

NOTES

The Ties That Bind: The Constitution, Structural Restraints, and Government Action Overseas

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INTRODUCTION

On February 20, 2007 the D.C. Circuit held that the Military Commissions Act (MCA), which stripped the federal court of jurisdiction to hear habeas corpus petitions from Guantanamo detainees, was constitutional.¹ The ruling represented a major setback for the detainees in their quest to access federal courts to challenge their detention. The court stated that “the Constitution does not confer rights on aliens without property or presence within the United States.”² As noted in Judge Judith Rogers’s dissent, this holding relies on selective precedent and ignores law to the contrary.³ More importantly, it confuses the role of individual rights provisions of the Constitution with structural restraints placed on the government.

The D.C. Circuit examined the Constitution in a binary fashion: Like an on/off switch, the Constitution either does or does not apply to aliens outside of the United States. Relying on *Johnson v. Eisentrager*⁴ and *United States v. Verdugo-Urquidez*⁵ for the proposition that certain constitutional provisions (in those cases, the Fifth and Fourth Amendments respectively) are not implicated vis-à-vis aliens on foreign territory,⁶ the D.C. Circuit held that the Suspension Clause is not applicable.⁷ However, this analysis blurs a crucial distinction between individual rights provisions and structural restraints within the Constitution. For instance, the Fourth Amendment has been interpreted as applying to “the people,” a term of art referring to U.S. citizens and those who have sufficiently close ties to the United States.⁸ The Suspension Clause is of a different flavor. Instead of conferring an individual right, it limits the government’s power to act. As the dissent in *Boumediene* pointed out, “[a] review of the text and operation of the Suspension Clause shows that, by nature, it operates to constrain the powers of Congress.”⁹ Unlike an individual right, the Suspension Clause is not limited to a particular class of individuals.¹⁰

1. *Boumediene v. Bush*, 476 F.3d 981, 991, 994 (D.C. Cir. 2007), *cert. granted*, 127 S. Ct. 3078 (June 29, 2007) (No. 06-1195).

2. *Id.* at 991.

3. *Id.* at 994–99 (Rogers, J., dissenting).

4. 339 U.S. 763 (1950).

5. 494 U.S. 259 (1990).

6. *Verdugo-Urquidez*, 494 U.S. at 269; *Eisentrager*, 339 U.S. at 783.

7. *Boumediene*, 476 F.3d at 991–92.

8. *Verdugo-Urquidez*, 494 U.S. at 265 (noting that “the people” refers “to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community”).

9. *Boumediene*, 376 F.3d at 995.

10. This issue will be of central importance in *Boumediene*’s appeal to the Supreme Court. One of the issues upon which the Court granted certiorari is “[w]hether aliens detained as enemy combatants at Guantanamo Bay have rights under the Suspension Clause of Article I, Section 9, of the Constitution.” See *Boumediene v. Bush*, 127 S. Ct. 3078 (2007) (granting certiorari). The petitioners argue that the Suspension Clause should bind the government at Guantanamo Bay. See Petition for Writ of Certiorari at 23–25, *Boumediene*, 127 S. Ct. 3078 (No. 06-1195). Other Guantanamo detainees have made similar arguments, focusing on the structural nature of the Suspension Clause. See, e.g., Petition for Writ of

The difference between individual rights and structural restraints is meaningful with respect to the applicability of the Constitution to government actions overseas. For example, the Second Amendment operates as an individual right.¹¹ Because as such, only people with sufficient ties to the United States can invoke its protection. Therefore, an alien living in Brazil could not challenge an action by the U.S. government for disarming him if he were in Brazil. However, this does not mean that the government could violate separation of powers even if its actions solely implicate that same man living in Brazil.¹² Because separation of powers limits the range of permissible government activity, the government is limited both at home and abroad.

Until recently, analysis of the Constitution's extraterritorial reach has focused on individual rights, and those who advocate for a Constitution with a global reach would extend those rights to aliens abroad.¹³ This Note argues that the Constitution does have a role to play beyond our borders, but unlike other approaches, it is not a "globalist" approach based on aliens possessing individual rights. Instead, I argue that structural provisions constrain government action, and that this constraint is not limited by territory. Certain provisions—like the Establishment Clause, the prohibition against cruel and unusual punishment, or the Suspension Clause—are directives to the government limiting its range of permissible activity. Regardless of the status of the person harmed or where the harm takes place, the government is forbidden from acting in a certain manner. As the Court declared in *Downes v. Bidwell*, constitutional provisions that go to the competency of the government to act apply both at home and overseas.¹⁴

This Note first explores the tension between individual rights and structural restraints, and argues that by examining the text, history, and purpose of a clause, and how that provision operates, we can draw meaningful distinctions

Certiorari at 19, *Hamdan v. Gates*, 127 S. Ct. 1507 (2007) (No. 06-1169) [hereinafter *Petition for Writ of Certiorari*] ("Like other structural protections, the Suspension Clause is not limited to a particular class of individuals, but rather constrains the power of Congress to act.").

11. In this context, I refer to the Second Amendment as an individual right in contrast to a structural restraint. The question of whether the Second Amendment is an individual right or a collective right is widely disputed. See, e.g., Sanford Levinson, *The Embarrassing Second Amendment*, 99 *Yale L.J.* 637 (1989).

12. See *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2772–75 (2006); see also *Petition for Writ of Certiorari*, *supra* note 10, at 19 ("Implicit in [*Hamdan*] was the principle that a Guantanamo detainee can invoke constitutional restraints—in that case, separation of powers—to contest government action.").

13. See, e.g., LOUIS HENKIN, *CONSTITUTIONALISM, DEMOCRACY AND FOREIGN AFFAIRS* 99–100 (1990) (arguing that the framers intended the Bill of Rights to embody a "universal human rights ideology"); Louis Henkin, *The Constitution as Compact and as Conscience: Individual Rights Abroad and at Our Gates*, 27 *WM. & MARY L. REV.* 11 (1985); Gerald L. Neuman, *Whose Constitution?*, 100 *YALE L.J.* 909 (1991); Kermit Roosevelt III, *Guantanamo and the Conflict of Laws: Rasul and Beyond*, 153 *U. PA. L. REV.* 2017 (2005). But see J. Andrew Kent, *A Textual and Historical Case Against a Global Constitution*, 95 *GEO. L.J.* 463 (2007) (arguing that although the Constitution has no application beyond our borders, treaties and congressional legislative action fill in the gap).

14. See *Downes v. Bidwell*, 182 U.S. 244, 277 (1901).

between the two. I then explain why territory matters with respect to individual rights provisions, but why this analysis is inapplicable to structural restraints. Finally, I examine several areas in which the government is currently acting that may conflict with constitutional requirements and examine whether structural restraints in the Constitution should apply to their actions. Specifically, I explore the Eighth Amendment's applicability to detainee treatment; the jury amendments' limitations on criminal trials conducted outside the territory of the United States; and the Establishment Clause's application to U.S. programs that seek to promote moderate forms of Islam. In some of these cases, the Supreme Court has recognized the structural nature of the provision. In other instances, the Court has not. I argue that the Court can and should recognize the provisions' structural underpinnings and apply those restraints to government action at home and abroad.

Although I argue that many provisions of the Constitution should apply to government actors overseas, this analysis is not an attempt to smuggle individual rights into "structural" provisions and therefore argue that the entire Constitution should apply abroad. Certain provisions, such as the Second and Fourth Amendments, are clearly individual rights provisions that should have no applicability overseas.¹⁵

I. DEFINING STRUCTURAL RESTRAINTS

Differentiating between individual rights and structural restraints has a profound impact on how we interpret the protections of the Constitution. The distinction is familiar to constitutional analysis.¹⁶ Structural restraints limit how the government can act, regardless of place or time. Although they can affect individual rights by the way in which the government can act, the purpose of a structural clause is to manage government power.¹⁷ Individual rights, on the other hand, are constitutional duties owed to each individual.¹⁸ They say nothing about the government's organization or dispersal of power; only that it cannot infringe on those under its jurisdiction in a certain manner.

But isn't the Bill of Rights about *rights* as its name suggests? Yes, but that was not its only purpose. Challenging the contemporary wisdom that the Bill of Rights' primary purpose was to protect individual rights, Professor Akhil Amar writes:

Of course individual and minority rights did constitute a motif for the Bill of Rights—but not the sole, or even the dominant, motif. A close look at the Bill

15. See *supra* note 11.

16. See, e.g., LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* §§ 2-1 to -4, at 118-36 (3d ed. 2000) (discussing the relationship between the structure of the Constitution and substantive rights); Carl H. Esbeck, *The Establishment Clause as a Structural Restraint on Governmental Power*, 84 *IOWA L. REV.* 1, 2-3 (1998) (distinguishing between constitutional structural restraints and individual liberties).

17. Esbeck, *supra* note 16, at 3.

18. *Id.* at 2-3.

reveals structural ideas tightly interconnected with language of rights; states' rights and majority rights alongside individual and minority rights; and protection of various intermediate associations—church, militia, and jury—designed to create an educated and virtuous electorate. The main thrust of the Bill was not to downplay organizational structure, but to deploy it; not to impede popular majorities, but to empower them.¹⁹

Although the Court has often viewed the Bill as a protector of individual rights and deemphasized its structural moorings, it has on occasion explicitly recognized the structural ties that run throughout the Bill of Rights as a whole. For example, the Court has noted “[t]he currently received understanding of the Bill of Rights as instituted ‘to curtail and restrict the general powers granted to the Executive, Legislative, and Judicial Branches’ of the National Government defined in the original constitutional articles.”²⁰

The Constitution contains two primary forms of structural restraints: vertical and horizontal.²¹ The vertical restraints are those born from federalism and prevent the national government from interfering with state institutions. The federalist nature of the Bill of Rights has been widely acknowledged.²² Horizontal restraints, on the other hand, constrain the national government: They are power-conferring and power-limiting restraints (commonly referred to as “separation of powers”).²³ Both, however, are not limited to managing power and can enact substantive rights at the same time. As Professor Steven Smith notes:

[A] measure can have a federalist component—it can apply to the national government but not the states—and in addition adopt a substantive principle or enact a substantive right—albeit one applicable only to the national government. The Eighth Amendment’s prohibition on cruel and unusual punishment seems a case in point: The prohibition may not initially have applied to the states, but it nonetheless seems to have limited the national government in accordance with a substantive right or principle disfavoring inhumane punishment.²⁴

If structural restraints run throughout the Bill of Rights, why have scholars and jurists focused primarily on the individual rights protections? Many schol-

19. Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 *YALE L.J.* 1131, 1132 (1991); *see also* *Clinton v. City of New York*, 524 U.S. 417, 450–53 (1998) (Kennedy, J., concurring) (noting that the structure of the Constitution itself advances liberty by separating powers).

20. *United States v. Balsys*, 524 U.S. 666, 674–75 (1998) (Black, J., concurring) (emphasis omitted) (citing *New York Times Co. v. United States*, 403 U.S. 713, 716 (1971)).

21. Esbeck, *supra* note 16, at 3.

22. *See, e.g.*, *Baron v. Baltimore*, 32 U.S. (7 Pet.) 243, 250–51 (1833) (holding the Bill of Rights inapplicable to the states); *see also* STEVEN D. SMITH, *FOREORDAINED FAILURE* 22 (1995).

23. Esbeck, *supra* note 16, at 3.

24. SMITH, *supra* note 22, at 22.

ars point to the Rights Revolution and the impact of incorporation.²⁵ Professor Amar suggests that incorporation, although theoretically sound, blinded many people to the way structural restraints function and shifted the focus to a purely individual rights model.²⁶ Amar writes, like “people with spectacles who often forget they are wearing them, most lawyers read the Bill of Rights through the Fourteenth Amendment without realizing how powerfully the lens has refracted what they see” and therefore ignore the structural restraints that were applied only against the federal government.²⁷ By removing the “incorporation lens” we can focus on structural restraints that run throughout the Bill of Rights.²⁸

Accepting that the Bill of Rights contains structural provisions is not the end of the analysis. Almost every provision *constrains* or *restrains* the government in some fashion.²⁹ By giving an individual a right, the Founders at the same time implicitly limited the government from violating that right. If a citizen has a right to confront witnesses against him, the government may not conduct a trial without providing a mechanism for confrontation. The task is to separate out those provisions of the Constitution where the primary function or goal is to limit or manage government action. This can be done in three ways. The first is textual, the second goes to purpose and history, and the third examines how the provision operates. Further, it is instructive to examine how the Supreme Court has actually interpreted the provision.

A textual approach focuses on the commands of the specific constitutional provision. Under such an analysis, the first two clauses of the First Amendment are prototypical structural restraints:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.³⁰

Notice the subject of the first clause: Congress. The command of this provision is focused on what the government can and cannot do with respect to establishing a religion and abridging either speech or the press. The text

25. See Amar, *supra* note 19, at 1136; Esbeck, *supra* note 16, at 25; Mary Ann Glendon & Raul F. Yates, *Structural Free Exercise*, 90 MICH. L. REV. 477, 477–78 (1991).

26. Amar, *supra* note 19, at 1136.

27. *Id.* at 1136–37.

28. A related problem derives from the way we as law students and scholars study the Bill of Rights. As Professor Amar points out, constitutional scholars tend to examine the text in discrete and insular chunks. Scholars will examine specifically the history and the aims of the Fifth Amendment or the Eighth Amendment, but not consider the Bill of Rights as a whole. This oversight has led to a doctrine that deemphasizes structure instead of employing it. See *id.* at 1131.

29. Likewise, individual rights flow from the restraints on the government. See *Printz v. United States*, 521 U.S. 898, 921–22 (1997) (discussing how individual liberty flows from the Constitution’s structure).

30. U.S. CONST. amend. I. The last clause, like the Fourth Amendment, speaks in terms of rights held directly by the people and should be interpreted as an individual right.

explicitly manages Congress's power to legislate laws of a certain type. Compare to the Fourth Amendment:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.³¹

Here, the focus is not on the government, but on the right of the people. The government cannot violate that right, but the Amendment first and foremost creates an individual right, vesting with the people. This analysis is consistent with the Court's view in *United States v. Verdugo-Urquidez* that the Fourth Amendment operates as an individual right.³² The Court emphasized that "the people" as used in the Constitution is a term of art; the term "refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community."³³ An alien in Mexico, therefore, was not entitled to Fourth Amendment protections when the search was executed there and not on U.S. soil.

In addition to text, one can determine whether a provision is meant to manage government power by examining its purpose and history. This can be seen dramatically with the prohibition against establishment. One of the Clause's central purposes was to manage federal power vis-à-vis the states. The federal government was not to establish a national religion, but the Constitution said nothing of state establishments, and as history shows, there were various state establishments in existence at the time of ratification.³⁴ Although the Religion Clauses, working in tandem, embody an individual right of religious freedom, the prohibition on establishment was meant to act as a prohibition on government action, not as a specific right held by the people.

Finally, structural provisions operate differently than individual rights provisions. For example, individual rights, unlike structural restraints, can be waived.³⁵ The right to free speech has traditionally been interpreted as an individual right (although a textual analysis could suggest structural components as well).³⁶ It is a duty the government owes to individuals in its jurisdiction. It can also be

31. U.S. CONST. amend. IV.

32. 494 U.S. 259 (1990).

33. *Id.* at 265 (citing *United States ex rel. Turner v. Williams*, 194 U.S. 279, 292 (1904) (stating that an alien is not entitled to First Amendment rights, because "[h]e does not become one of the people to whom these things are secured by our Constitution by an attempt to enter forbidden by law")).

34. See *infra* text accompanying notes 213–216.

35. Esbeck, *supra* note 16, at 2; see also *Clinton v. City of New York*, 524 U.S. 417, 451–52 (1998) (stating that structural clauses cannot be voluntarily surrendered or abdicated by Congress); *Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 703 (1982) (noting that because personal jurisdiction is an individual right, it can be waived).

36. See *supra* notes 29–30 and accompanying text.

waived. By taking a job with the Central Intelligence Agency or the Federal Bureau of Investigations, a job applicant agrees to forgo some measure of free speech in exchange for a security clearance.³⁷ In contrast, structural restraints are restrictions on power and implicate federalism and separation of powers and therefore cannot be waived.³⁸

Standing requirements can also shed light on whether a constitutional provision is an individual right or a structural restraint. When structural constitutional restraints are violated, standing is much harder to achieve.³⁹ When standing is achieved, it is often done through status as a taxpayer.⁴⁰ For example, in *Flast v. Cohen*, the Court held that the plaintiffs could sue for violations of the Establishment Clause (which has been viewed by some scholars as a structural restraint on government power rather than an individual right) based on their status as taxpayers.⁴¹ However, in *United States v. Richardson*, the Supreme Court refused to grant taxpayer standing for violations of the Accounts Clause—a structural restraint.⁴² The plaintiff argued that classifying intelligence budgets was unconstitutional and sought redress. The Court held that as a taxpayer the plaintiff had not suffered personalized injury to the extent necessary to create the nexus required for standing.⁴³ Although standing is not necessarily a determinative factor of whether a certain clause is structural or individual, how the courts choose to address the issue of standing can provide a window into how a certain clause operates.

Similarly, how a court chooses to remedy a constitutional violation can highlight the nature of the clause. Professor Esbeck notes that “[r]emedies tailored to relieving plaintiffs of injuries actually suffered are indicative of an

37. For example, as a condition of employment with the CIA, employees sign an agreement to “not . . . publish . . . any information or material relating to the Agency, its activities or intelligence activities generally, either during or after the term of [his] employment . . . without specific prior approval by the Agency.” *Snepp v. United States*, 444 U.S. 507, 508 (1980) (alteration in original). When a former CIA official published a book without prior prepublication review about his activities in South Vietnam, the CIA moved to enforce the official’s employment contract. The official argued that the agreement infringed on his First Amendment right to free speech. The Supreme Court held that the government could impose these restrictions on what would otherwise be a violation of the First Amendment. *Id.* at 510; cf. Jason Mazzone, *The Waiver Paradox*, 97 Nw. U. L. REV. 801, 801 (2003) (noting that First Amendment rights cannot usually be waived in bargaining with the government, whereas criminal rights such as right to counsel or plea bargains can and noting the paradox between the unconstitutional conditions doctrine and the doctrine of criminal waiver).

38. See, e.g., *Ins. Corp. of Ir.*, 456 U.S. at 702–03 (noting that subject matter jurisdiction is a restraint on sovereignty and therefore cannot be waived, unlike personal jurisdiction).

39. As Erwin Chemerinsky notes, “someone who seeks to prevent a violation of a constitutional provision dealing with the structure of government is unlikely to be accorded standing unless the person has suffered a particular harm distinct from the rest of the population.” ERWIN CHEMERINSKY, *FEDERAL JURISDICTION* § 2.3.2, at 69 (4th ed. 2003).

40. See, e.g., *Flast v. Cohen*, 392 U.S. 83, 105 (1968). But see *Hein v. Freedom from Religion Found.*, 127 S. Ct. 2553 (2007).

41. *Flast*, 392 U.S. at 85–86, 105.

42. 418 U.S. 166, 167–68, 179–80 (1974). The Accounts Clause requires Congress to publish from time to time the expenditures of the United States. See U.S. CONST. art. I, § 9, cl. 7.

43. *Id.* at 175, 177.

individual rights clause.”⁴⁴ On the other hand, when structural restraints are violated, the remedy tends to be class-wide, taking the form of injunctive relief.

II. WHY STRUCTURAL RESTRAINTS SHOULD APPLY BEYOND OUR BORDERS

Defining the precise boundaries of the Constitution’s reach has proved a deceptively hard task. The Court has generally looked at two factors: the individual’s status (U.S. citizen or alien) and the physical location (U.S. controlled territory or foreign sovereign nation). This focus on the status of the person has necessarily meant that the analysis centered on individual rights. Yet even in the context of individual rights, the Court has taken varying positions on how far to extend the Constitution.

For example, during colonialism, the Court relied heavily on the concept of territoriality and held that the “[C]onstitution can have no operation” outside the territory of the United States.⁴⁵ The Court was willing to concede that in territories such as Puerto Rico, the government was compelled to respect those constitutional rights which were deemed fundamental.⁴⁶

The Court moved away from this territoriality approach in *Reid v. Covert*, holding that the Fifth and Sixth Amendments apply to *citizens* located outside the United States territory.⁴⁷ Justice Black penned the plurality opinion which held:

The concept that the Bill of Rights and other constitutional protections against arbitrary government are inoperative when they become inconvenient or when expediency dictates otherwise is a very dangerous doctrine and if allowed to flourish would destroy the benefit of a written Constitution and undermine the basis of our government.⁴⁸

But there were diverging views as to how far this application should extend. Justice Black would have extended every provision of the Constitution extraterritorially to citizens.⁴⁹ Justice Harlan, although agreeing that the Fifth and Sixth Amendments should apply to citizens overseas, was not willing to go as far. Harlan could not “agree with the suggestion that every provision of the Constitution must always be deemed automatically applicable to American citizens in

44. Esbeck, *supra* note 16, at 6.

45. *Ross v. McIntyre*, 140 U.S. 453, 464 (1891).

46. *Downes v. Bidwell*, 182 U.S. 244, 268, 287 (1891). However, there was great disagreement among the Justices as to which rights were fundamental. The Court, for example, held that the Fifth and Sixth Amendments did not apply to territories. *See Hawaii v. Mankichi*, 190 U.S. 197, 212, 218 (1903). Justice Brown based his decision on the proposition that the right to a jury was not fundamental. *Id.* at 218. Justice Harlan strongly disagreed. *See id.* at 226–49 (Harlan, J., dissenting).

47. 354 U.S. 1, 5, 7 (1957) (plurality opinion).

48. *Id.* at 14.

49. *Id.* at 5–6 (“At the beginning we reject the idea that when the United States acts against citizens abroad it can do so free of the Bill of Rights. The United States is entirely a creature of the Constitution.”).

every part of the world.”⁵⁰

Professor Neuman has described this shift in the Court’s jurisprudence, specifically Justice Black’s plurality opinion, as moving away from a strict territoriality approach to what he terms “municipal law,” which focuses heavily on the “prescriptive jurisdiction over American citizens worldwide under the nationality principle.”⁵¹ The lower courts tended to read *Reid v. Covert* in a broad fashion, as protecting citizens’ rights against government action “on the high seas and in foreign countries.”⁵² For example, in *United States v. Tiede*, the U.S. court in Berlin used lofty rhetoric mirroring *Reid* to declare that “[i]t is a first principle of American life—not only life at home but life abroad—that everything American public officials do is governed by, measured against, and must be authorized by the United States Constitution.”⁵³

Today, territory still plays a central role in the applicability of individual rights provisions of the Constitution vis-à-vis aliens. In 1990, the Court decided *United States v. Verdugo-Urquidez* holding that the Fourth Amendment did not apply where United States officials searched foreign property owned by an alien with no attachments to the United States.⁵⁴ Chief Justice Rehnquist, writing for the majority, focused heavily on who is entitled to receive the benefit of constitutional protections (citizens and resident aliens) and relied on the concept of territoriality.⁵⁵ Because an alien was not part of the “people” the Constitution intended to protect, *Verdugo-Urquidez* could not lay claim to the protections against unreasonable search and seizure found in the Fourth Amendment.⁵⁶ Justice Kennedy, in a concurring opinion, gave a much more narrow reason for the inapplicability of the Fourth Amendment overseas. Kennedy espoused a more practical approach and argued that the Court should examine the Bill of Rights and find no extraterritorial application for provisions where adherence to the right would be “impracticable and anomalous.”⁵⁷

More recently, in *Rasul v. Bush*, the Court upheld its territoriality framework, holding that Guantanamo Bay is within the territorial jurisdiction of the United

50. *Id.* at 74 (Harlan, J., concurring in the result).

51. Neuman, *supra* note 13, at 68; *see also* GERALD L. NEUMAN, STRANGERS TO THE CONSTITUTION 109–11 (1996) (describing the various approaches to the extraterritorial reach of the Constitution such as “universalism,” “Hobbism,” “global due process,” and “mutuality of obligation”).

52. Neuman, *supra* note 13, at 970; *see, e.g.*, *Ramirez de Arellano v. Weinberger*, 745 F.2d 1500, 1505 (D.C. Cir. 1984) (holding citizen could bring due process claim against military for use of property overseas); *United States v. Demanett*, 629 F.2d 862 (3d Cir. 1980) (U.S. and Columbian nationals were protected by the Fourth Amendment when searched by the Coast Guard); *United States v. Cadena*, 585 F.2d 1252, 1262 (5th Cir. 1978) (applicability of Fourth Amendment not limited to U.S. citizens), *overruled by* *United States v. Michelena-Orovio*, 719 F.2d 738 (5th Cir. 1983); *Berlin Democratic Club v. Rumsfeld*, 410 F. Supp. 144 (D.D.C. 1976) (holding First, Fourth, and Sixth Amendments applicable to U.S. citizens in Germany).

53. 86 F.R.D. 227, 244 (U.S. Ct. Berlin 1979).

54. 494 U.S. 259, 274–75 (1990).

55. *See id.*

56. *Id.* at 265–66.

57. *Id.* at 278 (Kennedy, J., concurring).

States.⁵⁸ Applying *Rasul*, the D.C. District Court held that because Guantanamo Bay is controlled entirely by the United States government, “[t]he situation in these cases is very different from the circumstances in *Verdugo-Urquidez*” where the Fourth Amendment was not applicable because Mexico employs a completely different legal system.⁵⁹ Territory, thus, continues to play a central role in the Court’s decision to implicate individual constitutional liberties of aliens.⁶⁰

This distinction is important because the reliance on territory to trigger individual rights protection implicates a temporal and spatial limitation to those constitutional protections. The government must act in conformity with those provisions when acting within the jurisdiction of the United States. When the U.S. government controls a certain territory, the constitutional protections are not outweighed by *Verdugo*-like considerations, regardless of alienage. Therefore, whether the harm occurred on U.S. territory was crucial to the Court’s decision in *Rasul*. However, the focus shifts when considering a structural restraint provision. If the government is prohibited from acting—regardless of location—territoriality should not enter into the equation.⁶¹ This model speaks not to individual rights, but to structures which inhibit the government regardless of the status of the person harmed.

The Supreme Court relied on this proposition in *Hamdan v. Rumsfeld*, holding that the President’s establishment of the military commissions violated the Uniform Code of Military Justice and the Geneva Conventions.⁶² “Implicit in that ruling was the principle that a Guantanamo detainee *can* invoke constitutional restraints—in that case separation of powers—to contest government action.”⁶³ The Court held that “the President . . . may not disregard limitations that Congress has, in proper exercise of its own war powers, placed on his

58. 542 U.S. 466 (2004).

59. *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 463–64 (D.D.C. 2005).

60. *But see* *Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir. 2007), *cert. granted*, 127 S. Ct. 3078 (U.S. June 29, 2007) (No. 06-1195). In another decision challenging detainee detention at Guantanamo Bay, Judge Randolph (joined by Judge Sentelle) questioned the dichotomy between structure and individual rights as they relate to territory:

Why is the dissent so fixated on how to characterize the Suspension Clause? The unstated assumption must be that the reasoning of our decisions and the Supreme Court’s in denying constitutional rights to aliens outside the United States would not apply if a constitutional provision could be characterized as protecting something other than a “right.” On this theory, for example, aliens outside the United States are entitled to the protection of the Separation of Powers because they have no individual rights under the Separation of Powers. Where the dissent gets this strange idea is a mystery, as is the reasoning behind it.

Id. at 994. This “strange idea” is found throughout constitutional law, academic scholarship, and is the focus of this Note. Judge Rogers’s dissent in *Boumediene* explains the differences between individual rights and structural restraints and properly characterizes the law. *Id.* at 994–98 (Rogers, J., dissenting).

61. *See, e.g.*, *Downes v. Bidwell*, 182 U.S. 244, 341 (1901) (declaring that constitutional provisions that limited the government’s capacity to act applied in Puerto Rico, a U.S. territory, but “foreign to the United States in a domestic sense”).

62. *See Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006).

63. Petition for Writ of Certiorari, *supra* note 10, at 19.

powers.”⁶⁴ Even if Guantanamo is not a U.S. territory (a debatable proposition given *Rasul*), the government may not ignore the dictates of separation of powers when it acts in that sphere.

Further, this principle—that structural restraints do not stop at the ocean’s edge—can be seen in other cases interpreting the applicability structural provisions overseas. In *Downes v. Bidwell*, the Court was asked to consider whether a provision taxing oranges imported from Puerto Rico was constitutional in light of Article I, Section 8, which requires that “all duties, imposts, and excises shall be uniform throughout the United States.”⁶⁵ In holding that the provision did not apply to Puerto Rico, the Court explained:

[I]t by no means becomes necessary to show that none of the articles of the Constitution apply to the island of Porto Rico [sic]. There is a clear distinction between such prohibitions as go to the very root of the power of Congress to act at all, irrespective of time of place, and such as are operative only “throughout the United States” or among the several states.⁶⁶

The Court went on to explain that “when the Constitution declares that ‘no bill of attainder or *ex post facto* law shall be passed,’ and that ‘no title of nobility shall be granted by the United States,’ it goes to the competency of Congress to pass a bill of *that description*.”⁶⁷ Therefore, because of the structural restraints—the limitations on the ability of the government to act—the status of the person harmed has no role to play in the analysis of whether a provision should apply extraterritorially. Congress may not pass a bill of attainder or *ex post facto* law, regardless of whether the legislation would affect U.S. citizens or aliens overseas.

It therefore becomes apparent that the Court does apply different standards on the extraterritorial application of the Constitution when the provision at issue is a structural restraint, rather than an individual right. And this difference makes sense: If a provision exists to limit the range of permissible government activity, that activity does not become permissible simply because those affected live beyond our borders. Congress may not pass *ex post facto* laws as applied to aliens. The President may not violate separation of powers when he interacts with foreign governments.⁶⁸

Before addressing specific constitutional provisions, I should address a primary counter-argument this theory invites. Several leading constitutional scholars have rebutted the proposition that any part of the Constitution should have a

64. *Hamdan v. Rumsfeld*, 126 S. Ct. at 2774 n.23 (2006).

65. *Downes*, 182 U.S. at 249 (quoting U.S. CONST. art. I, § 8, cl. 1).

66. *Id.* at 276–77.

67. *Id.* at 277.

68. The Framers explicitly recognized this in at least one respect. In Article II, Section 2, the Constitution provides that the Executive may make treaties “with the advice and consent of the Senate.” This restraint on executive power is structural; it does not implicate individual rights but rather manages government power.

global reach because the people for whom the Constitution was devised are the American people.⁶⁹ Further, they argue that globalists⁷⁰ tend to pick and choose from history to find strands of universalism, or exceptions where the founders were thinking about aliens.⁷¹ They argue that the exceptions should not swallow the rule that the Constitution was meant to apply domestically. For my argument to succeed, however, the Constitution need not benefit aliens extraterritorially. Instead, I argue that *even if the Constitution is intended only to benefit American citizens*, the application of the Constitution extraterritorially serves that goal when structural restraints are involved. In fact, its application is required. In popular rhetoric, It's not about them; it's about us.

III. STRUCTURAL RESTRAINTS AND THE WAR ON TERRORISM

Because a large portion of the war on terrorism takes place beyond our borders, our jurisprudence must begin to flesh out which provisions of the Constitution bind government actors overseas. This section discusses several of the hot-button issues that have been raised by the war on terrorism in the last five years.

A. DETAINEE TREATMENT AND THE EIGHTH AMENDMENT

Operating under the assumption that the Constitution had no applicability on Guantanamo Bay, the Justice Department penned the infamous “Torture Memo,” which implicitly authorized the torture of detainees.⁷² Throughout the analysis, the memo did not once mention the restraints of the Eighth Amendment, Due Process, or the right against self-incrimination.⁷³ Yet the Eighth Amendment ban on cruel and unusual punishment was drafted specifically to prohibit torture.⁷⁴

69. See AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTITUTION* 170 (1998) (arguing that the Bill of Rights are “paradigmatically rights of and for American citizens”); Kent, *supra* note 13.

70. This term refers to any theory which purports to apply either the entire Constitution or some portion thereof to aliens overseas. See Kent, *supra* note 13, at 464.

71. Professor Amar writes that “[p]eripheral applications of the Bill” such as to “resident aliens . . . for reasons of prudence, principle or both . . . should not obscure its core meaning.” AMAR, *supra* note 67, at 170.

72. See Memorandum for Alberto R. Gonzales, Counsel to the President (Aug. 1, 2002), available at www.washingtonpost.com/wp-srv/nation/documents/dojinterrogationmemo20020801.pdf [hereinafter 2002 Memo].

73. See *id.* Although this memo has been repealed, there are still concerns about how detainees are being treated in U.S.-controlled facilities, as well as treatment of prisoners sent to foreign-controlled prisons. For a defense of the memo, see John Yoo, *A Crucial Look at Torture Law*, in *CIVIL LIBERTIES VS. NATIONAL SECURITY* 321–23 (Katherine B. Darmer et al. eds., 2004).

74. See, e.g., *Hudson v. McMillian*, 503 U.S. 1, 9 (1992) (“[P]roscribing torture and barbarous punishment was ‘the primary concern of the drafters’ of the Eighth Amendment” (quoting *Estelle v. Gamble*, 429 U.S. 97, 102 (1976)); *id.* at 13–14 (Blackmun, J., concurring in the judgment) (“Indeed, were we to hold to the contrary, we might place various kinds of state-sponsored torture and abuse—of the kind ingeniously designed to cause pain but without a telltale ‘significant injury’—entirely beyond the pale of the Constitution.”).

The issue of how detainees are treated has arisen in several other contexts regarding government action overseas. Following the documented abuse at Abu-Ghraib prison in Iraq, many have questioned whether detainees held at Guantanamo Bay or the CIA covert prisons have also been abused. Several former detainees have made such claims. Although the Uniform Code of Military Justice (UCMJ) covers treatment of prisoners in the military context, how should the Eighth Amendment apply where the UCMJ is inapplicable (for example, where CIA officials operate prisons on foreign soil)?

The question remains open as to whether indefinite detention *without the opportunity for judicial process* would be outside the ambit of the Eighth Amendment. Although several leading cases interpret the Eighth Amendment ban on “punishment” to apply to post-conviction sentences in the criminal context, these cases only examined the Amendment’s applicability within the context of school settings and medical care.⁷⁵ Lower courts have suggested that the Eighth Amendment applies in pre-conviction situations where government action would constitute punishment.⁷⁶ It seems likely that indefinite detention would constitute punishment for this purpose.⁷⁷

The Eighth Amendment can and should be interpreted as a structural restraint on government action. The text of the clause is a command that the government not act in a certain manner: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”⁷⁸ The focus of the amendment is on what government may not do, not on the rights held by the people. The horizontal restraint of the Eighth Amendment was concerned with the problem of agency—that government officials may attempt to rule in their own self interest as opposed to ruling in the best interests of the majority and their constituencies.⁷⁹ Instead of protecting minorities (a common theme of individual rights), the goal was to protect the majority from self-interested government officials.⁸⁰

75. See, e.g., *City of Revere v. Mass. Gen. Hosp.*, 463 U.S. 239 (1983) (holding that failure to provide medical care before the suspect had any form of criminal adjudication was not a violation of the Eighth Amendment); *Ingraham v. Wright*, 430 U.S. 651 (1977) (holding that punishment by paddling in the school context is outside the ambit of the Eighth Amendment).

76. See, e.g., *Casaburro v. Giuliani*, 986 F. Supp. 176 (S.D.N.Y. 1997) (holding Eighth Amendment applicable in pre-conviction situations where action constitutes punishment).

77. Although outside the scope of this paper, there is also historical support for the proposition that the Founders intended for the Eighth Amendment to apply to pre-trial interrogations. See Celia Rumann, *Tortured History: Finding Our Way Back to the Lost Origins of the Eighth Amendment*, 31 PEPP. L. REV. 661, 673–81 (2004) (citing to the *Blackstone Commentaries*, which equated rack and screw interrogation techniques as punishment, and to the debate during the ratification convention which suggests the Framers believed the Eighth Amendment would apply pre-conviction). Therefore, this Note assumes that the Court would find that indefinite detention without the opportunity for process is within the ambit of “punishment” for the purposes of the Eighth Amendment.

78. U.S. CONST. amend. VIII.

79. See AMAR, *supra* note 69, at 82.

80. The Eighth Amendment appears to have contemplated restraining both the legislative and judicial branches. See GEORGE ANASTAPLO, *THE AMENDMENTS TO THE CONSTITUTION: A COMMENTARY* 88 (1995) (“Legislators as well as judges are addressed by this amendment.”); see also *United States v.*

1. Historical Support for the Eighth Amendment as a Structural Restraint

The Eighth Amendment ban on cruel and unusual punishment mirrors that of the English Bill of Rights of 1689.⁸¹ Although torture was not a common-law sentence, “the monarch could authorize the rack by special royal warrant. . . . English law had permitted such grisly punishments as ‘pulling out the [defendant’s] tongue,’ slicing off the nose, cutting off the genitals, and, for capital crimes, boiling to death.”⁸² The penalty for treason—although not considered torture at the time—was one of the harshest: the convict was hung, but not to death. He was then cut down, “his genitals were cut off and burned before him; he was disemboweled, still alive, and then he was cut into four parts and beheaded.”⁸³ If the convict was a woman, she was burned to death.⁸⁴

Many commentators (including William Blackstone) believe that the bloody rule of King James II, and the King’s Bench headed by Lord Chief Justice George Jeffreys, was the cause for the English Bill of Rights ban.⁸⁵ Judge Jeffreys “sent 292 prisoners to their deaths and brutally punished hundreds of others.”⁸⁶ In 1685, Jeffreys conducted the “Bloody Assize” against rebels captured during the Duke of Monmouth’s rebellion.⁸⁷ Others, however, posit that the ban was a result not of the Bloody Assize, but rather arose from the case of Titus Oates, a cleric of the Church of England who was sentenced to life for perjury.⁸⁸ His sentence also included four annual floggings.⁸⁹ This punishment was viewed as excessive for the crime of perjury as well as cruel.⁹⁰ Regardless of the animating event, the goal of the provision was two-fold: to restrain judges from devising methods to keep prisoners detained indefinitely and to prohibit barbarous punishment.⁹¹

For the Founders, who adopted the provision almost wholesale into the Bill of Rights, juries proved to be the fundamental structural form for removing sentencing power from the hands of a centralized government and placing it instead in the hands of the populous.⁹² Criminal defendants were entitled to an indictment before trial by a grand jury.⁹³ Juries, instead of despotic judges,

Lopez, 514 U.S. 549, 552 (1995) (discussing the role of structure in “prevent[ing] the accumulation of excessive power in any one branch”).

81. See LEONARD W. LEVY, *ORIGINS OF THE BILL OF RIGHTS* 231 (1999).

82. *Id.* at 234.

83. *Id.* at 235.

84. *Id.*

85. See, e.g., AMAR, *supra* note 69, at 87, 279; 4 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 372 (Oxford, Clarendon 1765).

86. LEVY, *supra* note 81, at 234.

87. *Id.* at 236.

88. See, e.g., *id.*

89. *Id.*

90. *Id.* at 237.

91. *Id.* at 231.

92. See Part III B *infra* for an analysis of the jury as a structural restraint. See also AMAR, *supra* note 69, at 82–83.

93. U.S. CONST. amend. V.

would hear all criminal cases in a public forum.⁹⁴ And when meting out punishment, excessive bail or fines could not be demanded, nor could cruel or unusual punishment be imposed.⁹⁵ The underlying structure was not one rooted in individual rights, protecting against the minority, but rather was populist and majoritarian. Ordinary citizens, not elected officials, would serve as a check on excesses of the government.⁹⁶

Interpreting the Eighth Amendment as a structural restraint also finds support from its close link to the First Amendment. Crimes against the government (such as sedition or treason) or against the Church of England garnered some of the harshest punishments under the Crown.⁹⁷ In the New World, the ban on cruel and unusual punishment served to protect those who exercised their right to free speech. Noting the structural nature of the Fifth, Sixth, and Eighth Amendments, Justice Hugo Black argued that these amendments were aimed at confining the exercise of power by courts and judges “within precise boundaries.”⁹⁸ Rooted in history, these restraints were fundamental in protecting against the use of courts to impose criminal penalties to suppress speech, press, and religion. He further noted that the constitutional limitations of the courts’ powers were, in the Founders’ view, fundamental to supporting the rights guaranteed in the First Amendment.⁹⁹

The Framers, therefore, employed structure by placing the power to punish not with the executive, but rather with the judiciary, again using the horizontal structure of the Constitution to restrain excesses of the executive.

2. Indicia of Structural Restraints

Interpreting the Eighth Amendment as a structural restraint also finds support in how it operates. Although not conclusive, whether cruel and unusual punishment can be waived and standing requirements help highlight the structural moorings of the Amendment. When one examines waiver, standing, and remedies, a picture of structure tends to emerge.

The Supreme Court has never ruled on whether an individual can waive his Eighth Amendment protection against cruel and unusual punishment. However, in a case that allowed a criminal defendant to waive his right to an appeal that

94. U.S. CONST. amend. VI.

95. U.S. CONST. amend. VIII.

96. See AMAR, *supra* note 99, at 87.

97. See *id.* at 82 (noting the crime of “writing books and pamphlets” was punished by cutting off the convict’s ears and “his remaining ear stumps [were] gouged out while he was on a pillory”).

98. *Adamson v. California*, 332 U.S. 46, 70 (1947) (Black, J., dissenting); see also *Green v. United States* 356 U.S. 165, 209 (1958) (Black, J., dissenting) (“Above all that generation deeply feared and bitterly abhorred the existence of arbitrary, unchecked power in the hands of any government official, particularly when it came to punishing alleged offenses against the state. A great concern for protecting individual liberty from even the possibility of irresponsible official action was one of the momentous forces which led to the Bill of Rights. And the Fifth, Sixth, Seventh and Eighth Amendments were directly and purposefully designed to confine the power of courts and judges, especially with regard to the procedures used for the trial of crimes.”).

99. See *Adamson*, 332 U.S. at 71.

implicated the death penalty, Justices White and Marshall, each writing separate dissents, raised a structural Eighth Amendment concern centering on the constitutionality of the state statute at issue. Justice White noted that “the consent of a convicted defendant in a criminal case does not privilege a State to impose a punishment otherwise forbidden by the Eighth Amendment.”¹⁰⁰ Justice Marshall agreed and noted that the Eighth Amendment “expresses a fundamental interest of society in ensuring that state authority is not used to administer barbaric punishments.”¹⁰¹ In other words, for Justices White and Marshall, the possibility of execution under an unconstitutional statute was equivalent to a “barbaric punishment,” presumably because such a statute would implicate arbitrary state action.

In later cases, Justice Marshall continued to express his opinion that the Eighth Amendment does not solely implicate individual rights that can be waived by defendants.¹⁰² Other commentators have agreed, noting that the ban on cruel and unusual punishments not only protects individual rights, but also serves a beneficial societal purpose and should not be waived.¹⁰³ Comparing the Eighth Amendment to other areas of criminal procedural law, one scholar asks, “Does consent by the recipient [of cruel and unusual punishment] not turn what would otherwise be a cruel and unusual punishment into an acceptable one?”¹⁰⁴ In order to avoid this outcome, Professor King argues that “the imposition of certain penalties for certain crimes, no matter what procedure is followed” could not be waived by a consenting defendant.¹⁰⁵

While a defendant, a prosecutor, and even a trial judge may agree that the best resolution to a particular case would be to submit the defendant to torture, such as rape, castration, or caning, this type of agreement must never be enforced. Like the prohibition against even knowing and voluntary contracts for slavery, or the refusal to recognize consent as a defense to murder, a ban on the alienation of these outward-looking guarantees of the Eighth Amend-

100. *Gilmore v. Utah*, 429 U.S. 1012, 1018 (1976) (White, J., dissenting).

101. *Id.* at 1019 (Marshall, J., dissenting).

102. *See Whitmore v. Arkansas*, 495 U.S. 149, 173 (1990) (“A defendant’s voluntary submission to a barbaric punishment does not ameliorate the harm that imposing such a punishment causes to our basic societal values and to the integrity of our system of justice.”); *Lenhard v. Wolff*, 444 U.S. 807, 811 (1979) (Marshall, J., dissenting) (“Society’s independent stake in enforcement of the Eighth Amendment’s prohibition against cruel and unusual punishment cannot be overridden by a defendant’s purported waiver.”).

103. *See* Tim Kaine, Comment, *Capital Punishment and the Waiver of Sentence Review*, 18 HARV. C.R.-C.L. L. REV. 483, 513–14 (1983) (arguing that the Eighth Amendment demands mandatory appellate review in capital punishment cases to protect society’s independent interest in preventing the arbitrary infliction of the death penalty); Jeffrey L. Kirchmeier, *Let’s Make a Deal: Waiving the Eighth Amendment by Selecting a Cruel and Unusual Punishment*, 32 CONN. L. REV. 615, 617, 644–45, 651–52 (2000).

104. Nancy Jean King, *Priceless Process: Nonnegotiable Features of Criminal Litigation*, 47 UCLA L. REV. 113, 173 (1999).

105. *Id.* at 174

ment is *necessary to protect greater social values* from the more narrow interests of the parties.¹⁰⁶

This exposition highlights the arguments supporting the proposition that the Eighth Amendment serves not just to protect the defendant's individual rights; the prohibition against waiver signals the underlying structural nature of the provision—one which serves greater societal interests.¹⁰⁷

Examining standing, one must have an injury in fact to claim an Eighth Amendment violation.¹⁰⁸ Generalized grievances, on the other hand, will not amount to standing to seek redress.¹⁰⁹ The Eighth Amendment standing requirement would tend toward an individual rights interpretation: Only those who suffer cruel and unusual punishment may sue the government for exceeding their limits.¹¹⁰

However, there is evidence that, as originally drafted, the Eighth Amendment right was structural and not meant to be judicially enforceable. Professor Amar argues that the original English Bill of Rights “was not designed to create judicially enforceable rights . . . but rather was written to restrain . . . judges like George Jeffries.”¹¹¹ Antebellum era leaders argued that the Eighth Amendment could never be used to invalidate congressionally approved punishments, although Amar notes that once the Eighth Amendment was incorporated against the states, the clause had more “judicially enforceable bite” because states could be out of line with national or state norms for what constituted cruel and unusual.¹¹² Although judicially enforceable today, the original understanding of the Eighth Amendment can inform our interpretation of how the restraint on government action can operate today.

A third indicia of structural restraints can be found in how violations are remedied. Although individuals who suffer at the hand of the government are protected by the Eighth Amendment and are entitled to retributive compensation, many cases highlight the structural underpinnings of the Amendment. In

106. *Id.* at 175–76 (emphasis added) (footnote omitted).

107. See also *infra* section III.A.3 on normative rationales for a structural interpretation, which picks up on this theme.

108. See *Raines v. Byrd*, 521 U.S. 811, 818 (1997) (citing *Allen v. Wright*, 468 U.S. 737, 751 (1984)) (holding that standing requires that plaintiffs allege a cognizable personal injury that can be traced to the defendant's alleged conduct); *CHEMERINSKY*, *supra* note 39, at 69–70; *Esbeck*, *supra* note 16, at 33.

109. See *FEC v. Atkins*, 524 U.S. 11, 23 (1998) (citing cases that hold that generalized grievances of an abstract and indefinite nature cannot confer standing). For example, with respect to the National Security Agency's warrantless surveillance program, the plaintiffs failed to prove on appeal that they had standing to challenge the program. Although the district court held the plaintiffs had established government action sufficient to “chill” their First Amendment rights, the Sixth Circuit reversed, finding no concrete injury sufficient to confer standing. See *ACLU v. NSA*, 493 F.3d 644, 665–66, (6th Cir. 2007); see also *ACLU v. NSA*, 438 F. Supp. 2d 754, 766–71 (E.D. Mich. 2006).

110. Even where Congress statutorily creates a right for citizens to sue, plaintiffs must still meet the Article III injury requirement. See *CHEMERINSKY*, *supra* note 39, at 72.

111. *AMAR*, *supra* note 69, at 279.

112. *Id.* at 279–80.

these cases, remedies are not tailored to the injuries before the court, but rather to serve as an injunction against a form of punishment.

For example, in the context of the death penalty, suits brought against the government under the Eighth Amendment seek not just to prohibit the government from using the death penalty on a single individual (although that of course is a central goal) but rather to have the punishment enjoined altogether. In two recent cases, the Supreme Court has held that the death penalty as applied to the mentally challenged¹¹³ or juveniles¹¹⁴ violates the Eighth Amendment. The remedy for the individual plaintiffs was that the government was forced to stop the practice against the entire class of individuals.

Likewise, in the prison context, plaintiffs often bring suits for prison conditions they deem to violate the Eighth Amendment. The remedy for denying certain conditions or using certain forms of punishment within a prison setting is class-wide relief: Prison officials must change their behavior.¹¹⁵ To take one example, in *Estelle v. Gamble* the petitioner claimed the prison staff had refused him adequate medical care, which violated his Eighth Amendment rights.¹¹⁶ Although not finding a violation on these grounds, the Court noted that deliberate indifference to serious medical needs could constitute a violation.¹¹⁷ This decision, therefore, served to regulate prison official conduct, in addition to vindicating prisoners' individual rights.

3. Normative Rationales: Torture & Democracy

Just as cruel and unusual punishment cannot be waived because of its implications for society, normative grounds also call for a structural restraint interpretation. The restraint on government actors in the realm of cruel and unusual punishment serves the broader structural goal of maintaining a free and democratic state. These normative rationales are closely linked to the history and the operation of the clause.

As Justice Marshall emphasized in his dissenting opinion in *Gilmore v. Utah*,

113. See *Atkins v. Virginia*, 536 U.S. 304, 321 (2002) (holding that the application of the death penalty to mentally challenged defendants is cruel and unusual and remanding the case for a sentence consistent with the opinion).

114. See *Roper v. Simmons*, 543 U.S. 551, 578–79 (2005) (holding that the application of the death penalty to criminal defendants who committed their crimes before the age of eighteen violates the Eighth and Fourteenth Amendments and affirming the lower court's decision to set aside the sentence of death).

115. See *Hope v. Pelzer*, 536 U.S. 730, 738 (2002) (holding that handcuffing a prisoner to a hitching post and taunting him is cruel and unusual); *Farmer v. Brennan*, 511 U.S. 825, 832–34 (1994) (explaining that prison officials can be liable for violations of the Eighth Amendment for acting with "deliberate indifference"); *Hudson v. McMillian*, 503 U.S. 1, 4 (1992) (holding that "use of excessive physical force against a prisoner may constitute cruel and unusual punishment [even] when a prisoner does not suffer serious injury"); *Estelle v. Gamble*, 429 U.S. 97, 103–04 (1976) (holding that a failure to provide medical care is an Eighth Amendment violation).

116. See 429 U.S. at 99–101. The petitioner complained of back and chest pain, as well as black outs. Although medical care was sometimes delayed, he saw medical staff seventeen times. *Id.*

117. *Id.* at 104–05, 107.

“I believe that the Eighth Amendment not only protects the right of individuals not to be victims of cruel and unusual punishment, but that it also expresses a fundamental interest of society in ensuring that state authority is not used to administer barbaric punishments.”¹¹⁸ This restraint is ensured by the Court’s standard: punishments must reflect the “evolving standards of decency that mark the progress of a maturing society.”¹¹⁹

Scholars and commentators alike have expressed the view that the act of state-sponsored torture cannot coexist with a democratic state.¹²⁰ For example, quite poetically, commentator Andrew Sullivan has opined:

Indeed, the very concept of Western liberty sprung in part from an understanding that, if the state has the power to reach that deep into a person’s soul and can do that much damage to a human being’s person, then the state has extinguished all oxygen necessary for freedom to survive. . . . Any polity that endorses torture has incorporated into its own DNA a totalitarian mutation. If the point of the U.S. Constitution is the preservation of liberty, the formal incorporation into U.S. law of the state’s right to torture . . . would effectively end the American experiment of a political society based on inalienable human freedom protected not by the good graces of the executive, but by the rule of law.¹²¹

The focus here is not on protecting the individual from harm, but rather protecting the union as a whole from a corrupting and coercive force. Torture cannot be permitted because it simply cannot coexist with democracy. Importantly, this analysis emphasizes the effects on those engaging in torture,¹²² as

118. 429 U.S. 1012, 1019 (1976) (Marshall, J., dissenting).

119. *Trop v. Dulles*, 356 U.S. 86, 101 (1958). Interestingly, this very standard highlights the structural nature of the Eighth Amendment. The plurality in *Trop* wrote: “While the State has the power to punish, the Amendment stands to assure that this power be exercised within the limits of civilized standards.” *Id.* at 100. Punishments must be rooted in norms that are created by a representative democracy.

120. Navy general counsel Albert J. Mora has opined:

We should care because the issues raised by a policy of cruelty are too fundamental to be left unaddressed, unanswered or ambiguous. We should care because a tolerance of cruelty will corrode our values and our rights and degrade the world in which we live. It will corrupt our heritage, cheapen the valor of the soldiers upon whose past and present sacrifices our freedoms depend, and debase the legacy we will leave to our sons and daughters. We should care because it is intolerable to us that anyone should believe for a second that our nation is tolerant of cruelty.

Alberto J. Mora, Editorial, *An Affront to American Values*, WASH. POST, May 27, 2006, at A25.

121. Andrew Sullivan, *The Abolition of Torture*, NEW REPUBLIC, Dec. 19, 2005, at 19, available at <http://www.tnr.com/docprint.mhtml?i=20051219&s=sullivan121905>. *But see* ALAN DERSHOWITZ, WHY TERRORISM WORKS: UNDERSTANDING THE THREAT, RESPONDING TO THE CHALLENGE 131–64 (2002) (arguing that creating a torture warrant would ensure more liberty and create more accountability than a system without it, in the case of a ticking time bomb scenario).

122. Many note the corrosive effects of torture on those who mete out the punishment. *See* EDWARD PETERS, TORTURE 187 (“[I]f the victim is conceived to be without human dignity and therefore vulnerable to torture, the torturer also divests himself of human dignity.”); Marcy Strauss, *Torture*, 48

well as on society as a whole.¹²³ “When the state itself beats and extorts, it can no longer be said to rest on foundations of morality and justice, but rather on force. When a state [employs] torture, it reduces the moral distance between a government act and a criminal act.”¹²⁴

Therefore, the prohibition on cruel and unusual punishment goes to the core of the kind of society the Founders envisioned: one based on the rule of law. As Professor Louis Seidman suggests,

Law is about respect for commitments and limits, and the existence of torture challenges the possibility of such respect. If we are prepared to torture, then, it would seem, we are prepared to do anything, and the restraint that law purports to impose upon us is a fraud.¹²⁵

Professor Seidman further argues that accepting torture forces us to realize that as individuals, we will do whatever we need to preserve our bodies, and as a “body politic” we will do whatever it takes to ensure our national survival, even if it means going against the core values of freedom and liberty upon which the union was founded.¹²⁶ Seidman concludes that when considering torture, the tension between rule of law and the national survival instinct questions whether law is possible at all.¹²⁷

Further, the normalization of torture—either implicitly or explicitly—creates an environment in which domination and subjugation, even for limited purposes, are now permissible. Such state sponsored domination is a level of tyranny simply irreconcilable with democracy. Professor David Garland illustrates this point in his discussion of the notorious public lynchings that took place in the South between 1890 and 1940.¹²⁸ Although torture is often “understood as ‘pre-modern’ phenomena, associated with absolute monarchs, medieval sensibilities, and lawless regions,”¹²⁹ these torture killings occurred in our own modern democracy and, he argues, were utilized as a mode of social repression

N.Y.L. SCH. L. REV. 201, 254 (2004) (“The interrogator is corrupted; he learns to treat suspects as objects, as subhuman.”); Hendrick Hertzburg, *Terror and Torture*, NEW YORKER, Mar. 24, 2003, at 29 (“[T]orture is abhorrent not only for what it does to the tortured but for what it makes of the torturer.”). And of course, there is the infamous example of the Executioner of Paris. See generally Arthur Isak Applebaum, *Professional Detachment: The Executioner of Paris*, 109 HARV. L. REV. 458 (1995).

123. See Lincoln Allison, *The Utilitarian Ethics of Punishment and Torture*, in UTILITARIAN RESPONSE: THE CONTEMPORARY VIABILITY OF UTILITARIAN POLITICAL PHILOSOPHY 9, 24 (Lincoln Allison ed., 1990) (arguing that torture has a corrupting effect on society by affecting norms, rules, and institutions).

124. Mordecai Kremnitzer, *The Landau Commission Report: Was the Security Service Subordinated to the Law, or the Law to the Needs of the Security Service?*, 23 ISR. L. REV. 216, 264 (1989).

125. Louis Michael Seidman, *Torture’s Truth*, 72 U. CHI. L. REV. 881, 886 (2005).

126. *Id.*

127. *Id.*

128. David Garland, *Penal Excess and Surplus Meaning: Public Torture Lynchings in Twentieth Century America*, 39 LAW & SOC’Y REV. 793 (2005).

129. *Id.* at 796.

and subjugation.¹³⁰ In other words, this public use of torture was used for the very purpose we abhor today: to assert control and domination over African-Americans.

To summarize, the Eighth Amendment protects not only the individual who suffers at the hand of the government, but also the government from suffering the corrosive and tyrannical effects of torture. This supports a vision of the Eighth Amendment as a structural restraint; it works to ensure that our government operates within certain boundaries that are consistent with our basic principles.

B. DETAINEE ADJUDICATION AND THE ROLE OF THE JURY

The effort to combat terrorism necessarily involves capturing suspects beyond the borders of the United States. For those not held on U.S. soil, the government must decide whether to treat the suspects as prisoners of war or as criminal suspects.¹³¹ If the government chooses to work within the criminal paradigm, should it conform to the requirement that a trial be held by a jury?¹³² Does the Constitution *require* that criminal trials held outside the United States conform to the jury clauses?¹³³ If the jury serves as a structural restraint on how the judiciary may try and convict individuals, the answer must be yes.

As noted above, the Fifth, Sixth, and Seventh Amendments contain a majoritarian thrust, similar to that of the Eighth Amendment.¹³⁴ The jury serves to remove power from the central government and give it instead to the people.¹³⁵ The Framers were concerned with the problem of government overreaching and the main function of the jury was to protect ordinary individuals from these

130. *Id.* at 828 (pointing out that public lynchings, in addition to serving as a form of criminal punishment, also “operated as an occasion for the socially approved expression of racist sentiment and for public displays of racial dominance”).

131. *See, e.g.*, Dana Priest, *CIA Holds Terror Suspects in Secret Prisons*, WASH. POST, Nov. 2, 2005, at A1 (discussing secret program that detains terror suspects in secret prisons overseas). The Bush Administration subsequently confirmed the rendition program and transferred the suspects to Guantanamo Bay, where they are currently being held. *See* Dan Eggen & Dafna Linzer, *Secret World of Detainees Grows More Public*, WASH. POST, Sept. 7, 2006, at A18.

132. If the government chooses the military paradigm, the “land and naval forces” exception of the Fifth Amendment would apply. In *Ex parte Quirin*, the Court held that Nazi saboteurs could be tried by military tribunals and that the Fifth Amendment was inapplicable to their trials. 317 U.S. 1, 45 (1942). The court assumed this exception would not apply if the accused is not associated with military forces. *Id.* at 41 (noting “that a trial prosecuted before a military commission created by military authority is not one ‘arising in the land . . . forces’” when the person on trial is not a member of the armed forces or militia).

133. The Court has answered this in the negative while focusing on the status of the defendant as an alien. *See Johnson v. Eisentrager*, 339 U.S. 763, 784–85 (1950) (explaining that there is no historical or doctrinal support for the proposition that the Fifth Amendment should be applied to aliens abroad).

134. *See supra* Part III.A.1.

135. *See* AMAR, *supra* note 69, at 83. Much of the historical research on the jury institution in this section comes from Professor Amar’s excellent work in *THE BILL OF RIGHTS: CREATION AND RECONSTITUTION* (1998) and *AMERICA’S CONSTITUTION: A BIOGRAPHY* (2005) [hereinafter AMAR, CONSTITUTION].

excesses.¹³⁶ The Fifth Amendment constrains the government from prosecuting a criminal defendant without a Grand Jury indictment.¹³⁷ The Sixth Amendment ensures that all trials are held in public by an impartial, local jury¹³⁸ and the Seventh Amendment preserves the right to a trial by jury for civil lawsuits.¹³⁹

Reid v. Covert held that trials which take place beyond the borders of U.S. territory for citizens must conform to constitutional requirements.¹⁴⁰ However, the Court was silent on whether that same requirement would apply to trials of non-U.S. citizens if they were held overseas. Under the current constitutional framework, it is clear that as an individual right, the requirements of the Fifth and Sixth Amendment would not apply to non-citizens, following the *Eisentrager-Verdugo* analysis.¹⁴¹ But if the jury is a structural restraint, any trial held, no matter who the defendant is, should conform to the strictures of the Constitution. However, this is not the current path the Court has taken. In this section, I explore the structural underpinnings of the jury clauses of the Constitution.

1. Historical Support for the Jury as a Structural Restraint

King Henry II drastically reformed the way by which disputes were resolved in England in the twelfth century.¹⁴² Instead of trials by battles, he instituted the inquest to obtain verdicts in his courts, rather than in the courts of the local lords. This had the effect of increasing the King's revenues and authority, but it also had the effect of creating the trial by jury, by which "decision[s] were] based on facts, rather than on divine miracles, as in the instance of trial by water or fire or any other ordeal."¹⁴³ The Magna Carta, although not guaranteeing a trial by jury, "ensured that no one could be put to an ordeal unless formally accused by the jury of presentment before the royal judges on circuit."¹⁴⁴ Although some claim the Magna Carta as the mother of the double jury system, its aims were less grand. Instead, the Magna Carta ensured that criminals had to be indicted and tried by some method (ordeal, inquest, jury) before a judge

136. Amar, *supra* note 19, at 1183; *see also* George C. Thomas III, *When Constitutional Worlds Collide: Resurrecting the Framers' Bill of Rights and Criminal Procedure*, 100 MICH. L. REV. 145, 174–80 (2001) (arguing that the Founders were not as concerned with protecting the innocent, but rather focused on the jury as a way to protect the populous from government overreaching).

137. U.S. CONST. amend. V ("No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . .").

138. U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . .").

139. U.S. CONST. amend. VII ("In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.").

140. 354 U.S. 1, 5, 7 (1957).

141. *See supra* Introduction.

142. King Henry II ruled England from 1154 to 1189. *See* LEVY, *supra* note 81, at 210.

143. *Id.* at 211.

144. *Id.* at 212.

could issue a sentence.¹⁴⁵

Although juries in England could represent popular prejudice, trial by jury was viewed as a bulwark against government and minorities. For example, William Blackstone explained that trials by a single magistrate were prone to “partiality and injustice” because the magistrate could “assert[] that to be proved which is not so, or by more artfully suppressing some circumstances, stretching and varying others, and distinguishing away the remainder.”¹⁴⁶ He reasoned that trial by jury served the important goal of preserving “in the hands of the people that share which they ought to have in the administration of general justice, and prevents encroachments of the more powerful and wealthy citizens.”¹⁴⁷

The grand jury also was viewed as a “bastion of popular rights rather than a crown agent.”¹⁴⁸ The power to indict lay with the people, not with prosecutors or judges. Grand juries helped ensure that the government did not engage in malicious prosecution by requiring that the government put forth a well-founded accusation. In England, grand jurors did more than indict criminal defendants. They “acted as representatives of their locality by denouncing governmental abuses, recommending new laws, and even administering statutory law.”¹⁴⁹ As famed historian Leonard Levy explains, grand juries “stood between the liberties of the people and the prerogative of the Crown, thus permitting the grand jury to thwart executive impulses to imprison or exile politically obnoxious men.”¹⁵⁰

The use of the double jury system to constrain the government was seen as a fundamental tool in the early days of the republic. Justice Harlan described it as such when he wrote: “Those who emigrated to this country from England brought with them this great privilege ‘as their birthright and inheritance, as a part of that admirable common law which had fenced around and interposed barriers on every side against the approaches of arbitrary power.’”¹⁵¹ In fact, English colonists in America employed trial by jury in criminal cases from as early as 1606 when royal instructions for the governance of Virginia provided

145. *Id.*

146. *Id.* at 219 (quoting Blackstone).

147. *Id.* In his *Commentaries*, Blackstone further elevated the status of trial by jury:

“[T]he trial by jury has been, and I trust will be, looked upon as the glory of English law. And it has so great an advantage over others in regulating civil property, how much must that advantage be heightened when it is applied to criminal cases! . . . It is the most transcendent privilege which any subject can enjoy, or wish for, that he cannot be affected either in his property, his liberty, or his person, but by the unanimous consent of twelve of his neighbors and equals.”

BLACKSTONE, *supra* note 85, at 379; *see also* Reid v. Covert, 254 U.S. 1, 9–10 (1957) (quoting Blackstone).

148. LEVY, *supra* note 81, at 219.

149. *Id.* at 220.

150. *Id.* (paraphrasing Blackstone’s *Commentaries*).

151. *See* Thompson v. Utah, 170 U.S. 343, 349–50 (1898) (citation omitted).

for jury trials.¹⁵² The Continental Congress produced a “Declaration of Rights” which included “the great and inestimable privilege of being tried by their peers of the vicinage.”¹⁵³ Furthermore, the Declaration of Independence made charges against the King, such that he “depriv[ed] us, in many Cases, of the Benefits of Trial by Jury”;¹⁵⁴ and “made Judges dependent on his Will alone.”¹⁵⁵ In 1774, Congress specified that a trial by jury was the “preserver of life, liberty, and property against arbitrary and capricious men.”¹⁵⁶

However, the extent to which the people were protected by the right to trial by jury was a sticking point during the constitutional debates. A principal objection to the Federal Constitution was a fear that the jury trial, held within one’s own community, might be abolished.¹⁵⁷ Anti-Federalists claimed the failure to provide a vicinage requirement (and the lack of a civil trial guarantee) would lead to tyranny.¹⁵⁸ Perhaps not securely rooted in a clear sense of history, some Anti-Federalists tied the right to trial by jury to the Revolutionary War’s *raison d’être*, claiming: “What made the people revolt from Great Britain? The trial by jury, that great safeguard of liberty, was taken away.”¹⁵⁹

Alexander Hamilton, in *Federalist* No. 83 rebutted the Anti-Federalists, arguing that the provision in the Constitution for criminal jury trials (Article III, Section 2) did not negate the availability of a trial by jury in civil cases, but that it would be for the national legislature to provide, not the Constitution.¹⁶⁰ His prose evokes the sentiment of the time—that the jury was an important majoritarian institution:

The friends and adversaries of the plan of the convention, if they agree in nothing else, concur at least in the value they set upon the trial by jury; or if there is any difference between them it consists in this: the former regard it as a valuable safeguard to liberty; the latter represent it as the very palladium of free government. For my own part, the more the operation of the institution has fallen under my observation, the more reason I have discovered for holding it in high estimation; and it would be altogether superfluous to examine to what extent it deserves to be esteemed useful or essential in a representative republic, or how much more merit it may be entitled to, as a defense against the oppressions of an hereditary monarch, than as a barrier to the tyranny of popular magistrates in a popular government. Discussions of

152. LEONARD W. LEVY, *THE PALLADIUM OF JUSTICE* 69 (1999).

153. *Id.* at 88.

154. THE DECLARATION OF INDEPENDENCE para. 20 (U.S. 1776).

155. *Id.* para. 11.

156. LEVY, *supra* note 152, at 88.

157. *Cf.* Reid v. Covert, 354 U.S. 1, 9 & n.12 (1957) (citing 2 Elliot’s Debates (2d ed. 1836)).

158. LEVY, *supra* note 152, at 93. With some success, Anti-Federalists argued that the absence of a constitutional provision meant that the use of the jury trial in civil cases was being abolished.

159. *Id.* at 98.

160. THE FEDERALIST No. 83 (Alexander Hamilton).

this kind would be more curious than beneficial, as all are satisfied of the utility of the institution, and of its friendly aspect to liberty.¹⁶¹

Although expressing some doubt as to the relation between the civil jury trial and liberty, Hamilton reiterated how criminal juries serve to combat the “great engines of judicial despotism” by protecting against “[a]rbitrary impeachments, arbitrary methods of prosecuting pretended offenses, and arbitrary punishments upon arbitrary convictions.”¹⁶² Richard Henry Lee, also known as “Federal Farmer,” considered the jury to be the most important feature of the newly created judiciary. Yet more importantly, his analysis of the jury function clearly highlights its structural nature as he compares the role of the juror to that of the legislator and the role of the majority in protecting the people from oppressive or overreaching government actions. He wrote:

[B]y holding the jury’s right to return a general verdict in all cases sacred, we secure to the people at large, their just and rightful controul in the judicial department. . . . The body of the people, principally, bear the burdens of the community; they of right ought to have controul in its important concerns, both in making [by legislation] and executing [through juries] the laws, otherwise they may, in a short time, be ruined.¹⁶³

After ratification, the debate on the role of the jury in American society continued. It was of such importance, that the requirement of a trial by jury was the only right secured in *all* state constitutions written between 1776 and 1787.¹⁶⁴ James Madison in the First Congress recommended amendments to the Constitution that would soon become the Bill of Rights. He considered the right to a trial by jury to be “the most valuable amendment in the whole list.”¹⁶⁵ Although Madison was not successful in pushing through all of his jury proposals (for example, he would have constitutionalized a right for jury trials in state courts), the Bill of Rights ensured that the people would serve as an important check on government officials. As Alexis de Tocqueville observed: “The institution of the jury . . . places the real direction of society in the hands of the governed, . . . and not in that of the government. . . . [It] invests the people, or that class of citizens, with the direction of society. . . . The jury system . . . contribute[s] to the supremacy of the majority.”¹⁶⁶

161. THE FEDERALIST NO. 83, at 509 (Alexander Hamilton) (Bantam Books 2003).

162. *Id.*

163. Federalist Farmer No. 15 (Jan. 18, 1788); see LEVY, *supra* note 152, at 99.

164. See Amar, *supra* note 19, at 1183. As described by Professor Amar in AMERICA’S CONSTITUTION, “Every state that penned a constitution between 1775 and 1789 featured at least one express affirmation of jury trial, typically celebrating the jury with one or more of the following words: ‘ancient,’ ‘sacred,’ ‘inviolable,’ ‘great[,]’ and ‘inestimable.’” AMAR, CONSTITUTION, *supra* note 135, at 330 (2005).

165. LEVY, *supra* note 152, at 100–01.

166. ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 293–94 (Phillips Bradley ed., Vintage 1945), *quoted in* AMAR, *supra* note 69, at 88 (some omissions in original).

Both English and early American history are replete with rhetoric extolling the virtue of the jury for its majoritarian and tyranny-checking powers. Even the modern Court has seemed to acknowledge that the jury clauses are moored in structure. *Reid v. Covert*, although stylized in the language of individual rights (and firmly establishing that citizens retain their constitutional protections overseas, cementing the territorial/individual rights model), was clearly concerned with the structural nature of the jury.¹⁶⁷ The Court's language evokes a more universal restriction on the government itself, rather than focusing solely on the individual rights of citizens. Justice Black claimed: "The United States is entirely a creature of the Constitution. Its power and authority have no other source. It can only act in accordance with all the limitations imposed by the Constitution."¹⁶⁸ Furthermore, Justice Black appeared to pick up on the jury-as-a-majoritarian-check theme espoused by many of the Framers when he wrote:

Trial by jury in a court of law and in accordance with traditional modes of procedure after an indictment by grand jury has served and remains one of our most vital barriers to governmental arbitrariness. These elemental procedural safeguards were embedded into our Constitution to secure their inviolateness and sanctity against the passing demands of expediency or convenience.¹⁶⁹

Yet despite this expansive language and voluminous evidence that the Framers intended the jury to serve as a bulwark against government excess, the modern Court instead chose to interpret the right to a trial by jury as an individual right.¹⁷⁰

2. Jury Jurisprudence Today

When the United States acquired territories in the Pacific and Caribbean, a host of extraterritoriality questions was quickly raised. Among them was whether citizens of the territories enjoyed the protections of the Constitution. In a series of cases now known as the *Insular Cases*, the Court sketched out a theory of the Constitution's application to U.S. territories.¹⁷¹ The Court bifurcated its analysis into fundamental and non-fundamental rights. Fundamental rights, such as free speech, would be protected for citizens of U.S. territories. But non-fundamental

167. To be certain, the Court was concerned with the individual rights of citizens. Justice Black famously wrote: "At the beginning we reject the idea that when the United States acts against *citizens* abroad it can do so free of the Bill of Rights." *Reid v. Covert*, 354 U.S. 1, 5 (1957) (emphasis added).

168. *Id.* at 5–6 (emphasis added) (citations omitted).

169. *Id.* at 10.

170. *Patton v. United States*, 281 U.S. 276, 298 (1930).

171. There are approximately thirty-five *Insular Cases* that were decided by the U.S. Supreme Court across the span of two decades, in which the Court grappled with questions of how to govern the territories of Cuba, Puerto Rico, the Philippines, and Guam. See generally BARTHOLOMEW H. SPARROW, *THE INSULAR CASES AND THE EMERGENCE OF AMERICAN EMPIRE* (2006). The term "Insular Cases" is somewhat imprecise, but refers to the cases decided at the turn of the century establishing a separate constitutional status for aliens outside the United States. See Neuman, *supra* note 13, at 978.

rights, which were sometimes described in terms of structural restraints—that is, provisions that manage government power—were not applicable to the territories.¹⁷² In *Downes v. Bidwell*, the Court—after examining the treatment of trial by jury in the western territories—reaffirmed that “the Constitution does not apply to foreign countries or to trials therein conducted.”¹⁷³ Three years later in *Dorr v. United States*, the Court held that a right to a jury trial did not exist for a defendant in the Philippines.¹⁷⁴ The Court noted that had the right to a jury been “fundamental” it would have applied in the Philippines.¹⁷⁵

In *Patton v. United States*, the Court held that the right to a trial by jury functions as an individual right.¹⁷⁶ In framing the inquiry, the Court asked: “Is the effect of the constitutional provisions in respect of trial by jury to establish a tribunal as a part of the frame of government, or only to guarantee to the accused the right to such a trial?”¹⁷⁷ In the face of precedent to the contrary,¹⁷⁸ the Court held that the jury protections were a guarantee to the accused and therefore waivable by the accused.¹⁷⁹ The Court made this analytic leap by focusing on the right of a criminal defendant to plead guilty to a crime.¹⁸⁰ The Court thus reasoned, if a criminal defendant can waive a trial, he must be able to waive a trial by jury.¹⁸¹

This analysis has been criticized by scholars and jurists. Professor Amar has argued that “it is anachronistic to see jury trial as an issue of individual right rather than (and, more fundamentally) a question of government structure.”¹⁸² He argues that a bicameral analogy is more historically apt. Instead of focusing on the rights of the accused, as the *Patton* Court did, the Court should have realized that “a judge acting without a jury was simply not a court capable of trying a defendant, just as the Senate acting without the House is not a legislature capable of passing laws.”¹⁸³ Although the Court relied on a textual reading of the Sixth Amendment that places the right of a trial jury with “the accused,”¹⁸⁴ Professor Amar points out that this reading utterly ignores the Article III mandate that “the trial of all Crimes . . . shall be by Jury.”¹⁸⁵ This command, he argues, is “no less mandatory and structural than its companion

172. See *Dorr v. United States*, 195 U.S. 138, 148–49 (1904).

173. 182 U.S. 244, 270–71 (1901).

174. 195 U.S. at 149.

175. *Id.* at 148.

176. 281 U.S. 276, 293 (1930).

177. *Id.*

178. See, e.g., *Thompson v. Utah*, 170 U.S. 343, 353 (1898) (holding that a defendant could not waive a twelve-member jury, granted by statute); *Callan v. Wilson*, 127 U.S. 540, 549 (1888) (holding that the Sixth Amendment was not “intended to supplant” Article III’s jury clause).

179. See *Patton*, 281 U.S. at 298.

180. *Id.* at 305–06.

181. *Id.*

182. Amar, *supra* note 19, at 1196.

183. See *id.*

184. U.S. CONST. amend. VI.

185. U.S. CONST. art. III, § 2, cl. 3; Amar, *supra* note 19, at 1196.

commands that the judicial power of the United States ‘shall be vested in’ federal courts, whose judges ‘shall’ have life tenure and undiminished salaries, and whose jurisdiction ‘shall extend to all’ cases in certain categories.”¹⁸⁶

The *Patton* Court may have been wearing their incorporation blinders, ignoring the substantial evidence that the jury trial existed not only to protect the accused, but was fundamental to the structure of the justice system. The Court argued that an individual rights reading of the jury amendments was historically accurate and reflected the Framers’ intent. As Professor Amar shows, this proposition blindly “ignores the writings of the ‘Federal Farmer,’ the ‘Maryland Farmer,’ Jefferson, and many other[.]” leading theorists of the time.¹⁸⁷ These writers viewed the jury not simply as a right held by an individual defendant, but as a structure designed to protect against government overreaching.

Furthermore, *Patton* ignored substantial precedent interpreting the jury trial as a non-waivable structural provision. In *Thompson v. Utah*, the Court held that a criminal defendant could not waive his right to a jury trial.¹⁸⁸ Justice Harlan stressed that it was not in the province of the individual defendant to waive a jury because the tribunal itself would “not [be] authorized by law to determine his guilt.”¹⁸⁹ The *Thompson* Court understood the right to a jury to be one of an obligation on the state and believed that a court without a jury was one unconstitutionally constituted.

The Court in *Patton* relied, in part, on the assumption that no third-party interests were at stake in the right to a trial by jury.¹⁹⁰ Yet clearly, both history and practice prove that the role of the jury served more than the interests of the accused. Professor Amar points to the jury as a vehicle for educating citizens and a vehicle by which ordinary Americans can participate in the administration of government.¹⁹¹ As historian Jack Rakove has explained, the founding generation believed that the Bill of Rights, in addition to providing enforceable restrictions on government power, also served to educate and instill republican values.¹⁹²

The emphasis on the role and importance of the juror himself is reflected in the standing laws with respect to the exclusion of members of grand and petit juries. In petit juries, the accused can challenge the constitutionality of a jury

186. U.S. CONST. art. III; Amar, *supra* note 19, at 1196.

187. Amar, *supra* note 19, at 1198.

188. 170 U.S. 343, 353 (1898).

189. *Id.* at 354–55.

190. See *Patton v. United States*, 281 U.S. 276, 296 (1930) (noting that the “constitutional provisions in respect to jury trials in criminal cases are for the protection of the interests of the accused” and may be “waived by the party sought to be benefited” (quoting *Dickinson v. United States*, 159 F. 801, 821 (1st Cir. 1908) (Aldrich, J., dissenting))). The Court held that no evidence could be produced to show that the trial by jury was regarded as a structural part of government, but rather an individual right for the accused. *Id.*

191. Amar, *supra* note 19, at 1186–87.

192. JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 323–24 (1996); see also Kent, *supra* note 13, at 490.

where a class of jurors have been systematically excluded from the jury selection process.¹⁹³ Although the Constitution does not guarantee a jury that represents a cross-section of the community, the pool from which the jurors are drawn cannot systematically exclude any group.¹⁹⁴ Importantly, the defendant need not be an individual of the excluded group to raise the claim.¹⁹⁵ However, the defendant is not the only person with standing to bring a claim against the government where jurors have been systematically excluded from the jury. The juror herself also has standing to bring a claim under the Equal Protection Clause.¹⁹⁶

In *Patton*, the Court swerved away from a structural interpretation of the jury amendments and instead chose to vest the right of a jury trial with the defendant alone. One can question the policy implications of such a decision. If the jury is so fundamental to protecting all of us from government overreaching, should a defendant be able to waive that protection? Today, given the pressure on the federal judiciary, it may be hard to imagine a system in which every trial empanelled a jury. Some argue that for the sake of expedient justice, the defendant must be able to waive his right to a jury trial.¹⁹⁷ But why should that be? Would we allow Congress to waive the separation of powers doctrine because they *really* wanted an advisory opinion from the Court in order to save time? Despite these practical implications, it appears clear that the Founders intended the jury to serve as a restraint on government power rather than an individual right.

C. ISLAMIC OUTREACH AND THE ESTABLISHMENT CLAUSE

The most prominent programs associated with the war on terrorism are those that have garnered the most controversy: extraordinary renditions, detainee treatment at Guantanamo Bay, and warrantless wire-tapping. But the United States government is also engaged in a myriad of other programs that aim to reduce the threat of terrorism that rarely grace the front pages of the *New York Times*. For example, the State Department experimented with an Arab Youth

193. See *Duren v. Missouri*, 439 U.S. 357, 359 (1979). The Court has held that the accused is entitled to a jury selection process that chooses members of the jury from a fair cross-section of the community. See *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975).

194. See *Holland v. Illinois*, 493 U.S. 474, 478–79 (1990).

195. *Id.* at 476–77 (white defendant had standing to challenge the exclusion of African Americans from his jury).

196. *Powers v. Ohio*, 499 U.S. 400 (1991). A juror will always have standing because the juror herself suffers personal injury when excluded based on race. However, jurors often do not possess sufficient incentive to litigate these claims, and in *Powers*, the Court explained that criminal defendants may raise these claims as an exception to the prohibition on third-party standing. *Id.* at 410–15.

197. See, e.g., *Mazzone*, *supra* note 37, at 837 (noting arguments the Supreme Court has made in favor of waiver as helping bring about efficient resolutions to criminal suits). According to Fed. R. Crim. P. 23(a), to waive a trial by jury, the defendant must (1) waive the jury trial in writing; (2) have the consent of the government; and (3) obtain the approval of the court.

Magazine targeting Muslims from the ages of eighteen through thirty-five.¹⁹⁸ The United States Agency for International Development (USAID) also plays a central role in engaging Islamic leaders across the world.¹⁹⁹ Public diplomacy programs aim to fix America's "image problem" while reaching out to traditional religious leaders. For example, in Indonesia, USAID funds radio programs that promote moderate or liberal forms of Islam over more extreme sects.²⁰⁰ The U.S.-funded Liberal Islam Network produces a "Religion and Tolerance" radio show; the network's mission is "specifically to counter religious fundamentalism and militancy."²⁰¹

Many of these programs are sect-preferential and would easily run afoul of the Establishment Clause.²⁰² But to date, the Establishment Clause has been interpreted as an individual right,²⁰³ and therefore, under the territorial framework the Court has set out for triggering the application of individual rights, it is inapplicable to government action overseas. When the Court incorporated the Establishment Clause in *Everson v. Board of Education*, it stated that "[t]he broad meaning given the [First] Amendment . . . has been accepted by this Court in its decisions concerning an individual's religious freedom," and that these individual rights are "applicable to state action abridging religious freedom."²⁰⁴ Under an individual rights model, the U.S. government is only barred from establishing religion when it is operating in a jurisdiction under its control. Elsewhere, it would be free to "establish religion."

Yet is the Establishment Clause really an individual right, or has incorporation once again blinded jurists and scholars to the structural restraints embedded in the clause? In *Downes v. Bidwell*, the Court seemed to suggest that the entire First Amendment was structural in nature and limited the government from

198. *Hi Magazine* was created in 2003, but publication was suspended at the end of 2005 due to lower readership. The magazine can still be found online at www.himag.com. The magazine was intended to be a window into American culture and promote a better understanding of American values. Stories focused on popular culture, sports, relationships—and also on young Muslims in America. See *Arab Youths Wooed with US Magazine*, July 18, 2003, http://news.bbc.co.uk/1/hi/world/middle_east/3078063.stm (last visited Oct. 17, 2006).

199. See Jessica Powley Hayden, Note, *Mullahs on a Bus: The Establishment Clause and U.S. Foreign Aid*, 95 GEO. L.J. 171, 174–83 (2006) (describing the USAID programs in Indonesia and Central Asia in which U.S. funds are used to engage Islamic leaders).

200. See THE ASIA FOUND., ISLAM AND CIVIL SOC'Y PROGRAM, GRANT IMPACT MONITORING REPORT 1, 7–83 (2005) (on file with author) [hereinafter THE ASIA FOUND.]; see also Hayden, *supra* note 199, at 175–76.

201. THE ASIA FOUND., *supra* note 200, at 7–8.

202. Justice Breyer has recently opined that the Establishment Clause demands that the "government must 'neither engage in nor compel religious practices,' that it must 'effect no favoritism among sects or between religion and nonreligion,' and that it must 'work deterrence of no religious belief.'" *Van Orden v. Perry*, 545 U.S. 677, 698 (2005) (Breyer, J., concurring) (citing *Lee v. Weisman*, 505 U.S. 577, 587 (1992); *Sch. Dist. v. Schempp*, 374 U.S. 203, 305 (1963); *Everson v. Bd. of Educ.*, 330 U.S. 1, 15–16 (1947)).

203. See generally Esbeck, *supra* note 16.

204. *Everson*, 330 U.S. at 15.

acting, whether domestically or overseas.²⁰⁵ In deciding whether the Constitution applied to Puerto Rico, the Court held that “it [is] by no means necessary to show that none of the articles of the Constitution apply to the island of Porto Rico. There is a clear distinction between such prohibitions as to go to the very root of the power of Congress to act at all, irrespective of time of place, and such as are operative only ‘throughout the United States’ or among the several states.”²⁰⁶ The Court went on to hold that when the Constitution declares that no bill of attainder or ex post facto law shall be passed, “it goes to the competency of Congress to pass a bill *of that description*.”²⁰⁷ With respect to the First Amendment, the Court wrote:

Perhaps the same remark may apply to the 1st Amendment, that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people to peacefully assemble and petition the government for a redress of grievances.”²⁰⁸

The history and operation of the Establishment Clause clearly supports this view of the Establishment Clause, rather than the modern-day individual rights interpretation.

1. Historical Support for the Establishment Clause as a Structural Restraint

In introducing the Bill of Rights, James Madison said that its “great object” was to “limit and qualify the powers of Government” to prevent legislation in the field of religion.²⁰⁹ Madison explained that the First Amendment would serve as a bulwark against government tyranny, prevent internal strife among different sects, and prevent the establishment of a state religion.²¹⁰ That religious persecution was on the mind of the Founders should not be a surprise: religious persecution in England caused many to flee and become the first American settlers.²¹¹ Justice Black, in exploring the historical purposes that underlie the Establishment Clause, points to the “belief that a union of government and religion tends to destroy government and to degrade religion.”²¹² He

205. 182 U.S. 244, 277 (1901).

206. *Id.* at 276–77.

207. *Id.* at 277.

208. *Id.*

209. LEVY, *supra* note 81, at 84.

210. *See, e.g.*, James Madison, *Memorial and Remonstrance Against Religious Assessments* (1785), in 1 AMERICAN POLITICAL WRITING DURING THE FOUNDING ERA 631–37 (Charles S. Hyneman & Donald S. Lutz eds., 1983). Although Professor Kent, an anti-globalist, has argued that these purposes suggest a protection of domestic interests, Kent, *supra* note 13, at 517–18, he admits (in a footnote) that “[o]n the other hand, the Founders’ concern about the potential corruption of religion by entanglement with government could have salience if the U.S. government attempted to establish a religion abroad among foreigners.” *Id.* at 518 n.298.

211. *See, e.g.*, LEVY, *supra* note 81, at 79.

212. *Engle v. Vitale*, 370 U.S. 421, 431 (1962).

stated:

Another purpose . . . rested upon an awareness of the historical fact that governmentally established religions and religious persecutions go hand in hand. . . . It was in large part to get completely away from this sort of systematic religious persecution that the Founders brought into being our Nation, our Constitution, and our bill of Rights with its prohibition against any governmental establishment of religion.²¹³

There is strong support for the proposition that the Establishment Clause works both a vertical and horizontal restraint on government. According to Professor Amar, “as originally written, [the Establishment Clause] stood as a pure federalism provision. . . . [T]he clause was utterly agnostic on the substantive view of establishment; it simply mandated that the issue be decided state by state and that Congress kept its hands off, that Congress make no law respecting the vexed question.”²¹⁴ Many supporters of this view submit that the practice at the time of the Founding strongly supports this vision of the Establishment Clause. They point to the fact that the Founders believed state-created establishments were not thought to violate the Establishment Clause.²¹⁵ For example, state establishments existed in the constitutions of Massachusetts and New Hampshire; the Maryland Declaration of Rights of 1776; and the Rhode Island Charter of 1633.²¹⁶ Furthermore, both Thomas Jefferson and James Madison argued that press and religion were matters that were intended to be left to the states.²¹⁷ As Professor Esbeck posits, “[t]he Second Congress, consequently, could have no more disestablished the Congregational Church in the parishes of Connecticut than it could have re-established the Anglican Church in Virginia.”²¹⁸

The horizontal—or national—restraint constrained the national government from enacting legislation that would establish a national church.²¹⁹ Justice

213. *Id.* at 432–33 (footnotes omitted).

214. AMAR, *supra* note 69, at 246; *see also* SMITH, *supra* note 22, at 17 (stating that “the religion clauses were purely jurisdictional in nature; they did not adopt any substantive right or principle of religious freedom”).

215. *See, e.g.*, Wallace v. Jaffree, 472 U.S. 38, 99 & n.4 (1985) (Rehnquist, J., dissenting); *see also* Joseph M. Snee, *Religious Disestablishment and the Fourteenth Amendment*, 1954 WASH. U. L.Q. 371, 380 (arguing that the original intent of the First Amendment was to give states power over religious matters that were denied to the federal government).

216. *See* Wallace, 472 U.S. at 99 & n.4 (citing MASS. CONST. of 1780, pt., art. III; N.H. CONST. of 1784, art. VI; Md. Declaration of Rights of 1776, art. XXXIII; R.I. Charter of 1633 (superseded 1842)).

217. *See* Esbeck, *supra* note 16, at 29–31, 66–67. In this context, the two Founders argued that Congress had exceeded its authority by passing the Alien and Sedition acts and analogized free speech to the religion clauses, saying both belonged to the province of the states. *See* Hayden, *supra* note 199, at 192 n.119.

218. Esbeck, *supra* note 16, at 15–16.

219. *Id.*; *see also* Wallace, 472 U.S. at 38. In Wallace, Justice Rehnquist declared in his dissent that the “well-accepted meaning” of the Establishment Clause is that it only prohibited the establishment of a “national religion.” *Id.* at 106 (Rehnquist, J., dissenting).

Stewart, a leading critic of the individual rights model for the Establishment Clause, thought the purpose of the Clause was to limit Congress from establishing a national church, a purely horizontal restraint.²²⁰ This national ban would have included those issues attendant to the establishing of a national religion, including taxes for religious purposes, a role for government in electing religious leaders, and so forth.

2. Indicia of Structural Restraints

Although the Court has given lip service to the individual rights model of the Establishment Clause, there is ample evidence that the Court is nevertheless employing a structural restraint model based on the indicia of structural restraints. First, unlike traditional individual rights, the Court has carved out a special standing rule for the Establishment Clause. One need not suffer a personal harm to bring a taxpayer suit claiming a violation of the Establishment Clause.²²¹

Likewise, remedies do not follow an individual rights model. Remedies are class-wide and usually take the form of injunctions, indicating that the government has exceeded its power. For example, an individual rights model remedy to school prayer would result in the court exempting individual students from the requirement of praying. But in the context of a structural restraint, a remedy would ban the entire practice, regardless of who objects. The Supreme Court has followed the latter model, prohibiting school prayer sponsored by public schools,²²² at high-school graduations,²²³ and before high-school football games.²²⁴

CONCLUSION

Cases involving U.S. government action overseas are currently percolating throughout the courts of appeals. As demonstrated by the D.C. Circuit's opinion in *Boumediene v. Bush*, the question of which constitutional provisions apply overseas will continue to come before the courts. Theories which seek to grant aliens overseas the entire range of constitutional protections do not square with current Supreme Court precedent. Yet there is strong support for a doctrine that focuses not on the individual alien, but on the actions of the government.

As this Note has demonstrated, structural restraints run throughout the text of the Constitution. Unlike individual rights, they serve to manage and limit government action. Although the Court has held that individual rights do not apply to aliens living outside the U.S. territory, this analysis cannot logically be applied to structural restraints. Structural restraints do not depend on an indi-

220. *Sch. Dist. v. Schempp*, 374 U.S. 203, 309–10 (1963) (Stewart, J., dissenting).

221. *See Flast v. Cohen*, 392 U.S. 83 (1969).

222. *See Schempp*, 374 U.S. at 203.

223. *See Lee v. Weisman*, 505 U.S. 577 (1992).

224. *See Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000).

vidual having a nexus to U.S. territory; they are focused instead on the government actor.

As illustrated by this Note, there are strong arguments for interpreting the prohibition on cruel and unusual punishment, the jury clauses, and the ban on establishment as structural restraints. These arguments are based in the text, the history of the provision, the operation of the clauses and in part, on how the Courts have interpreted the clauses.

U.S. involvement in the world will continue to increase for the foreseeable future and it is imperative that our courts begin to consistently and logically apply the Constitution to government actors. A terrorist captured and held in a prison overseas may not enjoy the full panoply of constitutional protections, but the Constitution still applies to his captors. By applying a structural restraint model to the extraterritorial application of the Constitution, we ensure that government actors are bound by the spirit and the letter of the law in every corner of the world.