting U.S. markets, or whether FBI agents must read *Miranda* warnings to suspects abroad. These varied issues are not new or unknown, but to date they have been addressed separately. This book shows that all share a common core in our assumptions about, and responses to, the territorial nature of sovereignty.

My final aim is to advance several claims about the evolution of territoriality. First, extraterritoriality has shown surprising continuity in its purpose even as its form has changed. Extraterritoriality meant very different things to 19th century lawyers than it does to contemporary lawyers. But despite dramatic changes in form, the primary function of extraterritoriality has remained much the same. That function, I argue, is to manage and minimize the legal differences entrenched by Westphalian sovereignty.

Second, extraterritoriality is paralleled by what I call *intraterritoriality*. Just as extraterritoriality has long been a way to conceptually redraw maps, to redefine what is inside and outside the scope of a sovereign's law, intraterritoriality has served to delineate differences within national borders. Intraterritorial doctrines, such as the claim that some constitutional rights do not apply in some American territory, reflect the tension between the demands of liberal constitutionalism and the imperatives of global power politics. This tension was dramatically evidenced when the United States, as a rising great power, acquired an overseas empire a century ago. But it continues to play out today, as the debate over Guantanamo amply illustrates.

Throughout this book I pay close attention to the international context, and particularly to the changing global role of the United States. As a weak power the United States showed solicitude for traditional Westphalian principles of territoriality. As a superpower it was far more willing to bend and even break established doctrine. This transformation, and related shifts in international politics and economics, helped to shape the kinds of territorial claims that were made, even if the fundamental aim of these claims--to manage and sometimes manipulate legal differences--remained broadly constant.

In short, this book offers a framework that connects a disparate set of territorial rules and practices and explores their purpose and function. My overarching goal is to make sense of a world in which the United States applies its law to some actors in some places while denying it to other actors in other places. I do not claim to offer a comprehensive theory of the evolution of territoriality; the topic is too complex to be explained satisfactorily by a few master variables. Instead, I have written an account that I

hope brings clarity to the topic, that links its political and legal as well as domestic and international aspects, and that helps to ground current debates in an historical context.

CHAPTER ONE

TERRITORIALITY IN AMERICAN LAW

In 1899 the English writer Rudyard Kipling penned a poem entitled *The White Man's Burden*. The phrase is now famous, though few probably know that Kipling was its author. Fewer still know the full title: *The White Man's Burden: The United States and the Philippine Islands*. Kipling published the poem to implore the United States, which had just defeated Spain in a war, to assume control of Spain's former colonies. By the end of the 19th century the United States had grown into an economic giant and had shown itself capable of vanquishing a once great European nation. Now, Kipling suggested, it was time to step into its natural role as an imperial power. His final verse made clear the stakes:

Take up the White Man's burden--
Have done with childish days--
The lightly proffered laurel,
The easy, ungrudged praise.
Comes now, to search your manhood
Through all the thankless years
Cold, edged with dear-bought wisdom,
The judgment of your peers!

Many Americans at the time agreed that victory in the Spanish-American War of 1898 demonstrated that the United States was now a world power of the first rank. Yet as the poem suggests, they were not entirely sure about ruling Spain's former colonial islands. Even if the United States did follow the lead of other great powers and build an overseas empire, it was unclear exactly how its colonies should be governed. Were the islands acquired from Spain subject to the same laws as ordinary American territory, or could the United States rule offshore territories differently simply because they *were* offshore? In short, as contemporaries put the question, did the Constitution follow the flag?

This debate consumed the American public and elites alike. It became a central political theme in the 1900 presidential contest between Republican incumbent William McKinley and

Democratic challenger William Jennings Bryan. The Democratic Party platform emphatically declared an anti-imperial stance: “We hold that the Constitution follows the flag, and denounce the doctrine that an Executive or Congress deriving their existence and their powers from the Constitution can exercise lawful authority beyond it or in violation of it...Imperialism abroad will lead quickly and inevitably to despotism at home.”^{vi} Lined up against this view were those who believed that legal rights were geographically limited and did not apply fully--or at all--beyond the states of the union. For these individuals, the legal framework of the United States had a defined territorial ambit, one that did not necessarily correspond to American sovereign borders. In short, they believed that the Constitution did not follow the flag.

At stake in this debate was the ability of the United States to govern offshore colonies in an age of great empires. As proponents of empire knew, if the Constitution indeed followed the flag any American empire was going to remain very small. To govern distant Asian and Latin American colonies consistent with constitutional principles was widely agreed to be out of the question. At stake as well was the self-conception of the United States as a constitutional republic. Was the United States like other great powers, all of whom had embraced imperialism? Or did the Constitution provide powerful limits on “despotic” rule that could not be circumvented simply by (re)drawing lines on maps and declaring some areas to be beyond the reach of the Bill of Rights?

Almost exactly a century after McKinley bested Bryan, ensuring the creation of an overseas American empire, the United States, in the wake of the September 11th, 2001 attacks, transferred the first of what would become hundreds of suspected terrorists to the American naval base at Guantanamo Bay, Cuba. The base, itself a vestige of the Spanish-American War, was chosen in part because government lawyers believed it was beyond the reach of the federal courts.^{vii} In 2005 the *Washington Post* reported that the United States was also operating a secret network of detention centers abroad.^{viii} These “black site” prisons were believed to be the site of highly coercive interrogation by the Central Intelligence Agency and were located, the *Post* said, in Eastern Europe.

The revelations about the clandestine prisons rocked Europe. The Bush Administration had already faced severe criticism over the use of Guantanamo, and the extension of this policy of offshore detention inflamed key allies. At the same time Senator John McCain, himself a victim of torture during the Vietnam War, introduced a measure to bar cruel treatment by American officials anywhere in the world. The McCain Amendment stated that “nothing in this section shall be construed to impose any geographical limitation on the applicability of the prohibition against cruel, inhumane, or degrading treatment or

punishment.” In response, Secretary of State Condoleezza Rice declared that as a matter of policy existing legal restrictions extended extraterritorially to “US personnel wherever they are.”^{iv} McCain's bill, however, sought to make this restriction legally binding.

The resulting furor over the propriety--or necessity--of cruel and degrading treatment of suspected terrorists obscured an important issue. Why exactly was the Bush Administration flying suspected terrorists overseas in the first place? Critics in Europe and elsewhere were calling Guantanamo a “legal black hole” beyond the reach of American and international law. Was Guantanamo really lawless? Could the President escape the bounds of the law simply by acting outside American territory?

Geography matters for these questions because the organizing principle of modern government is territoriality. By *territoriality* I mean the organization and exercise of power over defined blocs of space.^v At the core of contemporary statehood is the idea, often associated with the Treaty of Westphalia in 1648, that each sovereign state has its own discrete and exclusive territory. Under this view, legal rules and rights are generally seen as congruent with territorial borders. The debates over whether the Constitution followed the flag to the Philippines, or to Guantanamo, are debates over whether, and if so how, the law of the United States is linked to its sovereign territory.

As a governing principle territoriality is so intuitive that we rarely question it. That states have borders, and that these borders determine the limits of their sovereign domain, is a widely accepted proposition in the modern world. Territoriality consequently lies at the core of most legal systems, including that of the United States. It is the most widely accepted form of jurisdiction.^{vi} Yet territoriality is not an inviolable principle, and domestic law is not always perfectly congruent with national borders. There are two fundamental ways that the connection between law and land can be stretched, or broken, both of which are extensively explored in this book. One is when domestic law extends beyond sovereign borders. This is commonly called *extraterritoriality*. The other, which is less well-known, is when domestic law is restricted to certain national territory; in other words, when different areas within a sovereign state have distinct legal regimes. I call this *intraterritoriality*.

Asserting jurisdiction over an actor inside the territory of another state is an instance of extraterritoriality. For example, when the Supreme Court held in 1992 that insurance brokers in London were subject to U.S. antitrust law, it reinforced the (once controversial) principle that the regulatory power of the United States extends not just within the nation, but also throughout the globe.^{vii} Extraterritoriality of this kind is common today; many domestic statutes, whether they relate to drug smuggling, environmental protection, or stock market

regulation apply extraterritorially to foreigners and citizens alike. These laws aim to *police* activities that occur offshore, yet affect markets or individuals at home.

Americans abroad have sometimes enjoyed another, more unusual form of extraterritoriality: the fictional *projection* of U.S. territory abroad. As a result of what were known as "capitulations," in the era before the Second World War Americans were shielded from local law in certain non-Western countries, such as China. They were instead subject to U.S. law, adjudicated by U.S. diplomats or judges.^{viii} In a related fashion, many postwar treaties have guaranteed a regime of extraterritorial legal rights for U.S. military forces stationed abroad. In both these instances, domestic law was extended extraterritorially in order to insulate American citizens from foreign law.

Guantanamo involves a third type of extraterritoriality: the reach of constitutional rights. Whether the U.S. Constitution *protects* those who are outside American borders is at the core of the fracas over Guantanamo. Historically this question arose most frequently in the extraterritorial courts of the capitulation system. Did the Americans who faced U.S. judges in China have the same constitutional rights as Americans at home? Today it arises primarily with regard to the extraterritorial interrogation, detention and trial of foreigners. Whether the Constitution protects non-citizens abroad is a vexing issue.

Intraterritoriality too comes in different versions. One is very familiar to Americans: federalism, which divides the United States into fifty states and a federal government. From the perspective of international law these state lines disappear, but internally legal rules plainly differ from state to state. State law is not the focus of this book, however.^{ix} Instead, my interest is in the territorial scope of federal law. How and why federal law varies within the sovereign borders of the United States, as well as outside those borders, is a central topic in the chapters to come.

For example, it is relatively common for federal legislation that polices acts and actors within the United States to vary depending on location. Special legal rules apply to the District of Columbia, for instance, or to certain federal lands. In general this form of intraterritoriality is uncontroversial. Much more controversial is whether constitutional rights also vary from place to place within the United States, or instead whether the Constitution inevitably and fully "follows the flag." As we have seen, this question was at the heart of the fervent debate over American empire that arose a century ago.

This book makes two chief arguments about the geographic scope of American law, both of which I develop in more detail later in this chapter. The first concerns extraterritoriality. Extraterritoriality has appeared in many different forms throughout history. All of these forms, however, exhibit a common theme: they are efforts to manage, minimize, or sometimes

capitalize on legal differences. These legal differences are a direct result of the territorial basis of sovereign rule, which has been the organizing principle of the international system for centuries. To address the differences inherent in territorial sovereignty powerful states have used various strategies, ranging from conquest to cooperation. Imperialism mitigated difference by colonizing foreign places; international agreements by negotiating shared rules. Whether focused on policing, projecting, or protecting, extraterritoriality provides a kind of middle ground between these two extremes, enabling the United States to unilaterally manipulate legal difference so as to better serve its interests.

The second argument is that American law has long employed intraterritoriality as a way to facilitate the growth and power of the United States. The United States comprises a complicated mix of territory, including the fifty states, federal territories such as Puerto Rico, and "Indian country." Within the states constitutional rights apply fully. But throughout much of American history only a limited set of rights have applied in other U.S. territory. In other words, just as the map of American law is larger than the map of American territory—that is, some domestic law extends extraterritorially--the map of legal rights is smaller than the map of American territory. Intraterritoriality is in a sense a mirror of extraterritoriality. Extraterritoriality generally serves to mitigate difference. By contrast, intraterritoriality generally serves to establish difference.

Throughout the book I contend that we cannot understand the evolution of extraterritoriality and intraterritoriality in U.S. law without understanding the broader international context. American notions and doctrines of territoriality were themselves drawn from international law. Yet these notions and doctrines evolved over time to reflect American national interests. As the United States grew from a weak state to a global superpower, and as the nature of world politics itself changed, principles of both extraterritoriality and intraterritoriality have been transformed. Some territorial principles, however, have proven useful even in their original form even in the 21st century, and so remain robust, if increasingly anachronistic.

In short, territoriality has neither been static nor treated as a given. Instead it has been stretched and pulled over time in an effort to achieve national ends within the existing international order. When U.S. regulatory regimes and American firms were threatened by a more global postwar economic system, for example, extraterritoriality was used to level the legal playing field. Likewise, when the U.S. government sought a freer hand when governing distant, foreign populations in places like Guam, intraterritoriality was used to limit the reach of constitutional rights. Legal "maps" have been drawn and redrawn even as sovereign borders remained unchanged.

The task of this chapter is to both introduce and explain these arguments and to lay a foundation for the rest of the book by summarizing the historical relationship between territoriality and sovereignty. What is sometimes called the "Westphalian system" is the basis of the contemporary territorial sovereign state. The sovereign state has a long history in Europe, but for the rest of the world it was more common to be part of a larger empire. The international rules governing territoriality differed depending on what kind of state was involved. Among Western sovereigns strict territoriality reigned and extraterritoriality was only very rarely permissible. Vis-à-vis so-called "uncivilized" states, by contrast, empire and extraterritoriality were legitimate and frequently-utilized options.

To understand the evolution of extraterritoriality and intraterritoriality, therefore, we have to first understand the history of territorial sovereignty. This history is significant because American legal thought and doctrine drew deeply upon international rules and principles. Though presented only in broad brushstrokes, this history helps orient the remainder of the book. From territoriality came extraterritoriality; and from empire came both concepts of intraterritoriality and, eventually, the consolidation of Westphalian territoriality as the organizing principle of the entire world. After presenting this historical background I then lay out in more detail the chief arguments of the book. This chapter concludes with a brief overview of the remaining chapters.

Westphalia and the Rise of the Territorial State

While many forms of political order have existed in times past, the dominant form today is the sovereign, territorial state.^x There are few realistic alternatives to territorial governance in the realm of contemporary politics, and many theories of international politics assume that the territorial state is the only, or only significant, actor on the world stage.^{xi} Indeed, every existing state in the world today is territorial. In a sense this is true by definition: sovereign states are defined under international law as territorial entities.

There nonetheless is a widespread belief today that territoriality is under siege. Some see the rise of a borderless, globalized world that is dismantling traditional sovereignty.^{xii} In this supposedly "flat world," to use New York Times columnist Thomas Friedman's famous phrase, political boundaries matter little and economic and social forces move freely. Cyberspace is thought to even more directly challenge territoriality; some theorists argue that the internet "radically subverts a system of rule-making based on borders between physical spaces...[and] territorially defined rules."^{xiii} These claims contain elements of truth, but are strongly overstated. Sovereign borders still matter greatly for economic and political life. And

territoriality even rules the virtual world; the internet turns out to be subject to the control of sovereign states and increasingly “bordered” in its structure.^{xiv}

The degree to which territoriality is loosening its grip is a topic that will arise in later chapters. Here it is sufficient to note that, as a political reality, territorial governance remains robust and is remarkably total. Virtually every patch of ground on Earth save Antarctica is allocated to some sovereign state. States today generally accept the sanctity of these borders, even if the occasional and sometimes violent disputes arise over their precise location within a riverbed or across a bay. And sovereign territoriality is enshrined in major international institutions, such as the United Nations. In short, there is “virtually universal recognition of territorial sovereignty as the organizing principle of international politics.”^{xv}

Yet the world was not always neatly organized in this way. Many older systems of rule were not territorial at all.^{xvi} The sovereign territorial state is essentially a European invention, but even in Europe it is only a few centuries old. Feudal Europe lacked sovereign, territorial states as we know them today. The medieval European order instead comprised multiple, layered centers of political power as well as diverse sources of legitimation, allegiance, and identity.^{xvii} Both secular and ecclesiastical forms of rule were important, and clearly demarcated borders that divided the various medieval rulers from one another did not exist.

One result was that a ruler’s jurisdiction often overlapped with that of other potentates or joined non-contiguous areas. (Today we generally think non-contiguous territories, aside from islands, are anomalous and odd. Examples exist, such as Alaska or Kaliningrad, but they are rare). Political authority in the feudal era was consequently “both personalized and parcelized within and across territorial formations.”^{xviii} More fundamentally, the idea that law was geographically bounded was only loosely-accepted, if it was accepted at all. Indeed, it was a “well-established mediaeval idea that man took his own law with him when he went to strange lands.”^{xix} Law was primarily tied to persons, not places.

The idea of law tied to persons rather than places dates back even further than the medieval period. As U.S. Supreme Court Justice Robert Jackson wrote in 1950, it “was old when Paul invoked it in his appeal to Caesar.”^{xx} The influential early 20th-century English jurist J. L. Brierly had noted decades before Jackson that the original conception of international law was personal. It was “only the rise of the modern territorial State that subjected aliens—even when they happened to be resident in a State not their own—to the law of that State. International law did not start as the law of a society of states each of omniscient jurisdiction, but of States possessing a personal jurisdiction over their nationals...”^{xxi} Roman law, for instance, allowed foreigners to exist under a separate legal system, the *jus gentium*, rather than the *jus civile* of Roman citizens.^{xxii} After the fall of the

Roman empire, and the rise of feudalism in Europe, the blending of territorial and personal notions of jurisdiction in international legal doctrine became greater.

The important point is that this complicated system of governance and authority began to change in the 17th century, and to understand later changes in American law we must understand how the United States adopted and understood the system of territorial sovereignty that prevailed in 1776.

The Treaty of Westphalia in 1648, which brought to a close the bloody Thirty Years' War in Europe, is generally seen as the central milestone in the shift to territorial sovereignty. Much of the Westphalian peace was devoted to reallocating land among minor Northern European princes. (The lasting significance of this aspect of the Westphalian settlement is limited, though some three centuries later Adolph Hitler complained in *Mein Kampf* about the treaty's territorial divisions of what is now Germany). Of far greater consequence was the recognition and entrenchment of important principles about sovereignty and territorial rule. The Westphalian conception of statehood drew all legitimate political power into a single sovereign who controlled absolutely a defined territory and its associated population. After Westphalia "the preeminence of the principle of territoriality in public international law became gradually entrenched in Europe."^{xxiii} The sovereign now had exclusive authority to enforce the law within that territory. Jurisdiction based on personality declined, and "the theory that a person who moved to another territory did not carry his personal laws with him, but became subject to the laws of that territory, gained support."^{xxiv}

In the Westphalian system, then, political borders clearly defined "outside" from "inside." As John Marshall, the first Chief Justice of the United States Supreme Court, summarized the core principle in the early 19th century, "the jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself."^{xxv} Again, this form of territoriality is an ideal, not a reality: As later chapters will make clear, the personal law of the medieval period was never fully extinguished, and the territorial sovereignty of many states was sometimes violated by stronger powers.

Scholars today debate whether the Treaty of Westphalia actually represented such a sharp break with the governance systems of the past. Many contend that its importance and novelty are overstated or misconstrued. Aspects of Westphalian sovereignty existed before Westphalia, pre-Westphalian principles and practices continued afterwards, and some aspects of Westphalian statehood were not consolidated until late in the 18th century.^{xxvi} As far back as 1555, for example, the Treaty of Augsburg introduced the principle of *cujus regio, ejus religio*, which held that each ruler determined the religion in his land. This principle was an important steppingstone to the creation of territorial sovereignty, because it allocated power over religion

to a ruler, and divided that power territorially. Likewise, the rise of capable and independent city-states in Italy and Northern Europe also helped create the proto-territorialist view that “certain places could be more or less immune from the authority structures that dominated elsewhere.”^{xxvii}

Consequently, it is fair to say that territoriality did not arise suddenly with the Treaty of Westphalia. The set of agreements and understandings encompassed by the phrase “Westphalia” nonetheless flagged an important if imprecise shift in world history. It did so both by seconding and reinforcing the principles of the earlier Augsburg treaty, and by re-organizing the political map of Europe and building on the practices of the early city-states. Although imprecise like much shorthand, Westphalia has thus become a useful marker for a revolution in political order within Europe, a revolution that eventually spread throughout the globe.

The distinctive feature of Westphalian statehood, in short, is that it divides the world into mutually-exclusive territorial entities. (As a result I will often refer to *Westphalian* or *strict* territoriality to signify the idea of mutually-exclusive territorial control.) Westphalian territoriality in turn provided the bedrock principles for the development of modern international law. Writing in the 1950s, the political scientist John Herz argued that from territoriality

resulted 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....Sovereign units must know in some detail where their jurisdictions end and those of other units belong; without such standards, nations would be involved in constant strife over the implementation of their independence.^{xxviii}

What Herz is saying in this passage is that once sovereignty in the sense of supreme, final authority became a core attribute—or ideal—of statehood, it was necessary to define clearly where one sovereign’s authority began and another’s ended.^{xxix} Territorial borders provided this definition.

The animating vision behind the shift to territoriality was stability and peace. Europe in the 17th century was plagued by bloody wars of religion. The Thirty Years’ War had killed an astonishing 30% of the population of the continent. Clearly demarcating one sovereign from another, and giving each absolute authority within a circumscribed territory, minimized the

potential for violent conflict--though, as history illustrates, it by no means eliminated it. Territoriality also provided an efficient way of communicating the authority of a sovereign, and of enforcing sovereign power. It was an effective "geographic strategy to control people and things by controlling area."^{xxx} The corollary of this territorial approach, however, was the need to refine a set of rules about interactions among sovereigns, rules that defined, as Herz points out, exactly where one sovereign's authority began and another's ended. International law, particularly through its rules of jurisdiction, provided that set of rules.

From the 17th century onward territoriality became increasingly dominant in Europe, even as other dimensions of sovereignty were altered. For example, the French and American revolutions and the rise of nationalism reoriented ideas of sovereignty away from a discrete, individual sovereign—a king—and toward a particular people that enjoyed a shared (or sometimes constructed) history, culture, and language.^{xxxi} The rise of popular sovereignty did not, however, alter the fundamentally-territorial nature of the Westphalian sovereign state. Arguably it reinforced it; as the English historian Eric Hobsbawm argues, "the equation nation=state=people, and especially sovereign people, undoubtedly linked nation to territory, since the structure and definition of states were now essentially territorial."^{xxxii}

Westphalian sovereignty also endorsed the view that states were juridically equal. Many classical thinkers analogized states to individuals, and argued that a small state was no less sovereign than a large state.^{xxxiii} Others have grounded sovereign equality in reciprocity. F.H. Hinsley, for instance, argued that "a state which claims to be free of limit and control within its community is bound in logic to concede the same freedom to other states in theirs."^{xxxiv} However justified, sovereign equality is an ideal of long-standing, today guaranteed by the United Nations Charter. Sovereign equality becomes important in the context of legal doctrines concerning extraterritoriality, which were later (though not always) applied to strong states as readily as weak states.

Sovereignty is also a "ticket of general admission to the international arena."^{xxxv} Once a state is recognized as sovereign, it can conclude international agreements, join organizations, engage in armed conflict, and so forth. Perhaps most attractively, sovereignty protects a state against influence by outsiders. In reality, of course, states are routinely influenced by events beyond their borders, and their domestic laws and practices are increasingly subject to scrutiny by the outside world.^{xxxvi} The acceleration of interdependence in the postwar era and the ascendancy of international human rights law have made this abundantly clear even for the most powerful states. But as a formal matter, under traditional Westphalian principles, no other sovereign state can legitimately intrude into the internal territory of another. This idea reached its zenith in American law in the late 19th century.

Embassies and Extraterritoriality

The sharp territorial distinctions created by this new conception of sovereignty posed some challenges to the international order.^{xxxvii} One was how sovereign states would communicate with one another. Well before 1648 rulers had exchanged ambassadors. But since one consequence of the Westphalian revolution “was an increased emphasis upon the supremacy of national law, not merely over the natural born subjects of the king, but over all who dwelt within the limits of the territorial state, irrespective of their nationality,” it was necessary to develop a set of legal principles governing the rights and privileges of ambassadors when they arrived in a foreign state.^{xxxviii}

Ambassadors were, after all, representatives of other co-equal sovereigns. To subject them to the rule of another sovereign appeared to elevate one sovereign over another. Yet as individuals residing within the territorial limits of a sovereign, under the Westphalian system they ordinarily would fall under the jurisdiction of that sovereign. The international law of ambassadors, which emerged from this quandary, reflected the juxtaposition of the functional need for emissaries with the supreme power within a defined area assumed by Westphalian territoriality.

The solution to this quandary was an idea central to this book: extraterritoriality. “In an effort to preserve the sanctity of the rights of embassy,” writes one historian, “the fiction of extraterritoriality [sic] was gradually and unconsciously built up.”^{xxxix} In effect, embassies became small plots of foreign territory projected into the domain of the host state. Sovereigns would “assume or pretend that the ambassador and the precincts of his embassy stood as if on the soil of his homeland, subject only to its law.”^{xl} These special extraterritorial zones allowed each sovereign to maintain their territorial sovereignty, while simultaneously enabling interaction between them. Akin to a medieval traveler, the ambassador’s home law traveled with his person.

The development of extraterritoriality was therefore in many respects an outgrowth of Westphalian territoriality. As Garrett Mattingly writes in his definitive history of Renaissance diplomacy, referring to the Treaty of Augsburg’s then-novel principle that a sovereign determined the religion of his domain, “[b]y arrogating to themselves supreme power over men’s consciences, the new states had achieved absolute sovereignty. Having done so, they found that they could only communicate with one another by tolerating within themselves little islands of alien sovereignty.”^{xli} By the American Revolution this approach was well established. In the 1812 case of the *Schooner Exchange v. McFaddon*, for instance, the Supreme

Court noted that the world was "composed of distinct sovereignties, possessing equal rights and equal independence." But, the court asserted, for reasons of practicality "all sovereigns have consented to a relaxation in practice, in cases under certain peculiar circumstances, of that absolute and complete jurisdiction within their respective territories which sovereignty confers."^{xlii}

As later chapters will detail, the concept of extraterritoriality was eventually extended beyond the case of the ambassador. The longstanding practice of extraterritorial jurisdiction over the nationals of Western powers who resided within so-called "uncivilized" nations (about which I will say more in a moment) mimicked the ambassadorial approach but applied it to ordinary citizens. Much later, during the Cold War, the concept was applied to nearly all American offshore military forces. Likewise, extraterritoriality was eventually extended to the police powers of the state, as in the practice--pioneered by the United States in the postwar period--of asserting jurisdiction over foreign actors for their acts that cause harm at home. Whether (fictionally) projecting domestic territory into other sovereign's domain or policing offshore activities that have transboundary effects, extraterritoriality has proven a useful tool for states eager to assert or maintain control over persons and actions beyond their borders.

Until the postwar era, however, extraterritoriality among acknowledged sovereigns was limited to the necessary case of ambassadors. Non-Western states like China and Morocco were subjected to other forms of extraterritoriality, but among the Western powers territoriality was respected. Indeed, by the 19th century the territorial nature of sovereignty was unquestioned. As a leading authority on international law wrote, reflecting the prevailing views of the era, each sovereign state "possesses and exercises exclusive sovereignty and jurisdiction throughout the full extent of its territory...No state 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."^{xliii} This view was well-established in the United States as well as in Europe. Indeed, strict territoriality "prevailed as dogma for most of American constitutional history."^{xliv}

The Age of Empire

Despite being central to the international order, sovereignty actually applied only to a small set of nations prior to the 20th century. Sovereignty was fundamentally a European construct. Until the 20th century the European powers generally did not consider non-Western polities to be civilized and therefore sovereign. In this regard the United States was an exception; as a land of European settlement, governed by white Christians, the United States

was treated as a sovereign state from 1776 onward. Sovereignty and territoriality only became applicable to many societies around the world, however, after a long and often violent process of colonization and decolonization.

As this suggests, empire was the dominant political form in most of the world before the 20th century. Territorial conquest was not unique to the European encounter with the rest of the world; within Europe states would often acquire territory from one another as a result of military victory. But while European states might gain or lose bits of territory in war, as France and later Germany did with Alsace-Lorraine, the game was still played among sovereigns. Outside Europe things were different. Given the great disparities in military power between the European powers and the local groups they encountered, territorial conquest and imperial rule were often decisive and lasting.^{xliv}

The first wave of European empire-building occurred in the 16th and 17th centuries, and led to the establishment of the vast Spanish, Portuguese, French, and British empires. By 1830, however, many of these colonies were free, in particular those in the Western Hemisphere. The United States was the most prominent, but Haiti, many of Spain's Latin American possessions, and Brazil also became independent in this period. In the late 19th century, however, a new wave of European imperialism took place. This wave was swifter and more total than the first. For example, in the century before 1880, new colonies were formed at the rate of five per decade; after 1880, the rate of colony-formation rose to twenty per decade.^{xlvi} By the end of the 19th century most of Africa and much of Asia had been partitioned by the European powers. These vast empires coexisted with the high point of strict territoriality among Western sovereigns.

In Jared Diamond's famous words, "guns, germs and steel" supplied the Europeans' overwhelming power advantage.^{xlvi} But internally, an ideological and legal framework for imperialism permitted European states to square their commitment to sovereignty with their thirst for colonies.^{xlvi} What was known as the "standard of civilization" kept outside the circle of sovereign states most non-Western political entities. A non-European state could only be deemed civilized if its internal legal structure resembled those in Europe--if, in essence, a foreigner in that state would be treated in roughly the same manner he or she was accustomed to at home. Over time a few nations successfully "civilized," as Japan did just before World War I. But such cases were rare, and the distinction between civilized and uncivilized states was in practice very important.

The standard of civilization was grounded in race, history, and culture, but it was also in the international law of the day. Alternatively, one could say that international law was grounded in the standard of civilization. International law was conceived by Europeans to be

the shared law of civilized states; it was an "intra-society" rather than international or inter-state law. For example, a leading international law treatise of the 19th century asked rhetorically, "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 of Europe or to those of European origin."^{xlix} Hence in the 19th century empire coexisted with Westphalian territoriality and was a viable and even valorized form of rule. Today, by contrast, no political entity openly declares itself to be an empire, though some, such as China and Russia, retain the look and feel of traditional empires. (Many critics say the same about the United States, though for different and usually more metaphoric reasons).¹

Empire also had important implications for the geographic reach of legal rules. Empire served, as did extraterritoriality, as a means to minimize or negate legal difference across countries. This minimization of difference in turn served to better achieve the national interest of the conquering state. Controlling a foreign territory directly as a colony offered legal certainty in comparison to the vagaries of arms-length trading. Thus Britain sought to rule India in part because India, vast as it was, "was a captive market that could not be trusted with self-rule lest tariffs follow in its wake...Lancashire industry and British rule in India were thus bound together by an extraordinary symbiosis."ⁱⁱ Likewise, for commercial endeavors involving foreign direct investment, imperial rule provided greater certainty of property rights than did sovereignty.

This is not to say that empires possessed uniform legal systems; rather, "geographical differentiation is critical to empires."ⁱⁱⁱ Metropole and colony were often legally distinct, with separate rules and rights. The key point is that those legal differences relevant to the interests of the conqueror could be minimized via conquest; other legal differences, which might benefit the conqueror, could be retained or created. This pattern was certainly true of the United States. As later chapters will describe, in the American experience the tensions between imperialism and constitutionalism helped develop and cement constitutional doctrines that reflect what I have called intraterritoriality. Intraterritoriality entailed the differentiation of legal rights and privileges within sovereign borders of the state, differentiation that corresponded to location, distinguished core from periphery, and, ultimately, aided the exercise of American power.

Intraterritorial distinctions in turn provided a foundation for differentiating the constitutional rights that protected overseas Americans from the constitutional rights that protected overseas aliens. From the geographic differentiation inherent in empire, in other

words, we can trace, albeit unevenly, a route to the American naval base at Guantanamo Bay and the "legal black hole" it has come to represent to many around the world.^{liii}

"Extrality" and Informal Empire

Despite the prevalence of empire the West did not colonize all so-called uncivilized nations.^{liv} In some cases, such as the Ottoman Empire, there was a long history of European traders operating within another independent civilization.^{lv} Similarly, Western powers could not, or chose not, to subdue and rule China, Thailand, or Japan. Instead they sought alternative ways to accommodate their growing desire for commerce with their need for order and security for their citizens. "Unequal treaties," sometimes known as capitulations, were commonly negotiated in the 19th century to solve this problem. These agreements coupled open trade to extraterritorial rights for sojourning Westerners.^{lvi} Nations like China abhorred these treaties, rightly seeing their extraterritorial provisions as a humiliation. But they lacked the power to resist.

The unequal treaties generally had three elements: unilateral most-favored-nation clauses, a lack of tariff autonomy for the non-Western partner, and what was known as consular jurisdiction for Westerners. Unilateral most-favored-nation clauses ensured "equality in exploitation:" whatever rights one Western power received had to be granted to all.^{lvii} Restrictions on tariff autonomy ensured that goods could move in and out freely. Consular jurisdiction was perhaps the most unusual feature of these treaties. It referred to extraterritorial jurisdiction by foreign diplomatic officials, or consuls. These consuls adjudicated both criminal and civil matters involving their citizens abroad.

The United States and most other Western powers established this form of extraterritorial jurisdiction widely in the Islamic world and throughout Asia. The aim was to ensure that Westerners--mostly traders but also government officials, missionaries, and various drifters--did not have to obey unfamiliar and "barbaric" laws and negotiate arcane legal systems when in places like Shanghai or Constantinople.^{lviii} Here we circle back to the extraterritoriality pioneered for ambassadors; much like ambassadors in "ordinary" sovereign nations, citizens of Western powers in Asia and the Middle East frequently enjoyed a form of extraterritorial protection. The extraterritorial courts provided a way for Western citizens to reside outside the West yet enjoy near-total immunity from local law.^{lix} These Westerners were, for legal purposes, in a sort of extraterritorial bubble projected outward from their home country. As in the Middle Ages, law followed persons rather than places.

“Extrality” as it was colloquially known at the time, reached its apogee at the turn of the 20th century. Consular jurisdiction was common, and in some rare instances Western powers even created what were called “international zones” (as in the case of Tangier) or “international settlements” (as in the case of Shanghai). These were areas carved out and administered directly by the foreign powers. The International Zone of Tangier, for example, was remarkably elaborate, with some 150,000 inhabitants, a legislative assembly, and an independent legal system with judges drawn from an array of Western states.^{lx} As later chapters will detail, in the years before World War I the American presence in China became so large that Congress went so far as to create a “US District Court for China” that sat in Shanghai.^{lxi} This extraterritorial American court lasted until the 1940s.^{lxii} Hence for almost a century American citizens, whether missionaries or merchants, were not subject to Chinese law, but instead to an odd array of American laws.

The Consolidation of the Territorial State

Imperialism and unequal treaties were central to the international order in the centuries before 1945. Paradoxically, it was through imperialism that Westphalian territoriality slowly and unevenly spread to the rest of the globe. As former colonies became independent they assumed the attributes of sovereign states. Over time, the number of such newly-independent states grew, with the vast majority of the world’s states becoming sovereign in the massive wave of decolonization that occurred after the Second World War. In an unraveling of remarkable swiftness the great Western empires came apart, and from some fifty member states in 1945 the United Nations encompassed over 150 by 1980. This unprecedented tripling of the world’s states in less than four decades represented the consolidation of Westphalian territoriality on a global scale.

Many factors lay behind this transformation in governance. By the Versailles Settlement of 1919 it was plain that the normative backdrop that fostered imperialism had begun to change. Notions of self-determination and democracy had gained sufficient strength that empires, capitulations, and international zones were all on the wane. Woodrow Wilson’s famous Fourteen Points, of which Point Five called for “free...adjustment of all colonial claims, based upon a strict observance of the principle that in determining all such questions of sovereignty the interests of the populations concerned must have equal weight with the equitable claims of the government whose title is to be determined,” garnered great attention, putting further pressure on the European powers to begin relinquishing their empires. And the increasingly powerful United States, which possessed only a small overseas empire but a

giant manufacturing base, made clear during the Second World War that the postwar international order was going to be very different with regard to imperialism. Soon the old imperial preference schemes, which discriminated against trade with areas outside an empire, were dismantled.

But it was hardly ideas or American pressure alone that changed the nature and role of empire. Military and economic changes after 1945 affected the will of great powers to control contested territories as well as their ability to do so. Militarily, the control of large territories "decreased in value as a security asset. As the world moved to bipolarity and the Cold War, and as nuclear weapons and advanced weaponry changed the modes of warfare, imperial reserves of troops and resources became less important for the great powers."^{lxiii} The economic value of overseas territories also declined, though the causal relationships are complex. The resurgence of a liberal economic system meant that states could increasingly trade for what they once acquired through possession. Technological change added further pressure; as the economies of the Western democracies became less resource-intensive, and more information and innovation-intensive, the incentives for direct imperial control faded still further.

In any event, by 1945 a new age had arrived. The Charter of the new United Nations endorsed the concept of sovereign equality and protected from interference those "matters which are essentially within the domestic jurisdiction of any state." The result was a system aimed at stabilizing the international order, limiting conflict, and protecting the sanctity of Westphalian territoriality. In this context the dismantling of European empires gathered speed, and in a short time only scant remnants--Gibraltar, Puerto Rico, French Polynesia--remained. Yet decolonization was not just about the end of direct territorial rule. As the British historian John Darwin notes, it instead represented "the demolition of a Europe-centered order in which territorial empire was interlocked with extraterritorial 'rights.' The bases, enclaves, garrisons, gunboats, treaty ports, and unequal treaties...that littered the Afro-Asian world were as much the expression of this European imperialism as were the colonies and protectorates coloured red, blue, yellow, or green on old imperial maps."^{lxiv}

In sum, empires and extraterritoriality were closely linked. Both were transformed by the events of the 20th century. And together, they played a striking and somewhat counterintuitive role in the regime of Westphalian territoriality that has prevailed over the last several centuries. On their face both seem straightforward violations of the core notion of exclusive territorial sovereignty. Indeed, extraterritoriality appeared to be a vestige of the personal, status relations that marked the feudal era.

Yet these practices also reinforced the centrality of sovereignty and territory to the Westphalian conception of the state. States that were truly sovereign—that met the standard of "civilization" decreed by Europeans—did not permit extraterritorial courts on their territories. The non-white, non-Christian countries that accepted, or were forced to accept, extraterritorial courts were considered to be outside international society and hence outside the realm of international law. While atavistic, empire and extraterritoriality reinforced the norm that among juridical equals, at least, Westphalian territoriality prevailed. It was this complex set of views that formed the basis, as the next chapter will describe, of the early American approach to territoriality.

Extraterritoriality & Intraterritoriality in American Law

This brief history of territoriality and extraterritoriality has stressed several important points: the rise of territoriality as the core organizing principle of sovereign statehood; the resulting incentives to develop various forms of extraterritoriality; the centrality of imperialism to the evolution of extraterritoriality and intraterritoriality; and the eventual consolidation of Westphalian territoriality around the globe in the postwar era. This summary omits many significant details, but it provides an essential foundation for the more extensive discussion of American understandings of territoriality in the chapters to come. With this framework in mind, in the remainder of this chapter I develop the major arguments of this book.

Extraterritoriality & the Minimization of Difference

The extraterritorial jurisdiction created by the capitulations so common before the Second World War was neither an historical quirk nor a mere expression of power. Extraterritoriality was instead a way to control and manage the interests of Western powers in foreign lands. Like empire, it was both a reaction to and a stimulus for rising interdependence in a world of disparate legal systems. When Western powers could not (or chose not to) conquer an alien land, they frequently used extraterritoriality to foster trade and protect their citizens. This form of extraterritoriality was certainly coercive--the unequal treaties were called capitulations for a reason--yet they fell well short of conquest and colonization. The aim was far more narrow: to insulate Western citizens from the allegedly barbaric and bizarre legal systems of "uncivilized" nations like China.

This insulation permitted Westerners to gain access to the riches of these societies without submitting to unwanted legal risks. Indeed, many of the unequal treaties of the era

specified that extraterritorial rights were to be abandoned if adequate legal reform took place. A treaty between Korea and Great Britain, for instance, stated that "the right of extraterritorial jurisdiction over British subjects in Korea [sic] granted by this Treaty shall be relinquished when, in the judgment of the British Government, the laws and legal procedure of Korea shall have been so far modified and reformed..."^{lxv} Following the same principle, when a European power assumed rule over an area deemed uncivilized it typically suspended the extraterritorial privileges accorded to nationals of other Western powers^{lxvi}. Legal harmonization civilized and thus destroyed the basis for extraterritoriality.

Extraterritoriality was, in short, a strategy to manage and minimize legal difference. Absent legal difference it had no role. In essence, it projected a small realm of domestic law into a (weaker) foreign power's territory as a way to inoculate one's citizens against the strange, the different, and the dangerous.

Seen this way, extraterritorial jurisdiction is really one of several strategies sovereign states historically have pursued to structure their relationships with alien powers. Empire was an extreme strategy—territorial conquest allowed the imperial power to control the foreign society and create whatever legal system it desired. The creation of extraterritorial consular courts was a more narrowly targeted approach that simply facilitated the presence of foreign nationals and the associated commerce (and prostylitizing) they engaged in. The use by the United States of such courts was thus not aberrational, but rather part of an established practice by great powers. The creation in 1906 of the "U.S. District Court for China," discussed in depth in later chapters, was an unusually institutionalized version of this strategy, but was also not unprecedented.

After the Second World War both unequal treaties and empire largely disappeared as ideals of sovereign equality and self-determination took root. The postwar management of difference instead occurred through other pathways, some of which existed prior to 1945 but which became much more significant after 1945. The most well-known is the use of international institutions. After the war, an intricate web of international treaties and their associated international organizations served to harmonize or minimize legal difference via negotiated agreements.^{lxvii} States bargained over shared rules, replacing heterogeneity with some measure of homogeneity. Likewise, the development of networks of national officials, who use the tools of modern communication and transportation, has served in the postwar era to coordinate and harmonize domestic policies in more flexible ways.^{lxviii}

These two forms of postwar difference management—treaties and networks—have been widely studied and analyzed. What is less commonly acknowledged is that extraterritoriality is, *mutatis mutandis*, a third strategy. Though dead in its traditional form of

extraterritorial jurisdiction in uncivilized nations, extraterritoriality reappeared in the postwar world in two new guises, both developed and employed extensively by the United States. The first was the "Status of Forces Agreement," or SOFA, and the second was effects-based regulatory jurisdiction.

The extensive postwar use of SOFAs grew out of America's dramatic postwar rise as a hegemonic power. Seeking for the first time a permanent global military presence, the American military retained or established hundreds of bases around the world aimed at containing the growing Soviet threat and protecting vital American assets and allies. Accompanying these forward bases were extraterritoriality agreements for American armed forces members. These SOFAs, many of which remain in force, typically decree that certain infractions committed by American military personnel be handled by U.S. military courts rather than local courts. Even when local courts take command of an investigation or trial, some special rules may apply for specified American personnel. Like "traditional" extraterritoriality, this form projected not only American law but American legal institutions into the domain of another state.

The agreement with Japan, for instance, for a long time required the US military to hand over American servicemembers to Japanese authorities only after they were charged with a crime, a right Japanese citizens do not enjoy. Other SOFAs are similar. In form these accords look very much like the extraterritoriality obtained via the unequal treaties of the 19th century, though they were less sweeping in scope--only members of the armed forces are covered--and more narrow in the legal insulation they provided. Due to the vast postwar presence of overseas American troops, however, many more individuals were subject to extraterritoriality under SOFAs than had been subject to traditional extraterritoriality via the unequal treaties. The use of SOFAs continues today; the most contentious example is the faltering negotiation, still ongoing as of autumn 2008, between Iraq and the United States. At the heart of the conflict is the question of extraterritorial jurisdiction over American troops.^{lxix}

Postwar extraterritoriality also took the form of extraterritorial regulation. Indeed, the extension of domestic economic, environmental, and other regulatory laws to overseas acts and actors is what most lawyers today think of when they hear the word "extraterritoriality." Like the SOFA, this form of extraterritoriality was novel. Throughout its history the United States had refrained from regulating acts that occurred in the territories of other sovereigns, consistent with the reigning principle of strict territoriality. In the postwar era, however, the United States began to routinely police foreign actors who somehow affected American markets or other domestic interests.

19th century lawyers believed it a violation of sovereignty to assert jurisdiction in this manner. Yet postwar courts (as well as Congress and the executive branch) embraced this more expansive understanding of jurisdiction, which, as I will describe in later chapters, advantaged an economically dominant state such as the United States. At the heart of the new approach was the concept of transboundary effects. If some act overseas affected American markets or interests, that effect gave rise to jurisdiction. The failure to do so, as courts often noted, would thwart the regulatory efforts of the state.

Effects-based extraterritoriality was unilateral and often conflictual. It was aimed not at weak or allegedly uncivilized states but largely at the Western allies of the United States. And it was based on statutes, not on treaties. Like the outpouring of new international institutions after 1945, effects-based jurisdiction reflected the burgeoning growth of the regulatory state in the 20th century as well as the rise of extensive economic interdependence in the West. Absent a thick web of regulation at home, there was little reason to seek to extend state power abroad. Absent interdependence, there were few effects to justify claims of extraterritorial jurisdiction.

SOFAs, capitulations, and the effects doctrine all illustrate a central point. Over the course of American history extraterritoriality has shifted in form but not function. The Westphalian paradigm purposefully granted each sovereign exclusive control over its domain; the very point of the rule of *cujus regio ejus religio* was to align religious differences spatially--Catholics here, Protestants there--and therefore compartmentalize them. When sovereigns interact, however, these differences in domestic law become apparent and often prove costly, and the costs of the barriers grow as interdependence grows. As America's place in the world system changed, and as that system itself changed, territoriality and extraterritoriality were manifested in new ways. There is nonetheless an underlying logic to these extraterritorial practices. As in the past, extraterritoriality today typically flattens the legal differences that are fundamentally embedded in Westphalian territoriality.

Intraterritoriality & the Constitution

Throughout American history citizens and leaders have debated not only the geographic reach of law that *policies* individuals, but also the reach of the law that *protects* individuals. That federal criminal and regulatory laws applied throughout the sovereign territory of the United States has never been in doubt. (Whether this policing function could reach outside the borders of the United States, as just discussed, was a different story.) Much more vexing has been the territorial reach of the constitutional rights that protect individuals

against the federal government.^{lxx} Is the map of the United States and of the Bill of Rights identical? Or are there gaps, where the United States rules but the Constitution does not reign? Whether there are internal demarcations with regard to legal rights is a question of intraterritoriality. Whether these rights extend abroad is a question of extraterritoriality.

Intraterritorial distinctions were at the heart of the debate over the acquisition of overseas colonies in 1898, the episode that gave rise to the title of this book. But similar questions arose about federal territories on the mainland, such as the Northwest Territory. The same was true of lands controlled by Indian tribes, who were often referred to as "domestic dependent nations" and yet were sometimes treated like foreign sovereigns. As a matter of international law, the sovereignty of the United States over all these areas was and remains uncontroverted; what was at issue was whether there were internal borders that determined where (and how) U.S. law applied.

In the infamous antebellum slavery case of *Dred Scott* the Supreme Court declared that constitutional rights, including property rights, did follow the flag. But many earlier cases had suggested otherwise, and by the post-Spanish-American War *Insular Cases* the court had rejected the reasoning of *Dred Scott* in favor of a "fundamental rights" approach. Thus the *Insular Cases* held that there are intraterritorial legal borders. Aside from certain fundamental rights that always applied within American territory Congress, to a large degree, possessed the power to determine what rights applied to what territory within the United States.

Rather than apply everywhere in equal measure, in other words, like water filling a canyon, U.S. law has differed depending on place. Throughout American history there has been a core in which all constitutional rights have applied and a periphery—federal territory, occupied enemy lands, Indian country, and the like—where only a subset applied. This intraterritorial distinction between core and periphery generally gave flexibility to the executive branch, enabled American expansion, and fed the global growth of American power.

Questions of intraterritoriality also fed into questions of extraterritoriality. The long-standing belief that constitutional protections did not apply extraterritorially was bolstered by judicial decisions entrenching intraterritorial distinctions. If the Bill of Rights did not fully apply within the United States, many reasoned, surely it did not fully apply outside the United States either. Thus the *Insular Cases*, the series of decisions by the Supreme Court in the early 20th century establishing that only fundamental rights applied to the Philippines and other distant islands, not only enabled American empire by limiting the reach of the Constitution.^{lxxi} They became essential elements in later rulings that preserved some traditional territorial limitations on constitutional rights.

Whether the Constitution followed the flag, in other words, not only had meaning for America's formal empire--the narrow but highly significant question at the heart of the *Insular Cases*--but also for the projection of U.S. military and police power in the postwar era. Consider the vast, informal postwar empire of military bases established to project American power around the globe. These bases were full of U.S. citizens, both members of the armed forces and civilians. It was easy to believe that constitutional rights did not apply to these Americans overseas if some of those same rights did not even apply within U.S. territory.

In the 1950s however, the Supreme Court rejected this view and expanded the extraterritorial reach of the Constitution. Today it is well-accepted that the Bill of Rights protects U.S. citizens against their government wherever those citizens might be found. Despite this change, however, older intraterritorial precedents have never been expressly overruled. The bizarre result is that American citizens enjoy the full protection of the Bill of Rights if they are tried by the U.S. government at a military base in Japan. But they may not if they are tried by the government in the federal territory of Puerto Rico.^{lxxii}

More puzzles exist. The *Insular Cases* declared that the Constitution only partly followed the flag to certain offshore colonies of the United States. Is Guantanamo Bay akin to these colonial possessions, or is it more like a foreign base leased from Germany? More profoundly, does constitutional protections apply at all to foreigners overseas? This last question is not only germane to the struggle against al Qaeda and other terrorist groups; the widespread deployment of American law enforcement officials overseas in recent decades raises it on a regular basis. Contemporary courts have grappled, for example, with the question of whether a foreigner interrogated in a foreign city by the FBI has the right to remain silent in an interrogation, or whether the Fourth Amendment's restrictions on search and seizure apply abroad as well as home.

Each of these issues, which are discussed in later chapters at length, implicates the relationship between law and land. The detention of foreign nationals at Guantanamo is certainly the most famous contemporary example. But as the Supreme Court noted in the 2008 case of *Boumediene v. Bush*, in which it declared that the right of habeas corpus applies to foreign detainees held at the island base, Guantanamo has many unique attributes that render it virtually U.S. territory. The larger issue is whether the Constitution controls the actions of American officials wherever they may act. Does the right of habeas corpus, or to receive *Miranda* warnings, apply in Bagram Air Base in Afghanistan as well?^{lxxiii} What about the streets of Karachi, Pakistan or Rome, Italy? These questions, which appear with increasing frequency in the 21st century, force us most dramatically to interrogate the assumptions and traditions of Westphalian territoriality.

Shaped By War and Trade

Throughout the pages that follow I stress the central role of international relations in shaping doctrines of territoriality. Of particular importance is the changing role of the United States within the international order: the implications of its rise from a nation on the fringe of world politics to a hegemonic “hyperpower” with global ambitions and reach.

The growing power of the United States had two major relevant effects. First, power promoted expansion, and expansion helped to entrench intraterritoriality. Forced to reconcile its constitutional traditions with its newfound global ambitions, the United States looked to intraterritoriality as a way to limit the costs of the former so as to better realize the latter. Second, power emboldened the United States to exercise extraterritoriality not only within weak societies—such as China—but also within other Western powers. This shift was in turn facilitated by important changes in world politics itself, most notably the “complex interdependence” that increasingly characterized the states of the West during the Cold War.^{lxxiv}

Both these claims sound in a long-standing, though hardly dominant, tradition of political inquiry that looks to the international plane to explain the domestic plane. In the 1970s Peter Gourevitch famously argued that “political development is shaped by war and trade.”^{lxxv} Not only are political movements and cleavages explicable in terms of international pressures and norms, he argued, but domestic institutional development is often a product of global forces. Using the jargon of international relations theory, which views the relationship between domestic factors and world politics as the “second image,” Gourevitch surveyed what he called the “second image reversed.”^{lxxvi} It is easy to see, for instance, how the rise of Nazism within Germany helped spawn the Second World War. The “second-image reversed” perspective looks in the opposite direction to show how systemic constraints and pressures not only drive states to adopt certain foreign policies--this is a fundamental tenet of realism--but also shape their internal structures and politics in profound ways.

Outside of a few obvious areas such as trade politics, most studies of American development have nonetheless failed to seriously consider the significance of the global context. Students of U.S. politics “continue to pay nearly exclusive attention to domestic institutions and policies.”^{lxxvii} Likewise, few works of legal history directly explore how international forces have shaped the development of American law. Nonetheless, like domestic politics and institutions, domestic law is often subject to powerful pressures from abroad. This point is most apparent when one considers the impact of the remarkable growth

of American power over two centuries. As a young and vulnerable state, the United States of the 18th and early 19th centuries was naturally drawn to Westphalian principles. Sovereignty was seen as a shield, and exclusive territorial control a bulwark against foreign invasion and influence. Even as the United States grew into an economic giant after the Civil War, it took a cautious approach with regard to other great powers and in regions outside the Western Hemisphere.

As the United States harnessed its latent power in the early 20th century, however, it began to play a much more formative role in world politics.^{lxxviii} Westphalian doctrines in turn grew less appealing, becoming nettlesome obstacles to the projection of American power and ideals. New and sometimes controversial forms of extraterritoriality better served the interests of the United States. These new forms were pioneered in the early postwar period, a time when the United States wielded unparalleled political, military, and economic power.

Yet it was not just that the United States went from weak to strong state; it was that the evolution of the international system itself altered the incentives and constraints the United States faced. Postwar effects-based extraterritoriality illustrates this dynamic well. The "effects doctrine" pioneered by American courts permitted the United States to police foreign actors who harmed American interests. U.S. firms were increasingly interested in competing on world markets, and they (and responsive federal regulators) sought to ensure that their foreign competitors faced similar regulations. A rapidly-reintegrating world economy highlighted the growing disjuncture between national laws and global markets. Empire was unrealistic and undesirable. But extraterritoriality, along with international treaty-making, was an attractive solution.

Meanwhile, other international changes created a more permissive environment for extraterritorial claims by the United States. In the 19th century such claims were viewed as dangerous incursions into another sovereign's domain. Yet by the 1950s the United States had embraced extraterritoriality, even when aimed at other great powers. The postwar order was more forgiving of such incursions: the dramatic decline of territorial warfare, the onset of the Cold War, and the intricate institutional enmeshing of the Western powers stand in stark contrast to the endemic great power conflict and imperialism of the 19th century. In this new, more interdependent context the United States was increasingly able to act extraterritorially without much fear of serious conflict with its allies. As a result, while postwar assertions of extraterritoriality were greeted with alarm by America's allies, there was no longer much concern that they would harm elemental political relationships.

These specific claims, and analogous ones, will be developed in chapters to come. The key point here is simply to flag the central importance of the United States' rise to power

within the international order. Absent careful attention to the global context we cannot understand the unusual evolution of territoriality in American law.

Outline of the Book

This introductory chapter has laid the theoretical and historical foundation for the story of territoriality in the United States told in the next six chapters. Chapter Two commences with an investigation of the constitutional design of 1789. Westphalian territoriality provided the template for the new nation. Yet the early decades of the United States presented a wide range of interesting territorial questions, some related to expansion—such as the constitutionality of the Louisiana Purchase—and others to military occupation and control. One of the most infamous judicial decisions of the era was the case of *Dred Scott*, which raised the central question of the reach of the Constitution’s prohibitions into the federal territories. In general, the early and antebellum periods illustrate the power of ideas of “strict territoriality,” which were present in a host of legal domains. But these periods also marked the early articulation of intraterritorial distinctions as the United States expanded westward.

Chapter Three picks up the thread after the Civil War and focuses on two chief developments: the burgeoning establishment of extraterritorial courts in Eastern societies and the dramatic move to imperialism occasioned by the Spanish-American War. The most interesting extraterritorial court was the remarkable U.S. District Court for China. The China court, which answered to the 9th Circuit Court of Appeals, heard thousands of cases over its history. Chapter Three also looks closely at the *Insular Cases*, the group of two dozen or so early 20th century rulings from the Supreme Court on the constitutionality of empire and the legal rules governing American colonies. These rulings definitively grounded the idea of intraterritoriality, and their principles continue to cast a heavy shadow over contemporary debates.

Chapter Four turns to the mid-20th century and explores the rise of effects-based extraterritorial jurisdiction. Prior to this period it was widely assumed that domestic statutes could not reach outside the sovereign borders of the nation. Effects-based jurisdiction was first applied by the United States in the context of antitrust law, but quickly spread to other regulatory laws, a broad area that, by the 1950s, had become centrally important to domestic legal systems throughout the developed world. It is here that the newly-dominant United States most rattled contemporaries by unilaterally bending traditional territorial doctrines in new ways.

The postwar era also witnessed another novel form of extraterritoriality, the Status of Forces Agreement. The rise of American hegemony and the exigencies of Soviet containment led to an unprecedented global deployment of U.S. military forces. This story is the heart of Chapter Five. U.S. forces abroad, numbering in the hundreds of thousands, were typically shielded from local law by agreements that shared some features of the 19th century capitulations. This remarkable deployment also brought many American civilians and dependants overseas, leading to one of the landmark territorial decisions of the 20th century and the first ever articulation of the principle that constitutional rights protect Americans outside U.S. borders.

How broadly this principle of extraterritorial constitutional rights applied is a central concern of Chapter Six. That American law could police acts abroad was increasingly accepted in the postwar era. At the same time, however, whether American law also protected actors abroad became increasingly contested. In this period a wide range of U.S. law enforcement agencies began to work offshore, tracking the rise of transnational criminal networks, global drug markets, and other aspects of the “dark side” of globalization. This push toward overseas policing forced the federal courts, increasingly solicitous of defendants’ rights in the 1960s, to consider just where the Bill of Rights stopped. A few courts upheld the extraterritorial application of constitutional rights for foreign nationals. But in 1990 the Supreme Court ruled otherwise, casting significant doubt on the idea that the Constitution had broad global application.

Chapter Seven brings the story back to our own era with an exploration of territoriality in the 21st century. The 9/11 attacks and the resulting armed conflicts in Iraq and Afghanistan have led to a range of territorial quandaries, including the law applicable to private military companies working for the United States. The most well-known quandary of course concerns the rights of foreign detainees held at Guantanamo. Guantanamo was chosen as a detention center precisely because it was thought to be beyond the reach of the federal courts—a question that nonetheless has come before them time and again in the ‘00s. The Supreme Court’s landmark decision in *Boumediene v. Bush* undermined much of the basis of this policy, but left many questions undecided. The detention and interrogation of suspected terrorists in offshore sites has forced U.S. courts and officials to consider anew whether, and to what degree, the Constitution followed the flag.

Chapter Eight brings these varied threads together by exploring more deeply the arguments laid out in this chapter and considering some of the other pressing issues at stake in the debate over the geographic ambit of American law. Territoriality in many ways remains vibrant, but it is also in undeniable tension with an increasingly interdependent world. The

offshoring of government activities--exemplified by Guantanamo--has surfaced this tension in ways not witnessed since the early 20th century debates over the Constitution, the flag, and the nascent American empire. Nearly a decade into the 21st century, the United States remains caught between its constitutional traditions and its global ambitions.

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In the 21st century offshore prisons and trials have become signature strategies of the United States, made more attractive to the government by the continuing power of territoriality. At the same time, however, aspects of territoriality have undergone substantial change. Many things unknown a century ago, such as subjecting firms in foreign countries to domestic regulation, are now commonplace.

Indeed, in the 1990s the political scientist John Ruggie famously argued that territoriality was becoming "unbundled"-- that it is ceding ground, as it were, to functionally-defined modes of political authority such as the European Union that transcend the Westphalian territorial paradigm.^{lxxix} Crude versions of this view are increasingly commonplace as globalization accelerates and challenges traditional territorial concepts. Thus a globalized world has hyperbolically been said to be a borderless or "flat" world.^{lxxx} The internet, thought to be the harbinger of a radically non-territorial form of community and governance, has likewise led to claims (also overheated) of the demise of territoriality.

Globalization, the internet, and even the rise of international human rights law have certainly made the legal differences among sovereign states more legible. By forcing states to engage their respective differences--whether through economic competition, negotiations over new norms, or jurisdictional conflict--these processes have highlighted the many barriers and differences among states.^{lxxxi} They have led to conflict over national rules, which has in turn accelerated the development of international treaties, institutions, and networks. Yet these are not the only ways to reconcile legal differences across nations. The extraterritorial extension of domestic law has many attractive features, not least that it requires some market presence by outsiders but little assent from other governments. Hence it is a particularly useful strategy to a hegemonic and wealthy power in a relatively peaceful world.

As this suggests, the relationship of the United States to territoriality in recent decades is deeply influenced by its anomalous and outsized global role. Some observers suggest that the contemporary world has undergone a "Westphalian flip," in which the United States enjoys a quasi-monopoly on the use of force internationally and other states are increasingly subject to international scrutiny over their domestic domains.^{lxxxii} If so, extraterritoriality will

only prove more attractive in years to come. Indeed, the United States may well have achieved, in the historian Charles Maier's words, "a post-territorial ascendancy—one in which it seems to transcend fixed borders and can project power, exert influence, and enjoy prestige far beyond traditionally bounded jurisdictions."^{lxxxiii} Along the way, however, the United States has had to grapple with the degree to which its fundamental legal commitments, as well as its military, criminal, and regulatory powers, reach beyond its borders. That story is the focus of this book.

Endnotes

ⁱ "Political Party Platforms", *The American Presidency Project*, available at <http://www.presidency.ucsb.edu/ws/index.php?pid=29587>.

ⁱⁱ Memorandum to William J. Haynes, II from Patrick Philpin and John Yoo, December 28, 2001, reprinted in Karen Greenberg and Joshua L. Dratel, eds., *The Torture Papers: The Road to Abu Ghraib* (Cambridge, U.K.: Cambridge University Press, 2005). As this book will describe, the question of whether constitutional rights follow the flag and whether U.S. courts have jurisdiction over places like Guantanamo are separate but closely linked issues.

ⁱⁱⁱ Dana Priest and Joe Stephens, "Secret World of U.S. Interrogation; Long History of Tactics in Overseas Prisons is Coming to Light", *Washington Post*, May 11, 2004, at A1.

^{iv} Richard Stevenson and Joel Brinkley, "More Questions as Rice Asserts Detainee Policy", *New York Times*, December 8, 2005.

^v John Agnew, "Territoriality", in *The Dictionary of Human Geography*, forthcoming, 2008.

^{vi} Lawyers distinguish various forms of jurisdiction. On the permissible bases of jurisdiction, and the role of territoriality in particular, see *Restatement (Third) of the Foreign Relations Law of the United States*, Volume 1, Part IV (American Law Institute 1987).

^{vii} *Hartford Fire Insurance Co. v. California*, 113 Sup. Ct. 2891 (1993).

^{viii} As I discuss below this practice was akin to, but distinct from, ambassadorial immunity.

^{ix} The question of extraterritoriality does arise vis-à-vis the American states, and there are various cases about whether the law of Georgia can extend into South Carolina and vice versa. In structure these cases raise many of the same issues, and involve many of the same principles, as extraterritorial disputes involving international sovereigns.

^x There is a vast literature on sovereign statehood. See in particular Stephen D. Krasner, *Sovereignty: Organized Hypocrisy* (Princeton: Princeton University Press, 1999); Daniel Philpott, *Revolutions in Sovereignty* (Princeton: Princeton University Press, 2001); Saskia Sassen, *Losing Control? Sovereignty in an Age of Globalization* (New York: Columbia University Press, 1996); Robert O. Keohane, "Sovereignty, Interdependence and International Institutions", in Linda B. Miller and Michael Smith, *Ideas and Ideals: Essays on Politics in Honor of Stanley Hoffmann* (Boulder: Westview, 1993); Christopher Schreur, "The Waning of the Sovereign State: Towards a New Paradigm for International Law?", *European Journal of International Law* 4, no. 1 (1993); F.H. Hinsley, *Sovereignty, 2nd Edition* (Cambridge, U.K.: Cambridge University Press, 1986).

^{xi} These views are often critiqued by geographers; e.g. John Agnew, "The Territorial Trap: The Geographical Assumptions of International Relations Theory", *Review of International Political Economy* 1 (1994); John Agnew and Stuart Corbridge, *Mastering Space: Hegemony, Territory, and International Political Economy* (New York: Routledge, 1995).

^{xii} Kenichi Ohmae, *The Borderless World: Power and Strategy in the Interlinked Economy* (New York: Harper Collins, 1999) ; Thomas Friedman, *The World Is Flat: A Brief History of the 21st Century* (New York: Farrar, Straus and Giroux, 2005).

^{xiii} David R. Johnson and David Post, "Law and Borders--The Rise of Law in Cyberspace," *Stanford Law Review* 48, 5 (1996) at 1370. Numerous examples of cyber conflict are given in Paul Schiff Berman, "The Globalization of Jurisdiction," *University of Pennsylvania Law Review*, 151, 2 (2002).

^{xiv} On globalization see Miles Kahler and David A. Lake, eds., *Governance in a Global Economy: Political Authority in Transition* (Princeton: Princeton University Press, 2003); on the internet see Jack Goldsmith and Tim Wu, *Who Controls the Internet?: Illusions of a Borderless World* (New York: Oxford University Press, 2005); Jack L. Goldsmith, "Against Cyberanarchy," *University of Chicago Law Review*, 65, 4 (1998); Oliver August, "The Great Firewall: China's Misguided (And Futile) Attempt to Control What Happens Online," *Wired Magazine*, 15,11 (October 2007)

^{xv} Friedrich Kratochwil, "Of Systems and Boundaries", *World Politics* 39 (1987), at 27.

^{xvi} See e.g. Kratochwil, supra; John G. Ruggie, "Territoriality and Beyond: Problematizing Modernity in International Relations", *International Organization* 47, no. 2 (1993) for examples. Some are territorial but do not feature exclusive territoriality; various groups shared a territory or a migration range.

^{xvii} Ruggie, supra; Hendrik Spruyt, *The Sovereign State and Its Competitors* (Princeton: Princeton University Press, 1995); Hedley Bull and Adam Watson, eds., *The Expansion of International Society* (New York: Oxford University Press, 1984).

^{xviii} Ruggie, "Territoriality and Beyond", supra note 16.

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- ^{xix} E.R. Adair, *The Exterritoriality of Ambassadors in the 16th and 17th Centuries* (London: Longmans, 1929) at 11.
- ^{xx} *Johnson v. Eisentrager*, 339 U.S. 263, 269 (1950).
- ^{xxi} J.L. Brierly, "The Lotus Case", *Law Quarterly Review* 44 (1928) at 156.
- ^{xxii} F. A. Mann, "The Doctrine of Jurisdiction in International Law", *Recueil des Cours de l'Academie de Droit International* 111, no. 1 (1964), at 24.
- ^{xxiii} Cedric Ryngaert, *Jurisdiction in International Law, Volume 1* (unpublished PhD thesis, Katholieke Universiteit Leuven, 2006) at 53. On Westphalia generally see Leo Gross, "The Peace of Westphalia, 1648-1948", *American Journal of International Law* 42, no. 1 (1948).
- ^{xxiv} Ryngaert, *supra*, at 53.
- ^{xxv} *The Schooner Exchange v. M'Faddon*, 11 U.S. (7 Cranch) 116, 136 (1812). Wheaton argued similarly to the Court in *U.S. v. Bevens*, 16 U.S. (3 Wheat.) 336 (1818) at 348, that "The exemption of the territory of every sovereign from any foreign jurisdiction, is a fundamental principle of public law."
- ^{xxvi} Krasner, *Sovereignty*, *supra* note 7; Andreas Osiander, "Sovereignty, International Relations, and the Westphalian Myth", *International Organization* 55 (2001); James Caporaso, "Changes in the Westphalian Order: Territory, Public Authority, and Sovereignty", *International Studies Review* 2, no. 2 (2000); Janice Thomson, *Mercenaries, Pirates, and Sovereigns: State Building and Extraterritorial Violence in Early Modern Europe* (Princeton: Princeton University Press, 1994); Spruyt, *supra*. Similar claims about territoriality are made by Agnew, "The Territorial Trap", *supra* note 8; and Agnew and Corbridge, *Mastering Space*, *supra* note 8.
- ^{xxvii} Alexander Murphy, "The Sovereign State as a Political-Territorial Ideal", in Thomas Biersteker and Cynthia Weber, eds., *State Sovereignty as a Social Construct* (Cambridge, U.K.: Cambridge University Press, 1996).
- ^{xxviii} John H. Herz, "Rise and Demise of The Territorial State", *World Politics* 9, no. 4 (1957), at 480-1. See also Kratochwil, "Of Systems and Boundaries", *supra* note 10.
- ^{xxix} That clarity is not always perfect; border disputes are the bread and butter of the International Court of Justice (see e.g., *The Temple of Preah Vihear*, [Cambodia v. Thailand] Judgment of June 15, 1962). More unusual, Neal Ascherson catalogs a few examples of alleged dead space in the international system, including the probably apocryphal "Akwizgran Discrepancy," an unallocated piece of land between 19th century Belgium, Germany, and the Netherlands. Ascherson, "On International Space," *London Review of Books*, 23 University Press, 1996). The high seas were the subject of a separate set of rules (later codified by treaty). With regard to piracy, for instance, states employed what is known as "universal jurisdiction," which granted any state in the system the right to pursue pirates and other particularly disfavored criminals.
- ^{xxx} Robert Sack, *Human Territoriality: Its Theory and History* (New York: Cambridge University Press, 1986) at 5.

^{xxx} The classic work is Benedict Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (London: Verso, 1983).

^{xxxii} Eric Hobsbawm, *Nations and Nationalism Since 1790* (Cambridge, U.K.: Cambridge University Press, 1990) at 19. See also J. Samuel Barkin and Bruce Cronin, "The State and the Nation: Changing Norms of Sovereignty in International Relations", *International Organization* 48, no. 1 (1994) 107-130.

^{xxxiii} This was especially argued by Vattel.

^{xxxiv} Hinsley, *Sovereignty*, supra note 7, at 158.

^{xxxv} Michael R. Fowler and Julie M. Bunck, *Law, Power, and the Sovereign State* (Penn St. Press, 1995), at 12.

^{xxxvi} Some aspects of territorial sovereignty are currently under attack by the rise of international human rights law and increasing demands that states intervene in other states to protect vulnerable populations. The recent efforts to entrench a "responsibility to protect" norm in the international system are part of this slow and uncertain evolution of sovereignty. See the Secretary-General's High Level Panel on Threats, Challenges, and Change, *A More Secure World: Our Shared Responsibility*, U.N. Doc. A/59/565 (2004); J.L. Holzgrefe and Robert O. Keohane, eds, *Humanitarian Intervention: Ethical, Legal, and Political Dilemmas* (Cambridge: Cambridge University Press, 2003); Report of the International Commission on Intervention and State Sovereignty, *The Responsibility to Protect* (Ottawa: International Development Research Centre, 2001).

^{xxxvii} Ruggie, "Territoriality and Beyond", supra note 16.

^{xxxviii} Adair, *The Extritoriality of Ambassadors*, supra note 19, at 9. This is closely intertwined with the rise of principles of comity and general notions of sovereign immunity.

^{xxxix} Id. at 7. Adair uses the phrase "extritoriality" but the meaning is the same; another common phrase from the 19th century is "extrality." Adair states that by the beginning of the 17th century ambassadors "were one of the normal methods of diplomatic intercourse."

^{xl} Garrett Mattingly, *Renaissance Diplomacy* (New York: Dover, 1988), at 236. The influential 19th century international lawyer James Lorimer wrote that "An English ambassador, with his family and his suite, whilst abroad in the public service, is domiciled in England, and his house in English ground." James Lorimer, *The Institutes of the Law of Nations: A Treatise of the Jural Relations of Separate Political Communities Volume 1*, (London, William Blackwood and Sons, 1883-4) , at 248.

^{xli} Id. at 244.

^{xlii} *Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812) at 137.

^{xliii} Henry Wheaton, *Elements of International Law*, 8th edition, Sec. 78 (Philadelphia: Carey, Lea & Blanchard, 1866). Similar statements abound in judicial decisions of the era. See e.g. *Hilton v. Guyot*, 159 US 113 (1895) at 163 "[n]o law has any effect, of its own force, beyond the limits of the sovereignty from which its authority is derived."

^{xliv} Gerald Neuman, *Strangers to the Constitution: Immigrants, Borders, and Fundamental Law* (Princeton: Princeton University Press, 1996), at 7.

^{xlvi} On the advantages of the European powers see Jared Diamond, *Guns, Germs, and Steel: The Fates of Human Societies* (New York: W. W. Norton & Company, 1996). In recent years there has been a marked revival of the study of empire; see e.g. Herfried Munkler, *Empires: The Logic of World Domination from Ancient Rome to the United States* (Malden, M.A.: Polity Press, 2007); John Darwin, *After Tamerlane: The Global History of Empire Since 1405* (London: Bloomsbury Press, 2007); Harold James, *The Roman Predicament: How the Rules of International Order Create the Politics of Empire* (Princeton: Princeton University Press, 2006); Hendrik Spruyt, *Ending Empire: Contested Sovereignty and Territorial Partition* (Ithaca: Cornell University press, 2005); Niall Ferguson, *Empire: The Rise and Fall of the British World Order and the Lessons for Global Power* (New York: Basic Books, 2003); Alexander Motyl, *Imperial Ends: The Decay, Collapse, and Revival of Empires* (New York: Columbia University Press, 2001). An older treatment is Michael W. Doyle, *Empires* (Ithaca: Cornell University Press, 1986).

^{xlvi} David Strang, “Contested Sovereignty: The Social Construction of Colonial Imperialism”, in Thomas Biersteker and Cynthia Weber, eds., *State Sovereignty as a Social Construct* (Cambridge, U.K.: Cambridge University Press, 1996) , at 27.

^{xlvi} Diamond, *Guns, Germs, and Steel*, supra note 39. See also the discussion in Darwin, *After Tamerlane*, supra note 39.

^{xlviii} Antony Anghie, *Imperialism, Sovereignty, and the Making of International Law* (Cambridge, U.K.: Cambridge University Press, 2005).

^{xlix} Cited in Anghie, Id. at 23. See also James Lorimer, *The Institutes of the Law of Nations: A Treatise of the Jural Relations of Separate Political Communities, Two Volumes* (Edinburgh and London: Blackwood and Sons, 1883, 1884) at 101-102. Some dispute the European character of international law in the past, though unpersuasively in my view. See e.g. Alexander Orakhelashvili, “The Idea of European International Law”, *European Journal of International Law* 17, no. 2 (2006).

¹ Whether the United States constitutes an empire today (or in the postwar era generally) is a topic of great controversy. On the parallels see Munkler, *Empires*, supra note 39; Harold James, *The Roman Predicament*, supra note 39; Charles Maier, *Among Empires: American Ascendancy and Its Predecessors* (Cambridge, M.A.: Harvard University Press, 2006); Chalmers Johnson, *The Sorrows of Empire: Militarism, Secrecy, and the End of the Republic* (New York: Metropolitan Books, 2004); Andrew Bacevich, *American Empire: The Realities and Consequences of U.S. Diplomacy* (Cambridge: Harvard University Press, 2004); Michael Mann, *Incoherent Empire* (New York: Verso, 2003).

^{li} Darwin, *After Tamerlane*, supra note 39, at 244.

^{lii} Maier, *Among Empires*, supra note 49, at 23. Munkler says similarly that “whereas states...integrate their populations equally—above all, grant them equal rights whether they live at

the core of the state or in its border regions—this is not the case with empires: there is almost always a scale of integration descending from centre to periphery...” Munkler, *Empires*, supra note 39, at 5.

^{liii} Johan Steyn, “Guantanamo Bay: A Legal Black Hole”, *International and Comparative Law Quarterly* 53, no. 1 (2004).

^{liv} These include spheres of influence and “preponderance;” for a brief treatment see Kratochwil, “Of Systems and Boundaries”, supra note 10, at 37-41.

^{lv} The practice was not limited to Europe, and some argue it dates back over a millennium. Arab traders may have enjoyed similar extraterritorial legal rights as far back as 8th and 9th century China. See Eileen Scully, *Bargaining With the State From Afar* (New York: Columbia University Press, 2001), at 23. See also Shalom Kassan, “Extraterritorial Jurisdiction in the Ancient World”, *American Journal of International Law* 29, no. 1 (1935); Orakhelashvili, “The Idea”, supra note 43, at 332: “[i]t was common practice in different parts of the world and in different stages of history for local sovereigns to allow foreigners to reside in their territories and be governed by their own laws. This took place in the inter-European and inter-Asian contexts, as well as between Europeans and Asians. From the 8th century, Muslim merchants enjoyed jurisdictional privileges in Hindu states, as did Chinese merchants in Siam and Indonesia.”

^{lvi} Ingrid Detter, “The Problem of Unequal Treaties”, *The International and Comparative Law Quarterly* 15 (1966), at 1069-1089.

^{lvii} Shinya Murase, “[The Most-Favored-Nation Treatment in Japan's Treaty Practice During the Period 1854-1905](#)”, *The American Journal of International Law* 70, no. 2 (1976), at 273-297.

^{lviii} A vestige of this approach is the 1963 Vienna Convention on Consular Relations, which grants nationals of the parties the right to notify their consulate when they are arrested in the territory of another party.

^{lix} For example, Shih Shun Liu describes the 6th century BC practice of permitting Greeks to live in Egypt under their own laws and religion, as well as many more recent examples from Roman times. Shih Shun Liu, *Extraterritoriality: Its Rise and Decline* (New York: AMS Press, 1969 [1925]) at 24. But Liu notes that in many parts of the world it was only the rise of coercive and unequal treaties in the late 19th century that led to full extraterritoriality for Westerners: “With the exception of Japan, the Powers of Eastern Asia, prior to the middle of the 19th century, assumed their territorial jurisdiction and were not in the habit of granting to foreigners extraterritorial privileges.” At 83.

^{lx} Kurt Nadelmann, “American Consular Jurisdiction in Morocco and the Tangier International Jurisdiction”, *American Journal of International Law* 49 (1955). The United Nations headquarters in New York City is a sort of contemporary international zone, governed by a mix of American and international law and into which American authorities cannot legally enter without the permission of the Secretary-General. “Agreement Between the United Nations and the United States Regarding the Headquarters of the United Nations”, signed June 25, 1947, available at <http://www.yale.edu/lawweb/avalon/decade/decad036.htm>.

^{lxi} The court operated formally until 1942 and appealed flowed to the 9th Circuit. Scully, *Bargaining*, supra note 50, at 15.

^{lxii} Scully, *Bargaining*, supra note 50, at 106; see also Teemu Ruskola, "Canton is Not Boston: The Invention of American Imperial Sovereignty", *American Quarterly* 57, no. 3 (2005, a special issue on Legal Borderlands), at 867-8; David Bederman, "Extraterritorial Domicile and the Constitution", *Virginia Journal of International Law* 28, no. 2 (1988).

^{lxiii} Spruyt, *Ending Empire*, supra note 39, at 4.

^{lxiv} Darwin, *After Tamerlane*, supra note 39, at 441-2.

^{lxv} Quoted in Liu, *Extraterritoriality*, supra note 52, at 90.

^{lxvi} *Id.* at 100-114.

^{lxvii} See generally G. John Ikenberry, *After Victory: Institutions, Strategic Restraint, and the Rebuilding of Order After Major Wars* (Princeton: Princeton University Press, 2000); Jose E. Alvarez, *International Organizations as Law-Makers* (Oxford: Oxford University Press, 2006)

^{lxviii} On the latter see Anne-Marie Slaughter, *A New World Order* (Princeton: Princeton University Press, 2004).

^{lxix} Karen DeYoung, "Lacking an Accord on Troops, US and Iraq Seek a Plan B," *Washington Post*, October 14, 2008.

^{lxx} Federalism of course entailed an internal division that had no meaning under international law. The key here is instead the role of federal territory and anomalous areas such as tribal lands. Did the Bill of Rights reach into these territories fully, or was it only fully applicable in the states of the Union?

^{lxxi} As Alex Aleinikoff notes, "the antiexpansionist constitutional argument that 'the Constitution follows the flag' was pressed more in order to prevent empire building (since the inapplicability of the Constitution to the 'savages' of the Philippines seemed apparent) than to ensure that all residents on U.S. soil would be guaranteed basic civil rights." T. Alexander Aleinikoff, *Semblances of Sovereignty: The Constitution, the State, and American Citizenship* (Harvard University Press, 2002) at 25

^{lxxii} As a matter of statutory law the Bill of Rights applies in unincorporated territories such as Puerto Rico; it is unclear whether it applies as a matter of constitutional law.

^{lxxiii} So-called "Miranda" warnings are familiar to viewers of American crime shows; pursuant to a Supreme Court decision from the 1960s police must read certain rights to a suspect before beginning an interrogation. The extraterritoriality of *Miranda* is discussed in Chapter Six.

^{lxxiv} Robert O. Keohane and Joseph S. Nye, *Power and Interdependence* (Little, Brown, 1977), Chapter 2.

^{lxxv} Peter Gourevitch, "The Second Image Reversed: The International Sources of Domestic Politics", *International Organization* 32, no. 4 (1978). This phrase became the title of a more collection in this tradition; Ira Katznelson and Martin Shefter, eds., *Shaped by War and Trade: International Influences on American Political Development* (Princeton: Princeton University Press, 2002).

^{lxxvi} The "second image" concept is drawn from Kenneth Waltz, *Man, the State, and War* (New York: Columbia University Press, 1959).

^{lxxvii} Ira Katznelson, "Rewriting the Epic of America", in Katznelson and Shefter, eds., *Shaped By War and Trade*, supra note 68, at 4

^{lxxviii} On this process see Fareed Zakaria, *From Wealth to Power: The Unusual Origins of America's World Role* (Princeton: Princeton University Press, 1998).

^{lxxix} Ruggie, "Territoriality and Beyond", supra note 11; see also Christopher Ansell and Giuseppe Di Palma, eds, *Restructuring Territoriality: Europe and the United States Compared* (Cambridge University Press, 2004), noting that "In many respects, Ruggie's argument is simply one of the more subtle and provocative examples of an emerging genre arguing that the modern state and the modern state system are being challenged, and perhaps eroded, by a variety of forces ranging from domestic privatization to economic and cultural globalization."

^{lxxx} This is not Ruggie's much more nuanced and complex view, but shares with his a sense that traditional territoriality is facing new challenges. Ohmae, supra; Friedman, supra.

^{lxxxi} The links between globalization and jurisdiction are extensively discussed in Berman, supra.

^{lxxxii} The phrase is John Ikenberry's. See G. John Ikenberry, "The Liberal Leviathan," *Prospect*, (October 2004); Anne-Marie Slaughter, "Security, Solidarity, and Sovereignty: The Grand Themes of UN Reform," *American Journal of International Law* 99, 3 (July 2005)

^{lxxxiii} Maier, *Among Empires*, supra note 45, at 101.