

# THE REACH OF RIGHTS: “THE FOREIGN” AND “THE PRIVATE” IN CONFLICT-OF-LAWS, STATE-ACTION, AND FUNDAMENTAL-RIGHTS CASES WITH FOREIGN ELEMENTS

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## I

### INTRODUCTION

With increasing frequency, courts around the world are confronted with fundamental-rights cases that are not wholly internal to the legal orders they strive to uphold. One such case was brought recently in the English courts by relatives of Baha Mousa, a twenty-six-year-old receptionist in a Basrah City hotel, who died under suspect circumstances while in the custody of U.K. soldiers of the occupying forces in Iraq.<sup>1</sup> His relatives claimed that the U.K. military violated Baha Mousa’s “right to life”—enshrined in the United Kingdom’s Human Rights Act<sup>2</sup> and in the European Convention on Human Rights and Fundamental Freedoms (the Convention).<sup>3</sup> Their case is a prominent example of the traditional paradigmatic understanding of “rights cases with foreign elements”—claims for protection under forum-rights guarantees with regard to forum-state conduct abroad.

There is a growing awareness, however, that foreign elements may come in shapes other than just extraterritorial state conduct, such as that of the U.K. troops in Iraq. Take the case of Karlheinz Schreiber, a Canadian citizen residing in both Canada and Europe. Schreiber’s Swiss bank account was searched by Swiss police at the request of Canadian authorities who had failed to seek the judicial authorization ordinarily required for domestic searches.<sup>4</sup> Or the case of

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1. R v. Sec’y of State for Def. (*Al-Skeini III*), [2007] UKHL 26, [2007] 3 W.L.R. 33 (appeal taken from Eng.) (U.K.); see also R v. Sec’y of State for Def. (*Al-Skeini II*), [2005] EWCA (Civ) 1609, [2006] 3 W.L.R. 508 (Eng.).

2. Human Rights Act, 1998, ch. 42, sched. 1, Part I, art. 2 (Eng.).

3. Convention for the Protection of Human Rights and Fundamental Freedoms art. 2, Nov. 4, 1950, Europ. T.S. No. 005 [hereinafter the Convention].

4. Schreiber v. Canada, [1998] 1 S.C.R. 841 (Can.).

Dr. Ernest Mandel, a Belgian communist academic and writer who was refused access to the United States, which meant he could not participate in a series of conferences to which he had been invited.<sup>5</sup> Both decisions contain references to “foreignness” very similar to those found in Baha Mousa’s case, although neither Canadian nor U.S. authorities had acted abroad at any relevant time.<sup>6</sup>

In cases of both these categories—extraterritorial conduct and other types of foreign elements—the key issue facing courts is often framed as a question of the scope of application—or reach—of fundamental-rights protection.<sup>7</sup> Although the centrality of the idea of the “reach” metaphor is widely accepted, many questions remain about its actual operation in concrete cases. One important controversy concerns the appropriate normative basis for demarcating the reach of rights—should courts, for example, look at people, to be brought within or kept outside a “circle of rights holders,”<sup>8</sup> or at territories, which are within or outside the coverage of a rights instrument? And *why* should these people or places be excluded or included in the first place? Another debate concerns whether courts should determine the reach of rights orders as a whole, or only for specific rights guarantees according to their distinct substantive content. Finally, there is discussion about whether the question of reach is a distinct issue at all—one that should be addressed in a separate doctrinal step, most plausibly by assessing relevant “contacts” between claimants and states—or whether the question should be integrated into normally applicable decisional models for fundamental-rights adjudication—a descending scale of privacy rights perhaps, for what you do and keep in your bedroom, in your car and at a bank abroad?<sup>9</sup> Against this background of controversy, it is not surprising to find that commentators have insistently pointed to the courts’ “continuing inability to settle upon a single perspective toward the persons, places and circumstances to which constitutional rights apply.”<sup>10</sup>

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5. *Kleindienst v. Mandel*, 408 U.S. 753 (1972).

6. In *Kleindienst v. Mandel*, for example, “It is clear that Mandel personally, as an unadmitted and nonresident alien, had no constitutional right of entry to this country.” *Id.* at 762. In *Schreiber v. Canada*, for example, “The question to be decided . . . is whether the respondent had a reasonable expectation of privacy in his banking records in Switzerland.” 1 S.C.R. 841 at para. 17 (Lamer, C.J.C., concurring in the result). Further examples of references to foreign elements are given below, *infra* II.A.

7. See, e.g., *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990) (holding that the Fourth Amendment “extends its reach” only to “the people”). For references in academic literature, see Gerald L. Neuman, *Whose Constitution?*, 100 YALE L.J. 909, 914 (1991) (referring to “debates over the Constitution’s reach”), and Note, *The Extraterritorial Applicability of the Fourth Amendment*, 102 HARV. L. REV. 1672, 1672–73 (1989) (discussing reach in terms of “applicability”).

8. E.g., *Mandel*, 408 U.S. at 771 (Douglas, J., dissenting) (“Dr. Mandel, an alien who seeks admission, has no First Amendment rights while outside the Nation . . .”).

9. Compare *Banković v. Belgium*, 2001-XII Eur. Ct. H.R. 333, 359 (looking at a “jurisdictional link” between applicants and states), with *Schreiber*, 1 S.C.R. 841 at para. 23 (Lamer, C.J.C., concurring in the result) (diminishing “reasonable expectation of privacy” for citizens residing abroad).

10. Neuman, *supra* note 7, at 990; see also Louis B. Henkin, *The Constitution as Compact and as Conscience: Individual Rights Abroad and at our Gates*, 27 WM. & MARY L. REV. 11, 31 (1985) (“[T]he Supreme Court has answered these questions inconsistently.”); Kal Raustiala, *The Geography of*

This article is an attempt at rethinking fundamental-rights cases with foreign elements by constructing a set of basic analogies between these cases and two other doctrinal areas in which the reach of norms occupies a central position. These areas are (1) conflict of laws, or private international law, and (2) state action, or the horizontal effect of fundamental rights.<sup>11</sup>

Conflict of laws, or private international law, is the domain of private-law cases with foreign elements. Conflicts theories and methods are concerned with determining the law applicable to private-law claims and thereby, implicitly, with the scope of application, or reach, of forum law.<sup>12</sup> Although conflict of laws has a venerable history as a discipline, commentators have long looked unfavorably upon the field's ability to resolve some of its core problems—a widely shared impression being that conflict of laws is “a source of constant embarrassment to lawyers, judges, and scholars.”<sup>13</sup> Interestingly, many of these difficulties are very similar to those just described for rights cases with foreign elements. Conflict of laws also faces questions on the normative basis for demarcating the reach of forum law, on the distinctive character of the reach inquiry, on the roles to be attributed to the substance of specific norms, and on the effects of various kinds of contacts between claimants and the forum legal order.

State-action and horizontal-effect doctrines are concerned with fundamental-rights cases with private elements—or private-law cases with fundamental-rights elements.<sup>14</sup> Cases involving state action (the U.S. term) or horizontal effect (the equivalent elsewhere) have, over the last few decades, become widespread in many legal systems.<sup>15</sup> These areas of law also rely heavily

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*Justice*, 73 FORDHAM L. REV. 2501, 2504 (2005) (“Current doctrine . . . provides no coherent and consistent theory of the role of spatiality within our legal order.”); Note, *supra* note 7, at 1672 (“The extraterritorial application of the Constitution . . . remains a largely unsettled issue.”).

11. The terms “conflict of laws” and “private international law” will be used interchangeably, as will the terms “state action” and “horizontal effect.”

12. For examples of the “reach” metaphor in conflict of laws, see Lea Brilmayer, *Rights, Fairness, and Choice of Law*, 98 YALE L.J. 1277, 1293 (1989) (discussing the reach of statutes); Brainerd Currie, *On the Displacement of the Law of the Forum*, 58 COLUM. L. REV. 964, 1014 (1958) (“[I]nterestedness” may bring matters “within the reach of the state’s legitimate governmental concerns”); and Larry Kramer, *Rethinking Choice of Law*, 90 COLUM. L. REV. 277, 293 (1990) (“[T]he great majority of laws are silent with respect to extraterritorial reach . . .”).

13. Joel P. Trachtman, *Conflict of Laws and Accuracy in the Allocation of Government Responsibility*, 26 VAND. J. TRANSNAT’L L. 975, 978 (1994).

14. Oversimplifying somewhat, the first description would seem to accord better with U.S. understandings, the second with European.

15. See, e.g., CLAUS-WILHELM CANARIS, GRUNDRECHTE UND PRIVATRECHT: EINE ZWISCHENBILANZ [FUNDAMENTAL RIGHTS AND PRIVATE LAW: AN INTERIM REPORT] (1999) (F.R.G.); HUMAN RIGHTS IN PRIVATE LAW (Daniel Friedman & Daphne Barak-Erez eds., 2001) (collecting articles by scholars from Canada, England, Germany, Israel, South Africa, and the United States); CHANTAL MAK, FUNDAMENTAL RIGHTS IN EUROPEAN CONTRACT LAW (Martijn Hesselink et al. eds., Private Law in European Context Series Vol. 2, 2008); Mark Tushnet, *The Issue of State Action/Horizontal Effect in Comparative Constitutional Law*, 1 INT’L J. CONST. L. 79 (2003); Stephen Gardbaum, *Where the (State) Action Is*, 4 INT’L J. CONST. L. 760 (2006) (book review). The closest available parallel in European Convention law is the doctrine of “positive obligations.” See *infra* IV. Note that all Convention claims adjudicated by the European Court of Human Rights in Strasbourg are necessarily against States.

on the spatial metaphor of the reach of fundamental rights, this time not over *foreign* territories and persons, but over actors and actions in the *private* sphere.<sup>16</sup> They face problems very similar to conflict-of-laws cases and rights cases with foreign elements: the normative basis for demarcating the reach of fundamental-rights guarantees, the role of the substantive content of particular rights provisions,<sup>17</sup> and the role of contacts, or a “nexus,” between states and claimants, are all profoundly unclear.<sup>18</sup> Finally, the general perception of these doctrines cannot come as a surprise: state action has long been recognized as an intellectually incoherent “conceptual disaster area.”<sup>19</sup>

Juxtaposing (1) fundamental-rights cases with foreign elements, (2) fundamental-rights cases with private elements, and (3) private-law cases with foreign elements gives rise to a number of intriguing questions on the relationships between rights and “the foreign,” between rights and “the private,” and between “the private” and “the foreign.” What would it mean, for example, to say that state action (horizontal effect) is a question of conflict of laws? Or to argue that the foreign is in important ways like the private, and vice versa? If private-law cases with foreign elements can be a somewhat coherent discipline, could fundamental-rights cases with foreign elements be one, too? Should they? If the recognized key themes in state action doctrine are the responsibilities, duties, and obligations of states, why is conflict of laws all about these states’ interests, authority, and power?

Not all these questions, to be sure, can be addressed in the space of one article. The issues that this contribution does discuss, though, share one background idea: If “rights cases with foreign elements” were a discipline, it would be one with both an often shameful history and a crucially important present. But it is not, and this article starts from the conviction that this fact is an essential reason why decisions on the fundamental rights of foreigners, or of those outside states’ territories, are so often so problematic. The analogies with conflict of laws and state action constructed here are principally intended as a contribution to remedying this defect.

The article is structured as follows: Part II discusses some of the most common conceptual and normative problems that courts have encountered in dealing with rights cases with foreign elements. Part III develops parallels

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16. *E.g.*, *Shelley v. Kraemer*, 334 U.S. 1, 22 (1948) (“[T]he scope of the restrictions which the Federal Constitution imposes upon exertions of power by the States has given rise to many of the most persistent and fundamental issues which this Court has been called upon to consider.”) (emphasis added); Gardbaum, *supra* note 15, at 761 (discussing “the proper reach of constitutional rights into the private sphere”).

17. *See infra* IV.

18. *See infra* IV.

19. Charles Black, *Foreword: “State Action,” Equal Protection, and California’s Proposition 14*, 81 HARV. L. REV. 69, 95 (1967); *see also* Erwin Chemerinsky, *Rethinking State Action*, 80 NW. U. L. REV. 503, 505 (1985) (“[E]arlier articles thoroughly demonstrated the irrationality of current state action doctrines . . .”). For an extensive listing of literature on state action (until 1990), see Barbara Rook Snyder, *Private Motivation, State Action and the Allocation of Responsibility for Fourteenth Amendment Violations*, 75 CORNELL L. REV. 1053, 1053 n.1 (1990).

between conflict of laws and the rights cases, discussing both areas in terms of disciplinary identity. Part IV does the same for state-action and the foreign-elements cases, this time focusing on normative bases and foundational questions. The last paragraph of part IV tries to square the triangle by briefly looking at the relationship between state action and conflict of laws. Part V concludes.

## II

### FUNDAMENTAL RIGHTS AND FOREIGN ELEMENTS: TRADITIONAL CONCEPTUALIZATIONS

#### A. Fundamental-Rights Cases With Foreign Elements

Fundamental-rights cases with foreign elements are defined here as all cases litigated before a court of State *A* (the forum), in which a claim for protection is raised under a rights guarantee from within the legal order of State *A* (the forum rights order),<sup>20</sup> but which cases are not, in their factual make-up, wholly internal to that legal order.

Legal systems have generally not recognized a category of rights cases with foreign elements that encompasses all the different factual positions and areas of substantive law envisaged by this definition. To the extent that a unifying perspective has been adopted, it has usually been that of the extraterritorial application of rights norms.<sup>21</sup> From this viewpoint, the *Mousa* case mentioned in the Introduction would be paradigmatic, with the U.K. Court of Appeal framing the central question before it as, “[D]id the [U.K. Human Rights Act] apply to the activities of British troops [arresting Iraqi citizens] in south-east Iraq at the material time?”<sup>22</sup>

Similar questions have been voiced elsewhere. The Supreme Court of Canada, for example, has had to confront the issue “whether [the] Constitution grants rights and freedoms to people outside the country.”<sup>23</sup> And the European Court of Human Rights, using public-international-law vocabulary, commonly asks whether claimants or victims abroad could have come within the

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20. The rights guarantee may be a supranational regional norm (for example, the European Convention) adopted in forum law, as with the United Kingdom’s Human Rights Act 1998.

21. *Cf.* Neuman, *supra* note 7, at 911 (“The current debate primarily concerns the rights of persons harmed by United States government action abroad.”).

22. *R v. Sec’y of State for Def. (Al-Skeini II)*, [2005] EWCA (Civ) 1609, [2], [2006] 3 W.L.R. 508, 514 (Eng.).

23. *R v. Cook*, [1998] 2 S.C.R. 597, para. 84 (Can.) (L’Heureux-Dubé, J., dissenting); *see also* Robert J. Currie, *Charter Without Borders? The Supreme Court of Canada, Transnational Crime and Constitutional Rights and Freedoms*, 27 DALHOUSIE L.J. 235, 238 (2004) (“[W]here does the Charter end?”) (emphasis omitted).

“jurisdiction” of a member state in the sense required for responsibility under the European Convention on Human Rights.<sup>24</sup>

Such questions on the geographical or personal reach of rights protection have received superficially convincing but obviously conflicting answers. At one end stand frequent assertions that local fundamental-rights instruments were not “designed to be applied throughout the world,”<sup>25</sup> or, in the U.S. context, that “the Constitution can have no operation in another country.”<sup>26</sup> On the other hand, we are urged to acknowledge that a state cannot “perpetrate violations [of rights contained in a fundamental-rights document] on the territory of another State, which violations it could not perpetrate on its own territory”;<sup>27</sup> that “the shield which the Bill of Rights and other parts of the Constitution provide . . . should not be stripped away just because [a U.S. citizen] happens to be in another land”;<sup>28</sup> and that the ultimate ideal of any liberal State should be “equal justice not for citizens alone, but for all persons coming within the ambit of [its] power.”<sup>29</sup>

These rhetorically powerful, but ultimately indeterminate and contradictory, slogans code for a range of different approaches for determining the reach of rights protection—both territorially and otherwise—that commonly revolve around a set of recurring issues. The following paragraphs use examples taken from U.S., Canadian, and European Convention case law to briefly discuss (1) ambiguities concerning appropriate normative bases, (2) the role of territoriality, and (3) the effect of foreign elements on the scope and nature of protection afforded.

## B. Demarcating Rights Protection: Normative Bases

Courts in both Europe and the United States have struggled to develop appropriate normative bases for delimiting rights protection in cases with foreign elements.

In U.S. Supreme Court case law, a variety of conflicting theories and models can be found, ranging from strict territoriality to (virtual) universality.<sup>30</sup> The decisions in what are arguably two of the most important twentieth-century U.S. cases on extraterritorial constitutional protection may serve as

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24. *Banković v. Belgium*, 2001-XII Eur. Ct. H.R. 333, 350 (“[T]he essential question to be examined therefore is whether the applicants and their deceased relatives were, as a result of [the] extraterritorial act, capable of falling within the jurisdiction of the respondent States.”).

25. *Id.* at 359.

26. *In re Ross*, 140 U.S. 453, 464 (1891).

27. Sergio Rubén López Burgos v. Uruguay, Comm. No. 12/52, *Report of the Human Rights Committee*, U.N. GAOR, 36th Sess., Supp. No. 40, ¶ 12.3, U.N. Doc. A/36/40 (1981), *cited in* *Issa v. Turkey*, 41 Eur. H.R. Rep. 567, 588 (2005).

28. *Reid v. Covert*, 354 U.S. 1, 6 (1957) (plurality opinion).

29. *Johnson v. Eisentrager*, 339 U.S. 763, 791 (1950) (Black, J., dissenting).

30. This part builds on earlier discussions and typologies in Henkin, *supra* note 10; Neuman, *supra* note 7; Raustiala, *supra* note 10; and Kermit Roosevelt III, *Guantanamo and the Conflict of Laws: Rasul and Beyond*, 153 U. PA. L. REV. 2017 (2005).

illustrations. In the 1957 case *Reid v. Covert*,<sup>31</sup> a Supreme Court majority sought for the first time to abandon an approach that strictly limited constitutional-rights protection to U.S. territories, an approach originally adopted more than sixty years earlier in *In re Ross*.<sup>32</sup> *Reid* concerned the question whether two women accused of murdering their husbands who were on trial at Air Forces bases outside the United States were protected by the Sixth Amendment's jury-trial guarantee. In their efforts to replace the strict-territoriality model, the Justices sought support from the following principles and theories: (1) a vision of the Constitution as the indispensable source of, and limitation on, all government power (a principle of limited government);<sup>33</sup> (2) the notion that imposition of forum laws and penalties should come with a grant of protection under forum safeguards (a principle of mutuality of obligation);<sup>34</sup> and (3) the idea that the question of the required extent of rights protection might largely be reduced to "the issue of what process is 'due' a defendant in the particular circumstances of a particular case"<sup>35</sup> (a principle of global due process).<sup>36</sup> All these approaches, however, were equivocal about the role of citizenship as a factor in determining the reach of rights protection, leaving unclear the role of a possible fourth theory, (4) a social-contract-inspired principle of membership.<sup>37</sup>

The 1990 case of *United States v. Verdugo-Urquidez*<sup>38</sup> revealed "the same lack of consensus about the proper scope of American constitutionalism as did *Reid v. Covert*."<sup>39</sup> The *Verdugo* case, in the words of Chief Justice Rehnquist's majority opinion, concerned "whether the Fourth Amendment applies to the search and seizure by United States agents of property that is owned by a nonresident alien and located in a foreign country."<sup>40</sup> Until *Verdugo*, no Supreme Court decision had actually held that aliens had constitutional rights

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

32. *In re Ross*, 140 U.S. 453, 464 (1891) ("The guarantees [the Constitution] affords [for trial by jury] apply only to citizens and others within the United States, or who are brought here for trial for alleged offences committed elsewhere, and not to residents or temporary sojourners abroad.").

33. *Reid*, 354 U.S. at 5–6 ("The United States is entirely a creature of the Constitution. Its power and authority have no other source.").

34. *Id.* at 6 ("When the government reaches out to punish a citizen who is abroad . . . his life and liberty should not be stripped away just because he happens to be in another land."); see also Roosevelt, *supra* note 30, at 2056 (discussing mutuality of obligation between United States and alien residents).

35. *Reid*, 354 U.S. at 75 (Harlan, J., concurring).

36. "Global due process" is Neuman's term. See Neuman, *supra* note 7, at 919. For a somewhat different interpretation, see discussion *infra* III.

37. Henkin, *supra* note 10, at 23 ("*Reid* does not tell us whether the Constitution applies abroad only to citizens or also to aliens. Although the Supreme Court stressed that *Reid* involved the constitutional rights of a United States citizen, the Court did not limit its holding or its reasoning to citizens."). This uncertainty persists. See Boumediene v. Bush, Nos. 06-1195, 06-1196, 2008 WL 2369628, at \*24 (U.S. June 12, 2008) ("That the petitioners in *Reid* were American citizens was a key factor in the case and was central to the plurality's conclusion that the Fifth and Sixth Amendments apply to American civilians tried outside the United States. But practical considerations, related not to the petitioners' citizenship . . . were relevant to each Member of the *Reid* majority.").

38. *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990).

39. Neuman, *supra* note 7, at 975.

40. *Verdugo-Urquidez*, 494 U.S. at 261.

against U.S. action abroad.<sup>41</sup> Chief Justice Rehnquist's opinion continued this exclusionary line, adopting an approach based primarily on a principle of membership that denied constitutional protection to Verdugo-Urquidez because he was not one of "the people" the Fourth Amendment sought to protect.<sup>42</sup> Writing in dissent, Justice Brennan, to contrary effect, favored a principle of mutuality of obligation arguing that because the United States had treated Verdugo-Urquidez as "a member of our community for purposes of enforcing our laws," the claimant had become, "quite literally, one of the governed."<sup>43</sup>

In recent years, the issue of constitutional-rights protection for aliens abroad has featured prominently in the legal and political battles over the status of the detainees at Guantánamo Bay.<sup>44</sup> The Court's latest decision, in *Boumediene v. Bush*, if anything, revealed persistent deep disagreement among the Justices over the appropriate demarcation of the Constitution's reach. A five-member majority held that the central question of whether aliens apprehended and detained abroad may invoke the Constitutional habeas corpus guarantee should be dealt with by way of a multi-factor "functional approach."<sup>45</sup> Although the majority's opinion was unequivocal in its rejection of what it called the "formalism" of a principle of strict territoriality, it was less clear what principle—or set of principles—is to determine the reach of Constitutional protection, carving out a role for a possible fifth approach—one based on pragmatism and an evaluation of the "specific circumstances of each particular case."<sup>46</sup> In a strongly worded dissent written by Justice Scalia, the four Justices of the minority, on the other hand, had no doubt about the continued "primacy of territorial sovereignty in determining the jurisdiction of a habeas court over an alien."<sup>47</sup>

On the other side of the Atlantic, the European Court of Human Rights, too, has had difficulties developing a coherent normative framework for

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41. Neuman, *supra* note 7, at 973; *see also In re Ross*, 140 U.S. 453, 464 (1891); Henkin, *supra* note 10, at 23–24.

42. *Verdugo-Urquidez*, 494 U.S. at 273 (Verdugo-Urquidez was not a U.S. citizen and did not have a "voluntary connection with this country that might place him among 'the people' of the United States."); *see also* Roosevelt, *supra* note 30, at 2047.

43. *Verdugo-Urquidez*, 494 U.S. at 284 (Brennan, J., dissenting).

44. *See* in particular *Rasul v. Bush*, 542 U.S. 466 (2004), and *Boumediene v. Bush*, Nos. 06-1195, 06-1196, 2008 WL 2369628 (U.S. June 12, 2008).

45. *Boumediene* at \*26.

46. *Id.* at \*24 (quoting *Reid v. Covert*, 354 U.S. 1, 54 (1957)). This approach seems similar in its particularism to Justice Harlan's "due process" theory in *Reid*. Justice Kennedy's majority opinion in *Boumediene* does not, however, make a similar effort to reduce the issue of the Constitution's reach to an overall question of due process. There is, arguably, an element of pragmatism too in Chief Justice Roberts's dissent (joined by all Justices of the minority), which consistently refers to "whatever rights the detainees may possess," *id.* at \*49, and "any constitutional rights aliens captured abroad . . . may enjoy." *Id.*

47. *Id.* at \*69 (Scalia, J., dissenting) (joined by the Chief Justice, Justice Thomas, and Justice Alito).



delimiting the reach of rights protection, with regard both to the responsibility of individual member states and to the reach of the Convention system as a whole. According to Article 1 of the Convention, the contracting states have undertaken to “secure to *everyone within their jurisdiction[s]*” the rights and freedoms listed.<sup>48</sup> The European Commission on Human Rights (the Commission)<sup>49</sup> took an expansive view of this concept of jurisdiction early on, adopting a general test of whether victims had come under the “actual authority and responsibility” of a contracting state.<sup>50</sup>

The European Court of Human Rights did not follow the Commission, but in a number of decisions formulated partial tests that it ultimately sought to integrate into an overarching conceptual framework in its 1995 decision *Loizidou v. Turkey*.<sup>51</sup> At the heart of the court’s overall approach lies adherence to what it sees as the “ordinary meaning” of jurisdiction in public international law.<sup>52</sup> Consonant with this “ordinary meaning,” the court has found that “the jurisdictional competence of a State is primarily territorial,” that “Article 1 of the Convention must be considered to reflect this ordinary and essentially territorial notion of jurisdiction,” and that “other bases of jurisdiction [are] exceptional and requir[e] special justification in the particular circumstances of each case.”<sup>53</sup> *Loizidou* distinguished three such “particular circumstances,” two of which were drawn from earlier cases.

First, following the *Soering v. United Kingdom* line of cases on extradition, member states could be held responsible for acts occurring within their own territories but having effects abroad.<sup>54</sup> Such responsibility for actions within the forum having sufficiently close repercussions on Convention rights was based on the “underlying values of the Convention” and the need to make the

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48. Convention art. 1, Nov. 4, 1950, Europ. T.S. No. 005. Almost all Convention rights use the formula “everyone” (in positive rights descriptions) and “no one” (in negative descriptions) with regard to their scope of application. Compare, for use of the term “jurisdiction” in the U.S. (domestic) rights context, U.S. CONST. amend. XIV (“No state shall . . . deny to any person *within its jurisdiction* the equal protection of the laws.”) (emphasis added).

49. The European Commission on Human Rights was, until November 1998, responsible for “first instance” review under the Convention.

50. *Cyprus v. Turkey*, App. Nos. 6780/74, 6950/75, 2 Eur. Comm’n H.R. Dec. & Rep. 125, 136 (1975); *see also Hess v. United Kingdom*, App. No. 6231/73, 2 Eur. Comm’n H.R. Dec. & Rep. 72, 74 (1975) (prisoner in Berlin facility jointly managed by United States, United Kingdom, France, and Russia not within jurisdiction of the United Kingdom). For later uses, see *W.M. v. Denmark*, App. No. 17392/90, 15 Eur. H.R. Rep. CD28 (1993) (Danish ambassador in East Berlin handing over asylum-seeker to East German police is action within jurisdiction of Denmark).

51. *Loizidou v. Turkey* (Preliminary Objections), 310 Eur. Ct. H.R. (ser. A) at 23–24 (1995).

52. *See, e.g., Banković v. Belgium*, 2001-XII Eur. Ct. H.R. 333, 351. The court has consistently held that “[t]he Convention should so far as possible be interpreted in harmony with other rules of international law of which it forms part . . . .” *Al-Adsani v. United Kingdom*, 2001-XI Eur. Ct. H.R. 81, 100.

53. *Banković*, 2001-XII Eur. Ct. H.R. at 351–52.

54. *Soering v. United Kingdom*, 161 Eur. Ct. H.R. (ser. A) at 35–36 (1989). The case concerned extradition from the United Kingdom of a German national to the United States where prolonged detention on “death row” would arguably violate the Convention’s prohibition on torture and inhuman treatment. *See* Convention art. 3, Nov. 4, 1950, Europ. T.S. No. 005.

Convention's safeguards "practical and effective," given its object and purpose "as an instrument for the protection of individual human beings."<sup>55</sup>

Second, the court cited *Drozd v. France* for the "established proposition" that "the responsibility of Contracting Parties can be involved because of acts of their authorities, *whether performed within or outside national boundaries*, which produce effects outside their own territory."<sup>56</sup> Both in *Drozd* and in *Loizidou*, the court was silent on the normative underpinnings for this ground of jurisdiction. In a later admissibility decision, *Issa v. Turkey*, however, it found that responsibility for state conduct abroad had to be imposed because "Article 1 of the Convention [could not] be interpreted so as to allow a State . . . to perpetrate violations of the Convention on the territory of another State, which it could not perpetrate on its own territory."<sup>57</sup>

The third and final "leg" of the *Loizidou* framework was new. "Bearing in mind the object and purpose of the Convention," the court said, "the responsibility of a Contracting Party may also arise when as a consequence of military action—whether lawful or unlawful—it exercises *effective control of an area* outside its national territory."<sup>58</sup> Where states effectively do control an area outside their own territory, "the obligation to secure, in such an area, the rights and freedoms set out in the Convention derives from the fact of such control . . . ."<sup>59</sup>

The question of the reach of Convention protection has caused difficulties respecting not only the responsibility attributed to each member state, but also the demarcation of a sphere of protection for the Convention system as a whole. In *Banković v. Belgium*, relatives of the victims of a NATO bombing campaign of Belgrade brought a claim against all Convention states that were also NATO members.<sup>60</sup> In deciding whether the victims had been "within the jurisdiction" of the relevant member states at the time of the bombing, the court described the Convention as a "constitutional instrument of *European* public order" and referred to the "essentially regional vocation of the Convention system."<sup>61</sup> In addition to merely demarcating each states' responsibility, the court for the first time referred to a "legal space (*espace juridique*) of the Contracting States," the boundaries of which, taken together, limited the applicability of Convention protection as a whole.<sup>62</sup> Because the bombing

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55. *Soering*, 161 Eur. Ct. H.R. (ser. A) at 34–35. The court speaks of an "inherent obligation" not to extradite, noting that "it would hardly be compatible with the underlying values of the Convention . . . were a Contracting State knowingly to surrender a fugitive to another State where there were substantial grounds for believing that he would be in danger of being subjected to torture . . . ." *Id.* at 35.

56. *Loizidou*, 310 Eur. Ct. H.R. (ser. A) at 23–24, *citing* *Drozd v. France*, 240 Eur. Ct. H.R. (ser. A) at 29 (1992) (emphasis added).

57. *Issa v. Turkey*, 41 Eur. H.R. Rep. 567, 588 (2005).

58. *Loizidou*, 310 Eur. Ct. H.R. (ser. A) at 24 (emphasis added).

59. *Id.*

60. 2001-XII Eur. Ct. H.R. 333.

61. *Id.* at 358.

62. *Id.* at 359.

victims, unlike Mrs. Loizidou in Cyprus, lived in an area that had never been covered by the Convention, they were left without protection even when affected by the actions of member states' governments. The *espace juridique* doctrine immediately came under heavy criticism, and its current status is unclear.<sup>63</sup>

As this brief overview demonstrates, the question of the territorial and personal reach of rights protection has been a difficult one to answer, both in the United States and in Europe. Even on the limited topic of extraterritorial governmental action, U.S. case law shows a wide range of alternative, foundational, substantive principles, leading to divergent questions and models. It is true that in debates on the reach of Convention protection in Europe, all commonly defended approaches at least revolve around some conception of control or actual authority. But even with regard to this main criterion, many questions remain, notably on the precise prerequisites for, and consequences of, a finding of sufficient control under the court's different tests;<sup>64</sup> the appropriate standard of review in cases in which sufficient control of any variety is found;<sup>65</sup> and the possibilities for states to deliberately relinquish control in order to avoid responsibility under the Convention. Finally, the disagreement over the Convention's *espace juridique* doctrine shows that in Europe too, different substantive understandings of the nature of rights protection under the Convention have exercised a profound influence on the demarcation of its reach.

### C. Extraterritoriality and Other Foreign Elements

Both in Europe and in North America, discussions on the reach of rights protection generally do not cover all types of foreign elements. Most commonly, courts and commentators adopt a limited perspective that only includes cases concerning extraterritorial state conduct. Even when attempts are made to

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63. See, e.g., Michael O'Boyle, *The European Convention on Human Rights and Extraterritorial Jurisdiction: A Comment on "Life After Bankovic,"* in EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS TREATIES 125 (Fons Coomans & Menno T. Kamminga eds., 2004) [hereinafter EXTRATERRITORIAL APPLICATION] ("There have been few inadmissibility decisions which have given rise to such adverse comment and controversy as the *Bankovic* case."). See generally Rick Lawson, *Life After Bankovic: On the Extraterritorial Application of the European Convention on Human Rights,* in EXTRATERRITORIAL APPLICATION, *supra*, at 83; Erik Roxstrom, Mark Gibney & Terje Einarsen, *The NATO Bombing Case* (Bankovic et al. v. Belgium et al.) and the Limits of Western Human Rights Protection, 23 B.U. INT'L L.J. 55 (2005). In particular, the reference to *Banković* in *Issa*, 41 Eur. H.R. Rep. at 589, is difficult to place. Although *Issa* concerned possible state action outside the *espace juridique* of the Convention (in Northern Iraq), this was apparently not, by itself, an obstacle to a finding of "jurisdiction" in the sense of Article 1.

64. It should be noted that the court itself continues to distinguish between its different tests for jurisdiction. See *Isaak v. Turkey*, App. No. 44587/98 (2006), available at <http://cmiskp.echr.coe.int/tpk197/search.asp?sessionId=5054494&skin=hudoc-en> (check "Decisions" then search "Application Number" for "44857/98") (last visited May 28, 2008), at Section II.A.2.b.

65. See for example the distinction, post-*Soering*, between "ordinary" and "flagrant" violations of fair-trial rights abroad after extradition. *Soering v. United Kingdom*, 161 Eur. Ct. H.R. (ser. A) at 45 (1989).

develop a more comprehensive view, the relationship between extraterritorial conduct and other types of foreign elements often remains problematic.

The European Court of Human Rights, for example, has in some decisions treated domestic acts with foreign consequences (of the *Soering* type) and foreign acts (of the *Drozd* type) together, as two manifestations of the jurisdiction problem.<sup>66</sup> In other cases it has insisted on separating the two, noting that actions of a state “concerning a person while he or she is on its territory” are different altogether from jurisdictional issues.<sup>67</sup> In the United States, analyses of the reach of rights protection traditionally focus heavily on state conduct abroad. There have, of course, been exceptions—such as Professor Louis Henkin’s path-breaking effort to address the “several small related subjects” of the rights of aliens within the United States, the applicability of the Constitution to persons outside the United States, and constitutional limitations on immigration law.<sup>68</sup> But even such comprehensive perspectives do not generally take in all possible types of foreign elements. Professor Henkin’s study, for example, omits any discussion of cases concerning domestic action with effects abroad (like *Mandel*) or those concerning execution of foreign judgments in the United States.<sup>69</sup>

This emphasis on extraterritoriality comes with two complications. First, it ascribes a crucial normative role to territory—a role it is, at the very least, questionable “mere soil” can or should actually play.<sup>70</sup> Second, and more important for this article, both European and North American case law reveal the serious difficulties involved in determining whether a case concerns extraterritorial state conduct in the first place. Recall the case of *Kleindienst v. Mandel*,<sup>71</sup> in which U.S. professors within the United States claimed that governmental refusal to admit a Belgian academic for a lecture tour deprived them of their listener’s rights under the First Amendment. Think also of the European Court’s decision in *Banković v. Belgium*,<sup>72</sup> which dealt with aircraft bombings of buildings in Serbia—a non-Convention state—planned at NATO headquarters in Belgium and in the capitals of other Convention states.

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66. *Loizidou v. Turkey*, 310 Eur. Ct. H.R. (ser. A) at 23–24 (1995).

67. *Banković v. Belgium*, 2001-XII Eur. Ct. H.R. 333, 354. In the more recent case of *Ilaşcu*, it seems that both strands of case law were again brought together under the heading of “acts which have sufficiently proximate repercussions on rights guaranteed by the Convention, even if those repercussions occur outside [the Contracting State’s] jurisdiction.” *Ilaşcu v. Moldova*, 2004-VII Eur. Ct. H.R. 179, 264 (emphasis added).

68. Henkin, *supra* note 10, at 11. Henkin explicitly acknowledged that all three of these topics lie removed from “the paths commonly trodden by students of the United States Constitution.”

69. *See* Neuman, *supra* note 7. Roosevelt’s discussion was explicitly limited to cases of extraterritorial state conduct. *See* Roosevelt, *supra* note 30, at 218 (discussing extraterritoriality).

70. *See, e.g.*, Raustiala, *supra* note 10, at 2504 (“[A] narrow fixation on . . . territoriality is at odds with . . . our most cherished principles of constitutionalism.”); *id.* at 2558 (“Simple locational analysis ought not to be the basis of our jurisprudence on constitutional rights.”).

71. *Kleindienst v. Mandel*, 408 U.S. 753 (1972).

72. *Banković v. Belgium*, 2001-XII Eur. Ct. H.R. 333.

In both *Banković* and *Mandel*, the labels “extraterritorial” or “domestic” are impossible to apply with any objectivity. One rather classic problem is that, in each case, determining the *location* of rights infringements depends on preestablished conceptions of what the relevant right actually protects.<sup>73</sup> *Mandel* turned out to be a “domestic” case only because the First Amendment was held to guarantee listeners’ rights as well as speakers’ rights.<sup>74</sup> And in *Banković*, the outcome depended on whether one understood the scope of the right to life in Article 2 of the Convention to protect against actual bombings only, or against careless planning as well.<sup>75</sup> A second problem is that, because rights claims are ultimately directed against state authorities, it is always possible to argue that central authorities in state capitals were at least to some extent involved in breaches of rights—wherever they occurred.<sup>76</sup> This makes using geography to differentiate between “foreign” and “domestic” cases acutely more difficult regarding state conduct than regarding the acts of private parties.<sup>77</sup>

#### D. The Many Possible Effects of Foreign Elements

The relevant decisions show, finally, that courts have not adopted a coherent perspective on the kinds of effects to be given to foreign elements.

A first group of decisions that can be distinguished addresses the issue of scope, or reach, in a separate doctrinal step. In these cases, reach is framed as a threshold question,<sup>78</sup> the answer to which turns on the kind of territory or groups of people covered by forum fundamental rights. Within this broad category, a further distinction can be made between (1) approaches that demarcate the boundaries of rights orders as a whole, and (2) those that

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73. Cf. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 264 (1990) (“[A] violation of the [Fourth] Amendment is ‘fully accomplished’ at the time of an unreasonable governmental intrusion. For purposes of this case, therefore, if there were a constitutional violation, it occurred solely in Mexico.”).

74. *Mandel*, 408 U.S. at 764–65 (discussing “the right to receive information”).

75. See, e.g., *Schreiber v. Canada*, [1998] 1 S.C.R. 841, para. 60 (Can.) (Iacobucci, J., dissenting) (substantive guarantees of Charter privacy protection are “activated”; Canadian authorities had an obligation to comply with Charter requirements when drafting and issuing the letter of request to their Swiss counterparts).

76. See, e.g., *Braden v. 30th Jud. Cir. Ct. of Ky.*, 410 U.S. 484, 495 (1973) (holding that a court has power to offer habeas corpus relief as long as authority holding the prisoner is within court’s jurisdiction); *id.* at 494–95 (“The writ of habeas corpus does not act upon the prisoner who seeks relief, but upon the person who holds him . . .”). In the European context, see *Bui Van Thanh v. United Kingdom*, App. No. 16137/90, 65 Eur. Comm’n H.R. Dec. & Rep. 330 (1990), cited in O’Boyle, *supra* note 63, at 131 n.25 (rejecting the idea that actions by immigration officials in Hong Kong—itsself not a territory to which Convention protection had been extended by the United Kingdom—would fall within the jurisdiction of the United Kingdom since actions were planned and managed in London).

77. For a discussion of the problems encountered by the U.K. House of Lords in their efforts to distinguish between “domestic” and “foreign” cases, see Ben Juratowitch, *The European Convention on Human Rights and English Private International Law*, 3 J. PRIVATE INT’L L. 173, 185–86 (2007).

78. Note that if a rights order adheres to a principle of universality—rights are always in principle “applicable,” but their concrete effect may vary with circumstances—court decisions may *look like* one-step approaches, even when they are not. For a similar distinction between one-step and two-step approaches in (private international) jurisdiction law, see Ralf Michaels, *Two Paradigms of Jurisdiction*, 27 MICH. J. INT’L L. 1003, 1017–18 (2006). For a discussion of threshold questions in horizontal effect cases, see Gardbaum, *supra* note 15, at 770, and *infra* IV.D and note 169.

determine the reach of specific rights guarantees based on characteristics of the particular right in question.

Justice Black's opinion in *Reid* is an example of the first subcategory. In *Reid*, Justice Black concluded that "the Constitution in its entirety applied" to the trial abroad of the American wives.<sup>79</sup> By this view, the underlying considerations demarcating the reach of U.S. constitutionalism as a whole—Black's principle of limited government—directly determine results; rights guarantees may be invoked in exactly the same way as they could be in purely internal situations.<sup>80</sup> The European Court of Human Rights, by channeling most issues of reach through the general threshold question of jurisdiction,<sup>81</sup> and the Supreme Court of Canada also, to a large extent, follow a model by which rights orders are demarcated in their entirety.<sup>82</sup>

Chief Justice Rehnquist's opinion for the Court in *Verdugo-Urquidez* can be seen as an example of the second subcategory. For Rehnquist, the question presented by the case was whether the Fourth Amendment applied to a search abroad,<sup>83</sup> and the Chief Justice's subsequent analysis was largely confined to the text and history of this specific Amendment.<sup>84</sup> Approaches within this second subcategory could also look at the characteristics of a cluster or family of rights taken together to determine their reach. This arguably was the model adopted by Justice Harlan in his concurrence in *Reid*. For Justice Harlan, the relevant question was "*which* guarantees of the Constitution *should* apply in view of the particular circumstances, the practical necessities, and the possible alternatives . . . ."<sup>85</sup> Ultimately, Justice Harlan found, "the question of which specific safeguards of the Constitution are appropriately to be applied in a particular context overseas can be reduced to the issue of what process is 'due' a defendant in the particular circumstances of a particular case."<sup>86</sup> Professor Gerald Neuman has interpreted this statement as a "global due process" model for all U.S. constitutional rights.<sup>87</sup> It is entirely plausible, however, that Justice

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79. *Reid v. Covert*, 354 U.S. 1, 18 (1957).

80. *Id.* at 8–9 ("While it has been suggested that only those constitutional rights which are 'fundamental' protect Americans abroad, we can find no warrant, in logic or otherwise, for picking and choosing among the remarkable collection of 'Thou shalt nots' which were explicitly fastened on all departments and agencies of the Federal Government by the Constitution and its Amendments.") (footnote omitted).

81. *See, e.g., Ilașcu v. Moldova*, 40 Eur. H.R. Rep. 1030, 1099 ("[J]urisdiction is a necessary condition for a Contracting State to be able to be held responsible . . . .").

82. That is, in generic fashion, without regard to the substantive content of the specific right concerned. *See, e.g., R v. Cook*, [1998] 2 S.C.R. 597, at para. 1 ("[D]oes the *Canadian Charter . . . apply* to the taking of the appellant's statement by Canadian police in the United States . . . ?") (emphasis added).

83. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 261 (1990).

84. *Id.* at 274–75. *See also* *Boumediene v. Bush*, Nos. 06-1195, 06-1196, 2008 WL 2369628, at \*2 (U.S. June 12, 2008) (asking the specific question whether petitioners "have the constitutional privilege of habeas corpus").

85. *Reid*, 354 U.S. at 75 (Harlan, J., concurring).

86. *Id.*

87. Neuman, *supra* note 7, at 920.

Harlan intended the scope of his due-process principle to be limited to the context of a cluster of “trial rights” or “process rights,” such as those at issue in *Reid* itself, with other principles governing the reach of rights such as freedom of expression or religion.

All approaches that focus on the reach of specific rights function, at least implicitly, against a background understanding of the outer boundaries of the relevant rights order as a whole. Chief Justice Rehnquist’s analysis of the reach of the Fourth Amendment can operate only if based on a threshold determination of the potential reach of U.S. constitutional rights in general—in his case, on an understanding that, in principle, territorial presence and a “substantial connection” with the United States are required for aliens to “receive constitutional protections.”<sup>88</sup> In this sense, models that look at the substance of individual rights for the determination of their reach are, at least implicitly, two-step approaches.

In a second main group of cases, however, the question of reach is not addressed separately, but integrated into the normally applicable doctrinal framework.<sup>89</sup> Variations in the intensity or strength of protection may, in such cases, be achieved through the application of a “balancing of interests” paradigm.<sup>90</sup> Within such a framework, (which applies to large areas of fundamental-rights protection in Canada, Europe, and the United States), the intensity of protection is altered through modifying—under the effect of foreign elements—the weight of interests deemed relevant. These interests may include individual interests of the rights claimant, governmental interests, third-party interests, and societal or systemic interests. Courts sometimes hold that asserted governmental interests are stronger in cases in which foreign elements are present—as in *Mandel*, in which the U.S. government’s power over immigration was at issue.<sup>91</sup> In cases with foreign elements, individual interests are sometimes found to be less pressing, as in the Canadian search case of *Schreiber*, for example, in which only a diminished “reasonable expectation of privacy” was granted for records kept abroad.<sup>92</sup> The *Schreiber* case also demonstrates another variation on the balancing-of-interests approach; the appeals court held that

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88. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 271 (1990).

89. These approaches necessarily operate on the basis of a background, or “threshold,” understanding of the outer limits of the reach of the relevant rights order.

90. Compare Corey M. Then, Note, *Searches and Seizures of Americans Abroad: Re-Examining the Fourth Amendment’s Warrant Clause and the Foreign Intelligence Exception Five Years After United States v. Bin Laden*, 55 DUKE L.J. 1059, 1060–61 (2006) (suggesting that the problem of searches and seizures of Americans abroad should be dealt with largely through application of standard Fourth Amendment doctrines) with Note, *supra* note 7, at 1677, 1682 (arguing for a “functional approach” that avoids the “tendency mechanically to apply domestic constitutional standards against extraterritorial government activity”).

91. *Kleindienst v. Mandel*, 408 U.S. 753 (1972). These cases, of course, do not merely contain a foreign element; they have strong political implications as well. It seems that in many cases, “foreign” may to some extent be a proxy for “political.” For a discussion within the context of immigration, see K. L. Pringle, *Silencing the Speech of Strangers: Constitutional Values and the First Amendment Rights of Resident Aliens*, 81 GEO. L.J. 2073, 2074 (1993).

92. *Schreiber v. Canada*, [1998] 1 S.C.R. 841 (Can.).

because a prophylactic exclusionary rule could have no effect on searches by foreign authorities, systemic interests were less important in this setting.<sup>93</sup>

Outside the balancing-of-interests paradigm, foreign elements are also seen to alter “the nature of the protection” offered by individual rights. This term, as used here, describes variations in the application of interpretative doctrines, specifically those doctrines that identify specific, proscribed, governmental conduct and protected individual behavior. The effect is perhaps most clearly visible in freedom-of-expression cases that either involve speakers abroad or alien speakers within the forum. Case law both in Europe and in the United States suggests that the character or the *meaning* of the general right to freedom of expression changes in these foreign-elements contexts.<sup>94</sup> In the *Mandel* case, for example, the U.S. Supreme Court developed a test whereby aliens could be excluded based on the *content* of their speech as long as government authorities had “facially legitimate and bona fide reason[s]” for their exclusion.<sup>95</sup> As even a cursory look at standard freedom-of-speech law in the United States will reveal, this is a doctrine that clearly has no application in purely internal First Amendment cases.<sup>96</sup> It has also been argued that the First Amendment rights of resident aliens in the United States “fluctuate depending on the *content* of the speech at issue.” In purely internal situations, by contrast, “such content regulation is exactly what the First Amendment proscribes.”<sup>97</sup>

Finally, similar variations in the nature of rights protection in cases with foreign elements can be seen in case law on the European Convention. In a case on the exclusion of the American Muslim activist Louis Farrakhan from U.K. territory based on the content of his expression, for example, the English Court of Appeals held that Article 10 of the Convention would be engaged only “where the authorities of a state refuse entry to an alien *solely* to prevent his

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93. *Schreiber v. Canada*, [1997] 2 F.C. 176, para. 35 n.41 (Fed. Ct.) (Can.) (citing with approval *Brulay v. U.S.*, 383 F.2d 345 (9th Cir. 1967), which held that Mexican authorities searching a U.S. citizen’s car in Mexico were not subject to the Fourth Amendment); *see also* *R v. Terry*, [1996] 2 S.C.R. 207, para. 26 (Can.) (“[A]ny attempt to bind foreign police by Canadian law would be impossible to regulate.”).

94. *See generally* Steven R. Shapiro, Commentary, *Ideological Exclusions: Closing the Border to Political Dissents*, 100 HARV. L. REV. 930, 938 (1987). For discussions in the context of the European Convention, *see R v. Sec’y of State for the Home Dep’t*, [2002] EWCA (Civ) 606, [53]–[56], [2002] Q.B. 1391, 1413–14 (U.K.) (citing *Omkarananda & the Divine Light Zentrum v. Switzerland*, 25 Eur. Comm’n H.R. Dec. & Rep. 105, 117–18 (1981) (holding no interference with freedom of conscience guarantee “unless it can be established that the measure was designed to repress the exercise of such rights and stifle the spreading of the religion or philosophy of the followers”) and *Piermont v. France*, 314 Eur. Ct. H.R. (ser. A) (1995)).

95. *Kleindienst v. Mandel*, 408 U.S. 753, 770 (1972).

96. *See id.* at 784 (Douglas, J., dissenting) (finding that the government’s decision was based solely on its “desire to keep certain ideas out of circulation in this country”).

97. Pringle, *supra* note 91, at 2089 (emphasis in original); *see also* Steven J. Burr, Comment, *Immigration and the First Amendment*, 73 CAL. L. REV. 1889, 1896 (1985) (“In immigration cases, the Supreme Court has abandoned its usual approach to First Amendment issues.”).



expressing opinions within its territory”<sup>98</sup>—a much less-stringent doctrinal test than the one usually applicable under the Convention.<sup>99</sup>

### III

#### CONFLICTS’ CONTRIBUTION: TOWARDS A DISCIPLINE OF FUNDAMENTAL-RIGHTS CASES WITH FOREIGN ELEMENTS

##### A. Conflict of Laws and Fundamental-Rights Cases With Foreign Elements: Engaging the Foreign

Traditional conflict-of-laws, or private-international-law, cases and the fundamental-rights cases discussed in part II share a basic and obvious connection: the presence of foreign elements of some kind. But conflict-of-laws and the rights cases share more than this one trait. Decisions in both areas rely heavily on the same *language*—“jurisdiction,” “reach,” “scope,” and “application”—and often refer to the same earlier case law.<sup>100</sup> In both areas, courts often look for contacts to determine the scope of legal orders—think of the roles of citizenship and territory, or of the similarities between “doing business” in conflict of laws and “mutuality of obligation” in the rights cases. They are also alike in the extent of confusion they evince about basic issues such as the appropriate normative basis for the demarcation of the reach of forum law, the role of territoriality, and the foundational question whether the determination of reach should even be a distinct issue at all.<sup>101</sup>

Given all these substantive and doctrinal parallels, it is surely surprising that in terms of disciplinary identity and configuration the two areas are so strikingly different. Whereas conflict of laws has a long and impressive history as a field of law, the reach-of-rights cases merely comprise, at best, “several small[,] related subjects which have been largely neglected.”<sup>102</sup> Whereas many conflict-of-laws theories look at fact patterns from both within and outside the forum, most discussions on the reach of rights are limited to extraterritorial state conduct.

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98. *Ex parte Farrakhan*, [2002] EWCA (Civ) at [56], [2002] Q.B. at 1414 (U.K.) (emphasis added).

99. Usually, exposing individuals to the threat of rights violations abroad, for example by extraditing them, breaches Convention standards only when the potential infringements are especially serious. *Soering v. United Kingdom*, 161 Eur. Ct. H.R. (ser. A) at 45 (1989) (risk of a “*flagrant denial* of a fair trial”) (emphasis added).

100. *See, e.g.*, *Johnson v. Eisentrager*, 339 U.S. 763, 776 (1950) (discussing the standing of an alien to maintain any action in U.S. courts); *id.* at 765 (describing the main issue in the case as the “jurisdiction of civil courts”); *see also* *Schreiber v. Canada*, [1997] 2 F.C. 176, paras. 79–80 (Fed. Ct.) (Can.) (Stone, J., dissenting) (citing *Tolofson v. Jensen*, [1994] 3 S.C.R. 1022 (Can.) for the proposition that Canadians residing in other countries have “submitted to the foreign jurisdiction”); *Rasul v. Bush*, 542 U.S. 466, 484 (2004) (citing *Disconto Gesellschaft v. Umbreit*, 208 U.S. 570 (1908) for the proposition that “the courts of the United States have traditionally been open to nonresident aliens”); Neuman, *supra* note 7, at 918 (referring to the “lens of conflict of laws” offered by Joseph Beale’s strictly territorial vested-rights doctrine); *id.* at 956–57 (arguing that judicial formulae in the seminal Supreme Court rights decision *In re Ross* “came from the conflict of laws”).

101. *Cf.* Kramer, *supra* note 12, at 280 (arguing for the resolution of choice-of-law problems by way of “interpretation,” through “canons of construction”).

102. Henkin, *supra* note 10, at 11.

And whereas many conflict-of-laws approaches apply the same doctrinal framework to cases from different areas of substantive law, cases on the reach of different fundamental-rights guarantees are rarely seen as presenting the same kind of problems.

Conflict of laws can teach the rights cases the benefits of focusing on the unifying trait of foreign elements. An important part of the conceptual trouble courts have had in dealing with cross-border rights cases stems precisely from the failure to regard fundamental-rights cases with foreign elements as a coherent legal category, on the model of private-law cases with foreign elements.

The suggestion of modeling treatment of rights cases with foreign elements on private international law raises the specter of advocating a “conflict-of-laws approach” to a problem not traditionally thought of as part of that field. This type of suggestion has a long and troubled intellectual history. Against this background, capturing the full benefits of a modeling approach requires developing a better understanding of the tension between conflict’s disciplinary coherence and its glaring internal divisions.<sup>103</sup> This article addresses that tension by proposing a conception of generic private international law that the rights cases could take as a model.

#### B. The Many Meanings of a Conflict-of-Laws Approach

Modern private international law is characterized by an impressive array of approaches and methods that vie for prominence.<sup>104</sup> This great variety in views makes it hard to reach consensus on the most basic issue of all—identifying conflicts’ “right question[s].”<sup>105</sup> These internal divisions are replicated in calls for conflict-of-laws approaches to questions not traditionally regarded as within the field’s scope. Authors and courts issuing such calls generally single out their own favored conflicts theories and methods for application to new problems. The many meanings attributed to advocating a conflict-of-laws approach have important consequences for this article’s project and deserve somewhat more extended attention.

The issue of the extraterritorial application of statutes in economic regulation offers an example.<sup>106</sup> Judges and commentators have often argued for

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103. See, e.g., Louise Weinberg, *Theory Wars in the Conflict of Laws*, 103 MICH. L. REV. 1631 (2005) (discussing internal debates among conflicts-of-laws theorists).

104. See Trachtman, *supra* note 13, at 993 (“Ever since Currie, Cook and Cavers discredited Beale’s ‘vested rights’ theory, no successor theory has met with widespread acceptance.”) (footnotes omitted).

105. J. W. Singer, *Real Conflicts*, 69 B.U. L. REV. 1, 3 (1989).

106. See, e.g., Russell J. Weintraub, *The Extraterritorial Application of Antitrust and Securities Laws: An Inquiry into the Utility of a ‘Choice-of-Law’ Approach*, 70 TEX. L. REV. 1799, 1801 (1992) (outlining three possible approaches to extraterritorial economic regulation taken from conflicts-of-laws theories). See generally Andreas F. Lowenfeld, *Public Law in the International Arena: Conflict of Laws, International Law and Some Suggestions For Their Interaction*, in 163 RECUEIL DES COURS: COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 311, 344–411 (1979-II).

adoption of a conflict-of-laws approach in this field.<sup>107</sup> Conflicts theory is said to have informed the very first Supreme Court treatment of a possible extraterritorial application of the Sherman Act, the classic U.S. antitrust statute, in Justice Holmes' famous 1909 opinion *American Banana Co. v. United Fruit Co.*<sup>108</sup> Justice Holmes used Joseph Beale's territorial private-international-law theory to support his conclusion that the Act could not apply overseas.<sup>109</sup> Since that early decision, all major judicial approaches to the issue of extraterritorial application of antitrust laws have at some time either been informed by, or criticized on, the grounds of conflict-of-laws theories and principles. Invoking conflict-of-laws methods, theories, or principles in all these opinions and writings, however, has meant very different things to different people. Conflict of laws meant territoriality for Holmes in *American Banana*, a broad notion of comity for Judge Learned Hand in *United States v. Aluminum Co. of America (Alcoa)*,<sup>110</sup> case-by-case "Second Restatement balancing" for the Ninth Circuit Court of Appeals in *Timberlane Lumber Co. v. Bank of America*,<sup>111</sup> and, again, comity for Justice Scalia in *Hartford Fire Insurance Co. v. California*,<sup>112</sup> to name a number of prominent examples.

More recently, the same tendency has been visible specifically in the call for a conflict-of-laws approach to the extraterritorial scope of U.S. constitutional rights.<sup>113</sup> In an article on *Rasul v. Bush*, Kermit Roosevelt III turns to conflict-of-laws theory to answer the question of the scope of the Constitution. Discarding alternative approaches, Roosevelt finally finds inspiration in what he calls a "proper conflicts theory"—which, unsurprisingly—turns out to be the particular method he favors for conflicts problems more broadly.<sup>114</sup>

### C. Conflicts Approaches and Generic Private International Law

Any attempt to "export" conflict-of-laws insights must face up to the divergences mentioned above in the preceding section, either by choosing one

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107. See generally William S. Dodge, *Extraterritoriality and Conflict-of-Laws Theory: An Argument for Judicial Unilateralism*, 39 HARV. INT'L L.J. 101, 103 & n.12 (1998) (discussing Justice Scalia's views and listing references to further literature).

108. 213 U.S. 347 (1909); see Dodge, *supra* note 107, at 122; Larry Kramer, *Vestiges of Beale: Extraterritorial Application of American Law*, 1991 SUP. CT. REV. 179, 186 (1991).

109. Justice Holmes's opinion does not refer directly to Beale or to vested rights, but does allude to a necessary connection between the place of conduct and applicable (foreign) law. See *American Banana Co.*, 213 U.S. at 358. Holmes also cites the vested-rights decision of *Milliken v. Pratt*, 125 Mass. 374 (1878), as an "extreme" application of the principle defended. *Id.* at 356. Interestingly, Holmes also uses his own proto-Realist theory of "law as prediction" to ground the result. *Id.* at 356–57.

110. *United States v. Aluminium Co. of America*, 148 F.2d 416, 443 (2d Cir. 1945) (referring to the "limitations customarily observed by nations upon the exercise of their powers; limitations which generally correspond to those fixed by the 'Conflict of Laws'").

111. *Timberlane Lumber Co. v. Bank of America N.T. & S.A.*, 549 F.2d 597, 613–14 (9th Cir. 1976); see Philip J. McConaughay, *Reviving the 'Public Law Taboo' in International Conflict of Laws*, 35 STAN. J. INT'L L. 255, 276–77 (1999).

112. *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 817–18 (1993).

113. Roosevelt, *supra* note 30, at 2019, 2030 (extending his approach to include the "extraterritorial scope of federal law").

114. Roosevelt, *supra* note 30, at 2064–65; see also Kramer, *supra* note 12, at 284–89.

approach over others, or by trying to find a common conception underlying the various approaches.

In developing an approach to rights cases with foreign elements, choosing one specific conflicts method is, at the very least, prone to lead to terminological confusion.<sup>115</sup> More fundamentally, however, although virtually all conflicts approaches contain profound insights into the business of demarcating legal orders, there does not seem to be one specific approach that can be transposed one-on-one to the fundamental-rights-cases setting. Bealean “vested rights” is concerned with recognition of legal status obtained under foreign law and, therefore, begs the crucial question of the scope of forum-rights guarantees. Savignian “closest connection,” or “seat” analysis relies on an apolitical conception of (private) law and on a high degree of substantive homogeneity between potentially applicable laws, both of which are generally not available for constitutional-rights law.<sup>116</sup> Interest analysis focuses on effectuating governmental policies and has very little place for the idea of norms (principles) constraining state powers—an important element of many theories of rights protection.<sup>117</sup> Finally, Professor Brilmayer’s rights-based approach is more concerned with limiting the forum’s adjudicative or prescriptive jurisdiction than with the guarantees states should offer to individuals who feel the effects of their actions.<sup>118</sup> These and other problems must provoke a reevaluation of what exactly conflict of laws may contribute to dealing with rights cases with foreign elements.

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115. See Ralf Michaels, *EU Law as Private International Law? Re-Conceptualising the Country-of-Origin Principle as Vested Rights Theory*, 2 J. PRIVATE INT’L L. 195, 211 (2006) (emphasizing “the need for a broader concept of private international law” and criticizing views that “[substitute] one approach for a whole discipline”); cf. Dodge, *supra* note 107, at 104 (criticizing Justice Scalia—a more recent advocate of a conflict-of-laws approach—for “fail[ing] to recognize that there is more than one ‘conflict-of-laws’ approach to extraterritoriality” and “overlook[ing] the central question, which was not *whether* conflicts theory should be applied to questions of extraterritoriality, but rather *which* conflicts theory should be applied”).

116. On Savigny’s apolitical conception of private law, see FRIEDRICH CARL VON SAVIGNY, *VOM BERUF UNSRER ZEIT FÜR GESETZGEBUNG UND RECHTSWISSENSCHAFT* [ON THE VOCATION OF OUR AGE FOR LEGISLATION AND JURISPRUDENCE] 16 (1814). On Savigny’s universalism, see, for example, Ole Lando, *Methods and Policies Underlying Decisions on International Conflict-of-Law Cases*, 15 AM. J. COMP. L. 230, 241 (1967) (“Savigny took it for granted that legal institutions have the same ‘nature’ in every country . . .”).

117. Interest analysis does not generally distinguish between policies and principles in the Dworkinian sense. See, e.g., Note, *Comparative Impairment Reformed: Rethinking State Interests in the Conflict of Laws*, 95 HARV. L. REV. 1079, 1080 (1982). To the extent that Dworkin’s analysis is accepted, this is a weakness also in all purposive-interpretation approaches, such as Kramer’s and Roosevelt’s.

118. Professor Brilmayer argues for “[a] *political rights model of choice of law*” that “requires a state to *justify its exercise of coercive authority* over an individual aggrieved by the application of the state’s law.” Brilmayer, *supra* note 12, at 1297 (emphasis added). Professor Brilmayer noted in an earlier article that explaining “why it is *fair to the complaining party* to impose a law to which he or she objects” is both an element lacking from modern choice-of-law theories, and “the essence of constitutional adjudication.” Lea Brilmayer, *Governmental Interest Analysis: A House Without Foundations*, 46 OHIO ST. L.J. 459, 475 (1985) (emphasis added); see also Lea Brilmayer & Charles Norchi, *Federal Extraterritoriality and Fifth Amendment Due Process*, 105 HARV. L. REV. 1217 (1992).

The crucial current difference between conflict-of-laws and the rights cases is that conflicts is generally accepted as a coherent discipline of its own, with endowed chairs and journals, and on a par with other fields such as constitutional law or contract law. Behind the many, diverse conflicts methods and theories, and holding them all more or less together, would seem to lie a concept of generic private international law.

It is very difficult to identify exactly what conflict-of-laws' generic, disciplinary identity consists of. One way to approach this question could be to adopt a functional definition of the field—for example, “to resolve the conflicts that may exist between different private law systems.”<sup>119</sup> Experience in other areas, however, most notably (public) international law and comparative law, highlights the difficulties involved in defining disciplines by means of a single, overarching question or objective whenever, as in private international law and these other fields, “almost every basic doctrinal position is . . . conceived in at least two voices.”<sup>120</sup> In such a situation, it seems more fruitful to view disciplinary identity in terms of “a group of people sharing . . . [a] disciplinary consciousness or lexicon . . . composed of typical problems, a stock of understood solutions, a vocabulary for evaluating new ideas, a sense about their own history and a way of looking at the world.”<sup>121</sup> The people within this group may very well disagree on many of the field's specific issues; what matters is that the centrality of at least a number of these points of disagreement is widely accepted.

From this vantage point, private international law's central occupation with conflicts between systems of private law becomes, as David Kennedy has put it for public international law, “less . . . a description of fact than . . . the outline of a common professional vision”<sup>122</sup>—a vision, in conflicts' case, of what could be called *engaging the foreign*. It is this vision that forms the backdrop to a number of basic loci for debate, and a set of canonical issues that the discipline finds interesting and around which it constitutes itself.<sup>123</sup> At least four such issues

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119. Michaels, *supra* note 115, at 211. For an early statement of this idea, see Carl Georg von Wächter, *Ueber die collision der privatrechtsgesetze verschiedener staaten* [*On the Collision of Private Laws of Different States*], 24 ARCHIV FÜR DIE CIVILISTISCHE PRAXIS [ACP] 230 (1841), 25 ACP 1, 161, 361 (1842) (F.R.G.), discussed in Kurt H. Nadelmann, *Wächter's Essay on the Collision of Private Laws of Different States*, 13 AM. J. COMP. L. 414 (1963).

120. David Kennedy, *When Renewal Repeats: Thinking Against the Box*, 32 N.Y.U. J. INT'L L. & POL. 335, 343 (2000) (discussing also the drawbacks of defining international law through its object as “the law which governs relations between states”). See also the controversy in comparative-law literature over Alan Watson's definition of the field as “the study of the relationship of one legal system and its rules with another”—a definition that is far from universally accepted. ALAN WATSON, *LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW* 6 (2d ed. 1993).

121. David Kennedy, *My Talk at the ASIL: What Is New Thinking in International Law?*, 94 AM. SOC'Y INT'L L. PROC. 104, 104 (2000); see also J.M. Balkin, *Interdisciplinarity as Colonization*, 53 WASH. & LEE L. REV. 949, 960 (1996) (defining disciplines as “groups of like-minded individuals”).

122. Kennedy, *supra* note 120, at 346.

123. Cf. J.M. Balkin & Sanford Levinson, *The Canons of Constitutional Law*, 111 HARV. L. REV. 963, 968, 985–87 (1998) (arguing that “there is no better way to understand a discipline . . . than to study what its members think is canonical to that discipline” and distinguishing between canonical arguments, problems and approaches, and narratives).

surrounding the question of engaging the foreign stand out:<sup>124</sup> (1) the relationship between formalism and material outcomes in dealing with the foreign,<sup>125</sup> (2) the question of parity between the foreign and the domestic,<sup>126</sup> (3) the public–private distinction,<sup>127</sup> and (4) the position of foreign norms in relation to both domestic and international ones.<sup>128</sup> Paradoxically perhaps, the very intensity and scope of disagreement on each of these issues affirms their accepted centrality and thus, indirectly, the cohesiveness of the discipline of private international law.

This stock of typical problems and solutions, combined with private international law’s distinctive vocabulary—from *renvoi* and “conflicts justice” to “procedural rose garden[s] on [a] well-watered plateau”<sup>129</sup>—and self-aware narratives of crises, revolutions, and stagnation,<sup>130</sup> constitutes the discipline’s generic canon. What is important for purposes of this article is that research in

124. Compare the “conflicts diads” identified by Joel Trachtman: (1) predictability and admissibility vs. accuracy; (2) unilateralism vs. multilateralism; (3) private vs. public interests; and (4) courts vs. legislatures. Trachtman, *supra* note 13, at 995–98. The first three diads especially show a clear overlap with the questions identified here. It is submitted that Trachtman’s fourth diad is, out of all four, least distinctive for private international law.

125. See Laura E. Little, *Hairsplitting and Complexity in Conflict of Laws: The Paradox of Formalism*, 37 U.C. DAVIS L. REV. 925, 928 (2004) (arguing that formalism is both part of the problem and part of the solution for conflict of laws); *id.* at 960 (“[F]ormalism emits a magnetic attraction for those who develop, refine, and apply choice of law doctrine.”); *cf.* Friedrich K. Juenger, *A Third Conflicts Restatement?*, 75 IND. L.J. 403, 415 (2000) (“The proposition that judges should be oblivious to the outcomes of the cases they decide is unique to the conflict of laws . . . .”); Friedrich K. Juenger, *What Now?*, 46 OHIO ST. L.J. 509, 523 (1985) (“There is a widespread belief that the conflicts of laws is different from all other legal disciplines in that practical results and workability do not matter.”). See generally David F. Cavers, *A Critique of the Choice-of-Law Problem*, 47 HARV. L. REV. 173 (1933) (reviewing famous approaches advocating substantivism over formalism).

126. For example, think of the controversy over Wächter’s, Currie’s, and Ehrenzweig’s forum bias. BRAINERD CURRIE, *SELECTED ESSAYS ON THE CONFLICT OF LAWS* 3–76 (1963); ALBERT A. EHRENZWEIG, *CONFLICT OF LAWS* 322 (1962); Albert A. Ehrenzweig, *A Proper Law in a Proper Forum: A “Restatement” of the “Lex Fori Approach,”* 18 OKLA. L. REV. 340, 345 (1965) (arguing for “the application of the domestic rule as the basic or residuary one”) (emphasis omitted); Wächter, *supra* note 119, at 237–39, 261–69. See also the immense body of literature in Europe on the status of “mandatory rules,” a discussion that began with P. Franceskakis, *Quelques précisions sur les lois d’application immédiate et leurs rapports avec les règles de conflits de lois* [Some Details on the Laws of Immediate Application and Their Relationship with the Rules of Conflicts of Laws], 55 REVUE CRITIQUE DE DROIT INTERNATIONAL PRIVÉ [REV. CRIT. DR. INT. PRIV.] 1 (1966), discussed in Thomas G. Guedj, *The Theory of the Lois de Police: A Functional Trend in Continental Private International Law*, 39 AM. J. COMP. L. 661, 662 & n.7 (1991). The multilateralism–unilateralism distinction also raises the question whether the foreign and the domestic should be treated equally.

127. Think of the controversy surrounding the “public law taboo” in conflict of laws. For an overview, see McConnaughay, *supra* note 111.

128. *Cf.* Alex Mills, *The Private History of International Law*, 55 INT’L & COMP. L.Q. 1, 1 (2006) (discussing “the myth that private international law is not actually international, as it is essentially and necessarily a part of the domestic law of states”); Joel R. Paul, *Comity in International Law*, 32 HARV. INT’L L.J. 1, 8 (1991) (discussing “the separation of public and private international law in the United States which occurred while European scholars sought to unify those fields”).

129. See James A.R. Nafziger, *Making Choices of Law Together*, 37 WILLAMETTE L. REV. 209, 232 (2001) (combining topical references to Cavers and Leflar).

130. *E.g.*, Perry Dane, *Vested Rights, “Vestedness” and Choice of Law*, 96 YALE L.J. 1191, 1192 (1987) (revolution, counter-revolution); Friedrich K. Juenger, *How Do You Rate a Century?*, 37 WILLAMETTE L. REV. 89, 114, 117 (2001) (revolution, stagnation); Arthur T. von Mehren, *Recent Trends in Choice-of-Law Methodology*, 60 CORNELL L. REV. 927, 933 (1975) (revolution).

other fields has shown that disciplinary canons can have meaningful practical consequences.<sup>131</sup> Most significantly, a canon can contribute to the perspective that cases raising similar issues belong to a single intellectual category. Such an inclusive perspective offers three main benefits. First, rule-of-law ideals and equal-protection concerns dictate that like questions be treated alike, a requirement that is difficult to satisfy without a clear understanding of relevant similarities and differences. Second, the existence of a canon facilitates exchange of knowledge on solutions to problems common to different traditional fields of substantive law or to different legal systems. Third, the process of canonization, by definition, standardizes or normalizes certain problems and relegates others to a discipline's periphery, a development that greatly facilitates adequate norm design.

Although each of these benefits may be contested,<sup>132</sup> conflict-of-laws' intellectual history arguably shows these elements' positive influence. For example, most, if not all, conflicts theories claim across-the-board application, regardless of the substantive area of law involved.<sup>133</sup> Such inclusive perspectives are important contributors to coherence and legal certainty. By way of another example, conflicts scholars of very different persuasions have often taken the same examples and constructed the same hypotheticals to elaborate on their own theories and critique those of others, facilitating the continuation of dialogue even during otherwise intellectually turbulent times.

#### D. Towards a Discipline of Rights Cases With Foreign Elements: The Importance of Horizontal Questions

Rather than transpose any single conflicts method to rights cases with foreign elements, the best way forward may be to look for clues in the structural characteristics of a generic conception of private international law. The structural quality that is arguably most helpful in thinking about the rights cases is the idea of "common" or "horizontal" questions.

On a most basic level, then, the discipline of private international law shows the importance of developing *a discipline* of fundamental-rights cases with foreign elements. Rights cases with foreign elements—whether they involve extraterritorial conduct or not, and regardless from what field of substantive

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131. Jill Elaine Hasday, *The Canon of Family Law*, 57 STAN. L. REV. 825, 827 (2004); see also Balkin & Levinson, *supra* note 123 (canons of constitutional law).

132. Each of these elements can obviously also constitute a drawback; a canon may wrongly exclude certain cases, problems may in fact require noncanonical approaches, and canons may foster obsession with outdated problems. See Hasday, *supra* note 131, at 830 (describing risks of a canon approach); Kennedy, *supra* note 121, at 104 ("[O]f course, a disciplinary vocabulary can also have limitations, characteristic blind spots and biases.").

133. This would certainly seem to hold for the classic approaches of Savignian choice-of-law and Bealean vested rights. It is almost inevitable for rights- or fairness-based approaches like Brilmayer's. Interest analysis has been propagated at least by Currie himself as setting forth an "entire theory of conflicts, not one limited to torts cases." Patrick Borchers, *Conflicts Pragmatism*, 56 ALB. L. REV. 883, 883 (1993) (citing CURRIE, *supra* note 126, at 77–127). The fact that the main impact of interest analysis has been limited to tort law does not undermine the theory's (initial) ambitions.

law they arise—should be seen as presenting a coherent set of questions that must be dealt with through a coherent conceptual framework. Perhaps surprisingly, many rights orders currently do not follow this approach. Freedom-of-expression claims, to take an example, may play a role in cases within many different areas of substantive law. One possibility is immigration law—as Ernest Mandel found. Others are deportation law, international criminal law (think of the extradition of an activist who made speeches abroad but has since fled to the forum), and private international law (when the case concerns the enforcement of a Yahoo!-type foreign judgment said to infringe upon freedom of expression). Substantially similar pictures can be drawn for other fundamental rights, such as guarantees of religious freedom or against unreasonable searches. At present, information on these different types of cases tends to remain compartmentalized.<sup>134</sup>

The same point holds for the types of factual situations in which foreign elements may be present. Understanding why a constitutional community might want to withhold freedom-of-expression protection to alien speakers abroad, for example, would benefit enormously from an understanding of why that same community does or does not offer freedom-of-expression protection to alien speakers within the forum. A coherent perspective on rights cases with foreign elements must be able to explain why speakers like Dr. Mandel do not have any First Amendment rights while outside the forum,<sup>135</sup> whereas aliens who express themselves abroad and are subsequently faced with private enforcement actions in the United States do receive First Amendment protection.<sup>136</sup> At present these two cases are not even treated together in any established legal field or doctrinal area.

There is still one more element demonstrating the importance of identifying the proper range of questions involved in rights cases with foreign elements. As long as a comprehensive perspective is lacking, it will remain very difficult to “normalize” some rights cases that are not wholly internal to a single legal order. Without an understanding of the potential range of these cases and of the elements that unite them, it will be hard to identify what are core problems and what are peripheral issues, what are “freak questions” and what should be standard cases around which a doctrinal framework may be constructed.<sup>137</sup> It

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134. Consider the U.S. literature on foreign searches, in which parallels to other constitutional rights are rarely drawn.

135. *Kleindienst v. Mandel*, 408 U.S. 753 (1972); see *supra* note 6 and accompanying text.

136. See Marc D. Rosen, *Exporting the Constitution*, 53 EMORY L.J. 171, 182–84 (2004) (discussing litigation at several courts in the case of *Telnikoff v. Matusevich*, 702 A.2d 230 (Md. 1997)).

137. An overview of the historical development of Strasbourg and U.S. case law shows that much of these courts' approaches have until now been shaped in highly idiosyncratic situations. The European Court's first confrontation with a rights case not wholly internal to a single legal order came in a case involving the two “co-princes” of Andorra—a centuries-old political arrangement found nowhere else in the world that occupied a large part of the judgment in *Drozdz v. France*, 240 Eur. Ct. H.R. (ser. A) (1992). As noted by Lord Justice Sedley in the *Al-Skeini* decision of the English Court of Appeal, most of the European Court's case law since *Drozdz* has been shaped within one particular factual context: the Turkish occupation of northern Cyprus. *R v. Sec'y of State for Def. (Al-Skeini II)*, [2005] EWCA



may be this last factor that currently constitutes the highest barrier to adequate norm design.

#### IV

#### DEMARCATING CONSTITUTIONALISM: RESPONSIBILITY, THE PRIVATE, AND THE FOREIGN

##### A. State Action and Fundamental-Rights Cases with Foreign Elements: Spheres of Constitutionalism

Just as conflict-of-laws and rights cases with foreign elements share a basic connection, so too the rights cases and state action (horizontal effect) are intimately related. But whereas the ties between conflicts and the rights cases are readily evident and can be expressed relatively easily as a vision of engaging the foreign, the relationship between the latter two areas is less immediately obvious. The most powerful initial indication that such a relationship does, in fact, exist comes from both areas' heavy reliance on the same language and, in particular, the same set of metaphors. State action and horizontal effect are concerned with "*the proper reach* of constitutional rights into the private sphere,"<sup>138</sup> fundamental-rights cases with foreign elements with "*the domain of . . . constitutionalism.*"<sup>139</sup> Similarly, a rights instrument either "*does not apply* to private litigation,"<sup>140</sup> or "*can have no operation* in another country."<sup>141</sup> What these quotations suggest is that both fields are concerned ultimately—and in very similar ways—with the demarcation of spheres of constitutionalism, the most striking difference between the two areas being perhaps that the rights cases with foreign elements require a more literal take on what are merely spatial metaphors for state action and horizontal effect.<sup>142</sup>

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(Civ) 1609, [2006] 3 W.L.R. 508, 566 (Eng.). Further leading cases include *Banković v. Belgium*, 2001-XII Eur. Ct. H.R. 333, handed down two months after September 11, 2001, *Issa v. Turkey*, 41 Eur. H.R. Rep. 567 (2005), concerning recent Turkish military activities in the context of the war in Iraq, and *Ilaşcu v. Moldova*, 2004-VII Eur. Ct. H.R. 179, dealing with the Moldavian breakaway territory of Transnistria, where the political environment is so hazy that the court found it had to organize its own fact-finding mission. See Lawson, *supra* note 63, at 102–03. It is important to note that the development of case law in the United States has been similarly marked. Important innovations have, first of all, often been many years apart; Raustiala writes that the 1891 case of *In re Ross*, "set the doctrinal pattern for nearly seventy years." Raustiala, *supra* note 10, at 2517. "The rarity of cases addressing geographical location," Raustiala argues, "leads to a bumpy doctrinal path at best, schizophrenia at worst." *Id.* at 2528. A telling example is the fact that a single 1950 Supreme Court decision, *Johnson v. Eisentrager*, 339 U.S. 763 (1950), was crucial to both the Court's discussion in *Verdugo-Urquidez*, 494 U.S. 259 (1990), and the Court's recent decision with regard to Guantánamo Bay, *Rasul v. Bush*, 542 U.S. 466 (2004); see also David W. Haller, Note, *Within the States' Jurisdiction: Metropolitan, Northeast Bancorp, and the Equal Protection Clause*, 96 YALE L.J. 2110, 2110 (1987) (discussing the rarity of cases addressing the jurisdiction component of the Fourteenth Amendment).

138. Gardbaum, *supra* note 15, at 761 (emphasis added).

139. Neuman, *supra* note 7, at 910 (emphasis added).

140. *R.W.D.S.U. v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573, para. 40 (Can.) (emphasis added).

141. *In re Ross*, 140 U.S. at 464 (emphasis added).

142. The sphere metaphor is pervasive in state-action thinking. The U.S. Supreme Court has held that the purpose of the state-action doctrine is to identify "where the governmental sphere ends and the

The two areas share more than reliance on the same language. For example, courts in both areas often look for contacts between governmental conduct and harm to individuals to determine the reach of rights.<sup>143</sup> Both areas, too—and they share this characteristic with conflict of laws—reflect uncertainty about whether the question of reach should even be a distinct issue at all.<sup>144</sup>

These substantive and doctrinal parallels suggest that the two areas may be alike in one further respect: the centrality of the question of how far a state's responsibility for assuring the effectiveness of its rights order extends. For state action, the central position of the issue of responsibility is widely accepted.<sup>145</sup> “[T]he state action doctrine,” Sidney Buchanan has written about the U.S. context, “constitutes the conceptual framework within which the courts seek to determine the scope of governmental responsibility under the Constitution.”<sup>146</sup> Rights cases with foreign elements, on the other hand, are currently generally formulated more in terms of authority and power than through the prism of responsibility, obligation, or duty. Comparison with state-action controversies, it is argued, can serve to bring out the responsibility dimension in cross-border rights cases. If the crucial issue in state-action cases is the extent to which *private* elements affect the intensity of government responsibility for harm that is alleged to constitute a violation of individual rights, in the rights cases that same question can be asked regarding *foreign* elements.

## B. Jurisdiction, Authority, and Responsibility

At present, the most familiar trope in discussions on the normative basis for distinguishing between purely internal rights cases and cases with foreign elements is the concept of jurisdiction in public international law.<sup>147</sup> Many courts make standard references to the famous 1927 *Lotus* decision of the Permanent

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private sphere begins.” Edmonson v. Leesville Concrete Co., 500 U.S. 614, 620 (1991); see also Louis Michael Seidman, *The State Action Paradox*, 10 CONST. COMMENT. 379, 393–94 (1993) (sphere of privacy in abortion decisions); Larry Alexander, *The Public/Private Distinction and Constitutional Limits on Private Power*, 10 CONST. COMMENT. 361, 367 (1993) (decisions in private sphere affect public life).

143. See *infra* text accompanying notes 177–180.

144. Compare Chemerinsky, *Rethinking State Action*, *supra* note 19, with Kramer, *Rethinking Choice of Law*, *supra* note 12.

145. Terry v. Adams, 345 U.S. 461, 473 (1953) (Frankfurter, J., separate opinion) (responsibility as the “vital requirement” in state-action doctrine), cited in G. Sidney Buchanan, *A Conceptual History of the State Action Doctrine: The Search for Governmental Responsibility (Part I of II)*, 34 HOUS. L. REV. 333, 333 n.1 (1997).

146. G. Sidney Buchanan, *A Conceptual History of the State Action Doctrine: The Search for Governmental Responsibility (Part II of II)*, 34 HOUS. L. REV. 665, 774 (1997); see also Susan Bandes, *The Negative Constitution: A Critique*, 88 MICH. L. REV. 2271, 2285 (1990) (discussing the role of responsibility in state action doctrine); R. George Wright, *State Action and State Responsibility*, 23 SUFFOLK U. L. REV. 685 (1989) (same). For a discussion of the role of responsibility in European visions of horizontal effect, see *infra* IV.C.

147. See Banković v. Belgium, 2001-XII Eur. Ct. H.R. 333, para. 57 (“The Convention should be interpreted as far as possible in harmony with other principles of international law of which it forms part.”). The court often refers to standard literature on jurisdiction in international law, such as F.A.P. Mann, *The Doctrine of Jurisdiction in International Law*, in 111 RECUEIL DES COURS: COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 1 (1964-I).

Court of International Justice,<sup>148</sup> to *Oppenheim's International Law*,<sup>149</sup> and to the legal status of ships and aircraft in international law.<sup>150</sup> Jurisdiction in the public-international-law sense, however, is concerned with the outer boundaries within which states may legitimately assert their authority, not with notions of responsibility towards individuals in specific cases. Knowing whether international law allows Canadian officers to interview suspects in the United States (*Cook*),<sup>151</sup> or whether U.S. officials may conduct property searches in Mexico (*Verdugo-Urquidez*), tells us little or nothing about whether such officials should issue cautions or obtain warrants if and when they decide to act.<sup>152</sup> As Justice L'Heureux-Dube wrote in her dissent in *Cook*, "the question of when the *Charter* applies is not properly determined by looking to the intricacies of extraterritoriality in international law . . . ."<sup>153</sup> A very similar point was made by Justices Brennan and Marshall regarding the Fourth Amendment of the U.S. Constitution in their *Verdugo-Urquidez* dissent:

Nor is the Warrant Clause inapplicable merely because a warrant from a United States magistrate could not "authorize" a search in a foreign country. Although this may be true as a matter of international law, it is irrelevant to our interpretation of the Fourth Amendment.<sup>154</sup>

What these cases say about the concept of jurisdiction in public international law is in multiple respects inadequate for determining the reach of rights protection. Instead of international norms limiting the abstract outer boundaries of authority as between states, what is needed are internal norms governing the assumption of responsibility towards individuals in specific cases.<sup>155</sup> The doctrine that most closely matches these requirements is state action—or horizontal effect—in domestic constitutional law.

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148. The *Lotus Case* (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7).

149. OPPENHEIM'S INTERNATIONAL LAW (Robert Jennings & Arthur Watts eds., 9th ed. 1992).

150. *E.g.*, R v. Cook, [1998] 2 S.C.R. 597, para. 26 (Can.); R v. Sec'y of State for Def. (*Al-Skeini I*), [2004] EWHC (Admin) 2911, [225], [2005] 2 W.L.R. 1401, 1466 (Q.B.) (reference to the *Lotus* decision); R v. Sec'y of State for Def. (*Al-Skeini II*), [2005] EWCA (Civ) 1609, para. 3, [2006] 3 W.L.R. 508, 514 (Eng.) (reference to OPPENHEIM'S INTERNATIONAL LAW); *Issa v. Turkey*, 41 Eur. H.R. Rep. 567, 586 (2005) (reference to OPPENHEIM'S INTERNATIONAL LAW). These references are baffling because virtually no fundamental-rights cases have ever concerned ships on the high seas, embassies, or any of the other typical settings for the discussion of jurisdiction in the international-law sense.

151. R v. Cook, [1998] 2 S.C.R. 597 (Can.).

152. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 296 (1990). Note that this is different from a situation in which a specific forum rights guarantee specifically demands compliance with law. In that case, it might be necessary to look at public international norms on sovereignty as part of the relevant test under the forum fundamental right. *See, e.g.*, *Öcalan v. Turkey*, 41 Eur. H.R. Rep. 985, 1018–1019 (2005).

153. *Cook*, [1998] S.C.R. 597 at para. 84 (L'Heureux-Dubé, J., dissenting) (emphasis in original).

154. *Verdugo-Urquidez*, 494 U.S. at 296 (Brennan, J., dissenting).

155. Most modern theories of private international law accept that the reach of domestic law is at heart an *internal* issue. *See, e.g.*, Hans W. Baade, *Foreword: New Trends in the Conflict of Law*, 28 LAW & CONTEMP. PROBS. 673, 674 (1963). To the extent this characterization is accepted, the necessity of a focus on internal norms might also be called a "lesson" from private international law.

### C. Spheres of Responsibility: State Action and Fundamental-Rights Cases with Foreign Elements

The idea of responsibility and the doctrines of state action and horizontal effect are intimately linked. In U.S. state-action cases, the central question, as formulated by the Supreme Court, is this: “In what situations should government be held in some way responsible” for harm that is alleged to constitute a violation of a constitutional right?<sup>156</sup> Outside the confines of U.S. state action, the connection between doctrines of horizontal effect and ideas of responsibility are perhaps less immediately obvious. But this picture changes once responsibility is placed alongside its close relatives: duty and (positive) obligation. The European Court of Human Rights has never referred to the horizontal effect of Convention rights, strictly speaking, but it often uses a doctrine of positive obligations to achieve a largely equivalent effect.<sup>157</sup> For example, the specific question of a positive duty for law-enforcement officers to protect members of the public against private aggressors has been classified as a state-action case in the United States and as a matter of positive obligations by the European Court of Human Rights.<sup>158</sup> Transplanting this distinction between negative rights and positive obligations back to the U.S. context affirms the close connections between state action and positive duties or obligations for states.<sup>159</sup>

The harm with which the state-action doctrine is concerned is the harm caused, at least to some extent, by private action. In pragmatic terms, in state-action cases, governments claim that they are somehow less responsible because they themselves did not directly infringe fundamental rights. The same argument, however, can also be framed in the more abstract conceptual language of bounded normative orders. The central question then becomes whether responsibility under one set of norms—constitutional law—may be affected because of the involvement of elements from another realm—the

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156. The term “responsibility” will be used throughout, primarily because this is standard terminology in the state-action case law and literature with which this article seeks to draw parallels. *See, e.g.*, *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982) (describing one of the aims of the state-action doctrine as an effort to assure constitutional protection “when it can be said that the State is *responsible* for the specific conduct of which the plaintiff complains”); *see also* Susan Bandes, *supra* note 146, at 2285 (“[T]he state action doctrine . . . seeks to identify the sphere of government responsibility.”); Buchanan, *supra* note 145, at 336; Snyder, *supra* note 19, at 1056–57. In Hohfeldian terms, the attribution of “responsibility” or of “obligation” will generally consist of the imposition of a “duty.” *See* Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 *YALE L.J.* 16, 30–32 (1913).

157. *See, e.g.*, Lech Garlicki, *Relations Between Private Actors and the European Convention on Human Rights*, in *THE CONSTITUTION IN PRIVATE RELATIONS: EXPANDING CONSTITUTIONALISM* 129, 143 (András Sajó & Renáta Uitz eds., 2005) [hereinafter *EXPANDING CONSTITUTIONALISM*]; Gardbaum, *supra* note 15, at 769 (noting that Judge Garlicki’s essay demonstrates “significant analytical and practical overlap” between the doctrines).

158. *Compare* *DeShaney v. Winnebago County Dep’t of Soc. Serv.*, 489 U.S. 189, 195–97 (1989), with *Osman v. United Kingdom*, 1998-VIII Eur. Ct. H.R. 3124, para. 101.

159. *See* in particular the discussions in Bandes, *supra* note 146, at 2272, and in David P. Currie, *Positive and Negative Constitutional Rights*, 53 *U. CHI. L. REV.* 864, 884 (1986).

private. That broader question is directly applicable to the issue of constitutional harm in situations with foreign elements.<sup>160</sup> The central normative issue in rights cases with foreign elements should be this: To what extent should the scope of governmental responsibility for the effectiveness of rights protection under forum rights guarantees be affected by the fact that a claim is not wholly internal to the forum rights order, but contains elements from another realm—the foreign?

#### D. Rights Cases with Private Elements and Rights Cases With Foreign Elements

Developing conceptual and normative connections between rights cases with private elements and those with foreign elements has the potential to bring a number of benefits. First, juxtaposing the two areas may help to place responsibility in the foreground as the primary normative basis for demarcating the reach of rights orders in cases with foreign elements. Although there is broad agreement that responsibility is the (or at least *a*) vital element of normative theories of state action and horizontal effect,<sup>161</sup> its status respecting rights cases with foreign elements is much less firmly assured. The question of responsibility has, of course, already surfaced in the context of rights cases with foreign elements. Several of the approaches Gerald Neuman has identified in U.S. Supreme Court case law—including “mutuality of obligation” and “global due process”—exhibit some form of connection to the theme of responsibility,<sup>162</sup> as do several specific references in Supreme Court opinions.<sup>163</sup> The European Court of Human Rights, in its seminal *Loizidou v. Turkey* judgment, used the language of responsibility in at least part of its normative framework for determining the reach of rights protection.<sup>164</sup> And it should not be forgotten that the European Commission on Human Rights, from its first statements on the reach of Convention protection, adopted a comprehensive test of “actual authority *and responsibility*.”<sup>165</sup> As the discussion above showed, however, the authority, or “jurisdiction,” component has received more attention from courts

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160. Interestingly, Buchanan, in his seminal article on the conceptual history of state action explicitly excludes “the intriguing jurisdictional issues created by incidents of harm that transcend national boundaries.” Buchanan, *supra* note 145, at 336 n.13.

161. *Terry v. Adams*, 345 U.S. 461, 473 (1953) (Frankfurter, J., separate opinion), *cited in* Buchanan, *supra* note 145, at 333.

162. Neuman, *supra* note 7, at 918–20.

163. For examples of the language of responsibility, duty, and obligation in rights cases with foreign elements, see *United States v. Verdugo-Urquidez*, 494 U.S. 259, 278 (1990) (“[T]he rights of a citizen, as to whom the United States has continuing obligations, are not presented by this case.”); *Johnson v. Eisenrager*, 339 U.S. 763, 770 (1950) (discussing correlation between the “Government’s obligation of protection” and the “duty of loyal support” inherent in citizenship); *id.* at 796 (arguing that responsibility is incurred when the United States occupies foreign territory) (Black, J., dissenting); and *Rasul v. Bush*, 542 U.S. 466, 487 (2004) (emphasizing “power and responsibility of courts to protect persons from unlawful detention”) (Kennedy, J., concurring).

164. *Loizidou v. Turkey* (Preliminary Objections), 310 Eur. Ct. H.R. (ser. A) at para. 62 (1995).

165. See *supra* note 50 and accompanying text.

and theorists, both in Europe and the United States. Comparison with state action could serve to re-equilibrate this focus.

Second, placing the two types of rights cases alongside each other may enhance understanding of the relationship between a general, horizontal criterion of responsibility and the substance of specific fundamental-rights guarantees. A central debate in the field of state action concerns whether the question of responsibility should be addressed in a separate doctrinal step or whether this issue should be integrated into the ordinarily applicable analytical framework that looks directly at the substance of specific rights. Professor Erwin Chemerinsky has famously argued for the “elimination of the concept of state action” and for incorporating the question of the intensity of government involvement into an overall balancing test on the merits of each case.<sup>166</sup> And Professor Mark Tushnet has very recently defended the thesis that “all the work of the third-party-effect doctrine . . . is done by the substance of constitutional norms.”<sup>167</sup> Others have instead called for a two-step approach, warning against “collapsing the state action inquiry into the determination of the constitutionality of the state action.”<sup>168</sup> An intermediate approach recognizes both the importance of looking at the substance of individual-rights guarantees and of maintaining a separate question on the sphere of governmental responsibility as a “threshold issue.”<sup>169</sup>

Precisely the same discussion is underway regarding the applicability of forum fundamental-rights guarantees to cases with foreign elements. Some approaches advocate treating rights as—in principle—always applicable, but varying in strength depending on the intensity of the nexus between the alleged infringement and the forum government.<sup>170</sup> Such universalist or global-due-process theories follow very closely Chemerinsky’s proposal for state action. Others, in contrast, have defended keeping the question of the “scope” of rights protection distinct from the issue of the “intensity” of applicable rights.<sup>171</sup> The similarities between these discussions suggest that much could be gained from explicating connections and attempting to learn from mutual experiences.

Third, and most important, the replication of debates observed here may serve as the starting point for broader investigations into parallels between the

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166. Chemerinsky, *supra* note 19, at 506 (“Eliminating the concept of state action merely means that the courts would have to reach the merits and decide if a sufficient justification exists; courts could not dismiss cases based solely on the lack of government involvement.”).

167. Mark Tushnet, *The Relationship Between Judicial Review of Legislation and the Interpretation of Non-Constitutional Law, With Reference to Third Party Effect*, in EXPANDING CONSTITUTIONALISM, *supra* note 157, at 167, 180.

168. Snyder, *supra* note 19, at 1058 n.32.

169. Gardbaum, *supra* note 15, at 770; see also Stephen Gardbaum, *The “Horizontal Effect” of Constitutional Rights*, 102 MICH. L. REV. 387, 414–15 (2003).

170. See Neuman, *supra* note 7, at 919 (describing the various approaches).

171. E.g., Dominic McGoldrick, *Extraterritorial Application of the International Covenant on Civil and Political Rights*, in EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS TREATIES, *supra* note 63, at 41, 42 (distinguishing between jurisdictional and substantive issues); Roosevelt, *supra* note 30, at 2039 (describing the one-step analysis as “disturbing”).

private and the foreign. State action and horizontal effect often occupy central positions in modern constitutional theory. It is here that we find the most thorough and sustained discussion of foundational problems such as “the distinction between ‘action’ attributable to government . . . and ‘inaction’ . . . for which the government bears no responsibility”;<sup>172</sup> of the desirable extent of governmental neutrality towards “existing distribution[s] of wealth and entitlements”;<sup>173</sup> of oppositions between positive and negative constitutionalism;<sup>174</sup> and, of course, of the theme often seen as underlying all these dualities—the public–private distinction.

Stressing parallels between the foreign and the private facilitates asking these crucial questions for rights cases with foreign elements. Governmental neutrality towards the “baselines”<sup>175</sup> of domestic private law becomes neutrality towards the status quo outside a state’s borders and outside its community of citizens. Preserving a “sphere of private liberty” becomes respecting the sovereign choices of other states. And in more general terms, the profound and influential problematization of the idea of governmental responsibility that has taken place with regard to state action, horizontal effect, and positive state obligations for much of the past century would become available for rethinking rights cases with foreign elements.<sup>176</sup> Even if none of the debates on state action and horizontal effect lead to any widely accepted outcomes, the mere fact of recognizing their replication in the field of foreign elements means pushing this comparatively neglected topic to its rightful place at the center of any theory of constitutionalism.

#### E. Rights, Responsibility, and Conflict of Laws

Both conflict of laws and state action contain insights that are indispensable for an appropriate understanding of rights cases with foreign elements. But placing the connections between these three fields in the foreground may also, ultimately, contribute to a rethinking of the nature of conflict of laws itself.

State action and conflict of laws share the idea of focusing on contacts as a means to demarcate the reach of norms. U.S. courts have long accepted the importance of a “nexus” or “contacts” inquiry in state-action cases.<sup>177</sup> Modern state-action doctrine consists of a multitude of separate tests that all aim to

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172. Louis Michael Seidman, *Public Principle and Private Choice: The Uneasy Case for a Boundary Maintenance Theory of Constitutional Law*, 96 YALE L.J. 1006, 1026 (1987).

173. Cass R. Sunstein, *Lochner’s Legacy*, 87 COLUM. L. REV. 873, 874 (1987).

174. See generally Seidman, *supra* note 172; Bandes, *supra* note 146.

175. Cf. Sunstein, *supra* note 173, at 874. Note that it is irrelevant for the argument made here whether, as a historical matter, Sunstein’s account of the *Lochner* Era is correct. See David E. Bernstein, *Lochner’s Legacy’s Legacy*, 82 TEX. L. REV. 1 (2003) (criticizing Sunstein’s “baseline” theory of *Lochner*).

176. See sources cited *supra* notes 172–174; see also Wright, *supra* note 146.

177. The test is implicit in *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 172 (1972). See also *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 351 (1974) (“[T]he inquiry must be whether there is a sufficiently close nexus between the State and the challenged action.”); Buchanan, *supra* note 145, at 347; Chemerinsky, *supra* note 19, at 508.

evaluate the intensity of the contacts between the state and an individual's claim in order to determine the extent of state responsibility and, thus, the reach of constitutional norms.<sup>178</sup> Conflict of laws also habitually relies on contacts or nexus theories. In conflict of laws, however, these concepts are used to determine legitimate authority—prescriptive or adjudicative jurisdiction—and not generally to attribute responsibility or obligation. In fact, comparison with state action and the rights cases brings out the surprising fact that responsibility plays hardly any discernable role at all in either classical or modern conflicts thinking. The interest-analysis project, for example, is concerned with the ways in which interestedness, measured through contacts, may ground the legitimate exercise of authority over outsiders.<sup>179</sup> Lea Brilmayer's important rights-based alternative also works in terms of power, utilizing a conception of fundamental rights to determine when it is fair for the forum to submit outsiders to its rule.<sup>180</sup> Neither of these approaches tries to identify when governments *should* be responsible for outsiders, broadly defined.

One important conflicts approach that expressly does grant some role to ideas of responsibility comes from Professor Joel Trachtman. The core element of Professor Trachtman's proposal is the idea to "allocate power consistently with responsibility."<sup>181</sup> Responsibility, in turn, "is derived from effects on constituents: a government . . . must take responsibility, to the extent that its constituents are affected."<sup>182</sup> This perspective on responsibility, however, omits the crucial question whether governments might ever be responsible for anyone *other* than their constituents.<sup>183</sup> This absence of the issue of responsibility from conflicts thinking may be an important source of some of the field's internal confusions. The discipline's focus on authority and jurisdiction may have contributed to an undervaluation of the themes of responsibility, duty, and positive obligation towards those who are in some way outsiders to the forum's legal order. But, by looking only at interestedness *in* without responsibility *for*, or at authority *over* without obligation *to*, conflict of laws is in an important way incomplete.

There are at least two ways to sustain a plea for a more dominant role for responsibility in conflict of laws. The first looks at developments in substantive private law. As domestic private law in many systems is increasingly influenced—for better or for worse—by fundamental-rights concerns, the question of the appropriate scope for effectuating domestic guarantees will at some point have to be incorporated into conflicts doctrine. If large swathes of

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178. Compare Chemerinsky, *supra* note 19, at 506, with Snyder, *supra* note 19, at 1056–57.

179. See generally John Hart Ely, *Choice of Law and the State's Interest in Protecting its Own*, 23 WM. & MARY L. REV. 173 (1981).

180. See generally Brilmayer, *supra* note 12.

181. Trachtman, *supra* note 13, at 985–86.

182. *Id.* at 986.

183. See Roosevelt, *supra* note 30, at 2049 (referencing Currie's "selfish state" and its interest only in the welfare of its own citizens); Dane, *supra* note 130, at 1202 ("Which persons [should the State act on behalf of]? Obviously, persons within the state's political community . . .").



ordinary private law are progressively “constitutionalized” under the influence of fundamental-rights concerns, it may well become intellectually incoherent not to bring the issue of demarcating the reach of these private-law norms within the ambit of these same fundamental rights.<sup>184</sup> Second, analogies such as those drawn in this article may promote the importance of responsibility in private international law. If the relationship between public constitutionalism and the private sphere is indeed anything like the relationship between domestic constitutionalism and the foreign sphere, it would seem plausible that in both cases, theories and methods of demarcation should be similar. Both conflict of laws and state action will always be, to a large extent, about competing claims of authority: governmental power versus individual liberty and versus the legitimate interests of other sovereigns. But if the theme of responsibility is a second vital element in state action, there should at least be some measure of life for it in the conflict of laws.

## V

### CONCLUSION

In superficially different but ultimately very similar ways, private international law, state action, and rights cases with foreign elements are all, in the end, about establishing the boundaries of normative orders—be they public or private, domestic or foreign. In this respect, all three fields are instances of conflicts of laws.

This article has been concerned with stressing the similarities and parallels between these three areas, with the primary aim of developing a better understanding of rights cases with foreign elements. Regarding both these analogies and the rights cases in general, much work obviously remains to be done. Further analysis may confirm fundamental connections between the three areas. It could be, for example, that a widespread and uncontroversial acceptance of state-action doctrines—or of horizontal effect—correlates empirically with a broad application of forum fundamental rights to cases with foreign elements, and vice versa.<sup>185</sup> Whichever way these links ultimately come to be viewed, however, it seems certain that developing a more comprehensive understanding of both the technicalities and the substantive commitments involved in establishing the reach of rights will be a task of the greatest importance, as constitutionalism’s reach over the foreign progressively joins—or replaces?—its relation to the private as a central theme in constitutional thinking.

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184. This development may be reinforced when private liability of government agents becomes more widely accepted, or when traditionally public tasks are privatized.

185. The incomplete comparisons of U.S., European, and Canadian case law in this article would suggest that this correlation holds at least to some extent, with European and Canadian case law being more open both to horizontal effect—or positive obligations—and to the application of rights guarantees in cases with foreign elements.