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APPLYING THE U.S. CONSTITUTION ABROAD, FROM THE ERA OF THE U.S. FOUNDING TO THE MODERN AGE

Alina Veneziano[*]

ABSTRACT

This Essay traces the extent to which constitutional protections have been extended to foreign nationals within or outside the territory of the United States, as well as to U.S. nationals abroad. The United States Supreme Court's metric for making such determinations has evolved. Early analyses were grounded in considerations reflective of strict territorialism and citizenship. However, technology and globalization have challenged the traditional notion that the Constitution applies only to those within the United States. The question of whether the Constitution follows its citizens when they enter foreign territory has been hotly debated, particularly as the Supreme Court has struggled to answer questions implicating the United States-Mexico border and Guantanamo Bay. It seems not only fair and equitable, but also logical, that such constitutional guarantees be afforded to U.S. nationals when not within United States territory. But on what criteria should such determinations be based?

This Essay traces case law on the extraterritorial applicability of the U.S. Constitution and criticizes the Supreme Court's failure in the Hernandez *decision to dispel inconsistencies and loopholes. In doing so, this Essay sets forth a modified approach that would accomplish the following goals: (1) ensure ease of consistent application; (2) create a clear standard for lower courts; (3) recognize the Executive's*

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legitimate foreign policy and national security objectives; (4) reduce the likelihood of infringing on the sovereignty of foreign governments; and (5) provide fair administration of certain constitutional guarantees to foreigners.

Many scholars have urged that Verdugo-Urquidez*'s formalistic approach should control analyses of constitutional extensions, while other scholars have promoted* Boumediene*'s functional approach for the issue. Thus, as they have argued, either the formalistic or functional approach should control in its entirety. However, these approaches are not mutually exclusive. This Essay maintains that context matters: While citizenship and enemy status may remain relevant, it is a nuanced understanding of the territory prong that should be the most determinative factor in judicial analyses concerning constitutional extensions. An approach that emphasizes flexibility and sovereignty, while also considering consistency and fairness in the application of the Constitution to foreign nationals, is the ideal strategy and the one promoted by this Essay.*

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INTRODUCTION

> With the fixation on geographic borders and the desire to shift and affect jurisdiction in a globalized world, "this sort of reverse forum shopping by governments is much easier than it would have been in the past."[1]

One might assume that considerations of race, national origin, or citizenship are inconsequential to the application of the United States government's laws and regulations. However, the geographic reach of the Constitution, extended on the basis of these factors, has long been a debated topic.[2] This debate concerning the extraterritorial[3] reach of U.S. constitutional protections upon foreign nationals have existed throughout U.S. history, in contexts ranging from the Second World War and the Cold War to international drug cartels at the southern U.S. border to the War on Terror.[4] Foreign nationals present in the

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1. *See* KAL RAUSTIALA, DOES THE CONSTITUTION FOLLOW THE FLAG?: THE EVOLUTION OF TERRITORIALITY IN AMERICAN LAW 207 (2009).

2. *See* Eva Bitran, Note, Boumediene *at the Border? The Constitution and Foreign Nationals on the U.S.-Mexico Border*, 49 HARV. C.R.-C.L. L. REV. 229, 232 (2014) ("As the United States has expanded its footprint in the international order, the question of whether the Constitution should follow the flag has taken on increased importance."); *see also* Andrew Kent, *A Textual and Historical Case Against a Global Constitution*, 95 GEO. L.J. 463, 467 (2007) [hereinafter Kent, *A Textual and Historical Case*] ("Americans have long debated where, and for whose benefit, the Constitution applies."); Gerald L. Neuman, *Whose Constitution?*, 100 YALE L.J. 909, 911 (1991) [hereinafter Neuman, *Whose Constitution?*] ("The domain of constitutionalism has always been contested, and it has grown as the nation has grown.").

3. Extraterritorial is defined as the extension of U.S. law to regulate the conduct or effects, or both, that occur outside the territory of the United States. *See* CURTIS A. BRADLEY, INTERNATIONAL LAW IN THE U.S. LEGAL SYSTEM 167 (2d ed. 2015) (defining extraterritoriality as "the application of federal and state law to conduct that takes place at least partially outside the territory of the United States . . . "); *see also* Zachary D. Clopton, *Extraterritoriality and Extranationality: A Comparative Study*, 23 DUKE J. COMP. & INT'L L. 217, 218 (2013) ("[E]xtraterritoriality refers to the application of the laws of one country to persons, conduct, or relationships outside of that country.").

4. *See* Bitran, *supra* note 2, at 232. *See generally* Boumediene v. Bush, 553 U.S. 723 (2008); United States v. Verdugo-Urquidez, 494 U.S. 259 (1990); Johnson v. Eisentrager, 339 U.S. 763 (1950).

United States "have been subjected to selective interrogation, registration, detention, and deportation on the basis of their national identity."[5]

The issue for the courts has been whether such constitutional provisions apply in cases where "some of the relevant facts are located outside the territorial borders of the state."[6] While the traditional cannons of interpretation can provide some guidance, case law reveals that the Supreme Court ultimately does not rely on this approach when deciding whether to extend the reach of the Constitution beyond the United States, because of the unique nature of constitutional questions.[7] For instance, statutes can be more easily amended if the Supreme Court decides an issue contrary to congressional intent, whereas constitutional provisions are "extremely difficult to amend."[8] Therefore, the judiciary examines them differently.

U.S. courts are still struggling to answer the broader question of how far constitutional protections should extend — a question with tremendous historical significance. During the Civil War, for instance, constitutional protections did not extend to military enemies, leaving courts closed to enemy combatants during and after the war.[9] This meant that all persons residing in the enemy nations "were out of the protection of the Constitution, no matter their citizenship."[10] Thus, contrary to popular belief, citizenship was not the determining factor; rather, determinations were made based on "formal, categorical distinctions between domestic and foreign territory, war and peace, resident and nonresident, enemy fighter and not, and zone of battle and elsewhere."[11] Nor did the Constitution

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5. *See* David Cole, *Are Foreign Nationals Entitled to the Same Constitutional Rights as Citizens?*, 25 T. JEFFERSON L. REV. 367, 367 (2003).

6. *See* Clopton, *supra* note 3, at 218.

7. *See* Gerald L. Neuman, *Extraterritoriality and the Interest of the United States in Regulating Its Own*, 99 CORNELL L. REV. 1441, 1457 (2014) [hereinafter Neuman, *Extraterritoriality*] ("Extraterritorial application of constitutional rules involves a set of considerations that differ in part from those relevant to extraterritorial application of statutory rules.").

8. *Id.*

9. *See* Andrew Kent, Boumediene, Munaf*, and the Supreme Court's Misreading of the Insular Cases*, 97 IOWA L. REV. 101, 123 (2011) [hereinafter Kent, Boumediene, Munaf*, and the Supreme Court's Misreading*] ("During wartime, both civilian residents of the enemy nation and enemy combatants – wherever located – were barred from using U.S. courts to assert legal rights.").

10. *See* Andrew Kent, *Citizenship and Protection*, 82 FORDHAM L. REV. 2115, 2122 (2014) [hereinafter Kent, *Citizenship and Protection*].

11. *Id.* at 2123.

extend protections to non-U.S. nationals outside the sovereignty of the United States during the nineteenth century.[12] Specifically, during the nineteenth century, the United States embraced an approach of strict territoriality.[13] Courts treated "[t]erritorial location and domicile" as more determinative than citizenship when extending protections.[14] This notion, however, was slowly abandoned and is now markedly different in the twenty-first century.

Today, U.S. nationals within the United States — *citizens at home* — enjoy the full protections of the Constitution.[15] Outside the United States, however, U.S. nationals in foreign territories — *citizens abroad* — enjoy limited constitutional protections due to certain exigencies or limited government power.[16] More complex is the stance concerning foreign nationals situated domestically or abroad. Within the United States, foreign nationals — *aliens within the United States* — the Constitution provides certain protections, such as the Fourteenth Amendment guarantee of equal protection.[17] Outside the United States, however, U.S. law generally does not protect foreign nationals in a foreign state — *aliens outside the United States* — from U.S. conduct abroad.[18] Common justifications for this distinction are based on assertions that foreign nationals "do not deserve the same rights as American citizens," "that citizenship makes a difference," and the "deeply ambivalent approach of the Supreme Court, an ambivalence matched only by the alternately xenophobic and xenophilic attitude of the American public toward immigrants."[19]

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12. *See* Kent, Boumediene*,* Munaf*, and the Supreme Court's Misreading*, *supra* note 9, at 123.

13. *See* Roszell Dulany Hunter IV, Note, *The Extraterritorial Application of the Constitution – Unalienable Rights?*, 72 VA. L. REV. 649, 653 (1986).

14. Kent, *Citizenship and Protection*, *supra* note 10, at 2118.

15. *See* Dulany Hunter IV, *supra* note 13, at 660.

16. *Id.* at 661.

17. *See* Kwong Hai Chew v. Colding, 344 U.S. 590, 596 (1953) (holding that resident aliens are entitled to the protections of the Fifth Amendment); *see also* Bridges v. Wixon, 326 U.S. 135, 162 (1945) (holding that resident aliens are entitled to the protections under the First Amendment); Truax v. Raich, 239 U.S. 33, 39 (1915) (holding that resident aliens are entitled to the protections under the Equal Protection Clause); Wong Wing v. United States, 163 U.S. 228, 238 (1896) (resident aliens are entitled to the protections under the Fifth and Sixth Amendments); Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886) (holding that resident aliens are entitled to the protections under the Equal Protection and Due Process Clauses of the Fourteenth Amendment).

18. *See* Dulany Hunter IV, *supra* note 13, at 666.

19. Cole, *supra* note 5, at 367–68.

While it is clear that those physically present within the United States are protected, the protections afforded to those with little or no contact with U.S. territory are less clear, particularly where situations involve regulating U.S. government actions, or protecting foreign nationals outside the United States.[20] It is not surprising that the general public presumes that non-citizens do not share the same rights as citizens.[21] After 9/11, such concerns became even more pressing, since the national security of the United States was at stake, and detention schemes and Guantanamo took center stage in national discourse.[22]

If foreign nationals seeking admission to the United States are subject to the complete and plenary power of congressional authority,[23] the critical and complex concern is this: Whether foreigners can be regulated by or assert the protections of the U.S. Constitution when they are not on U.S. soil, but continue to be affected by U.S. conduct or policies abroad.[24] As discussed below, the Supreme Court no longer strictly adheres to the doctrine of territoriality and instead embraces a due process, or functional, approach.[25] Furthermore, increasing U.S. interests in "foreign involvements" and the development of "international protection for human rights" have tipped the scale in favor of providing extended constitutional protections to foreign nationals from U.S. conduct abroad.[26]

This Essay traces case law on the extraterritorial applicability of the U.S. Constitution and criticizes the Supreme Court's failure in the *Hernandez* decision to dispel inconsistencies and loopholes. In doing so, this Essay sets forth a modified approach that would accomplish

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20. *See* Neuman, *Whose Constitution?*, *supra* note 2, at 915 (describing the Supreme Court's changing jurisprudence regarding U.S. government action abroad).

21. *See* Cole, *supra* note 5, at 369.

22. *See* Marc D. Falkoff & Robert Knowles, *Bagram,* Boumediene*, and Limited Government*, 59 DEPAUL L. REV. 851, 867 (2010) ("What were once regarded as exotic issues concerning the nuances of governance in remote U.S. territories became urgent matters of national security in the wake of the U.S. government's global detention scheme and the decision to operate long-term prisons at Guantanamo . . . .").

23. *See* Kleindienst v. Mandel, 408 U.S. 753, 769–70 (1972) ("[P]lenary congressional power to make policies and rules for exclusion of aliens has long been firmly established.").

24. *See* Neuman, *Whose Constitution?*, *supra* note 2, at 911 ("The current debate primarily concerns the rights of persons harmed by United States government action abroad, especially aliens but also United States citizens . . . .").

25. *See* Dulany Hunter IV, *supra* note 13, at 666.

26. *Id.*

the following goals: create a clear standard for lower courts and ensure consistent application; recognize the Executive's legitimate foreign policy and national security objectives; reduce the likelihood of infringing on the sovereignty of foreign governments; and provide fair administration of certain constitutional guarantees to foreigners.

The Essay proceeds in the following manner: Part I analyzes seminal Supreme Court cases adjudicating the scope and extent of the Constitution's protections. This Part also explores trends based on strict territorialism, partial territorialism, citizenship, domestic principles, and national security. Part II summarizes three main approaches that the Supreme Court adopted in these situations and offers a matrix of possible situations considering particular attendant circumstances, such as territoriality and nationality of the claimant. Part III examines how Supreme Court decisions have shaped the position of the United States when deciding the extent of constitutional guarantees. This Part also evaluates the different ways the Supreme Court has prioritized the prongs of territoriality, citizenship, and enemy status in various contexts, and tracks how the law has evolved with respect to the extension of constitutional rights abroad. Part IV recommends that the United States adopt an approach that reconciles the underlying approaches of *Verdugo-Urquidez*'s formalism with *Boumediene*'s functionalism. This combined scheme would recognize the distinction between foreign territory and controlled territory, while placing a somewhat lesser emphasis on citizenship and even lesser focus on enemy status. Finally, Part V elaborates upon the urban implications of the Constitution's scope, as well as the problems faced by states when attempting to remedy such inconsistencies.

I. AN ANALYSIS OF THE JURISPRUDENCE ON THE EXTRATERRITORIALITY OF CONSTITUTIONAL PROVISIONS

This Part examines the different shifts in extraterritoriality jurisprudence and analyzes the changes in the Supreme Court's considerations when determining the allocation of constitutional protections. As will be demonstrated in this Part, Supreme Court jurisprudence has shifted away from a focus on territorialism — basing the extension of rights on the physical location of the non-citizen in relation to the U.S. border — to an approach that foregrounds citizenship and national security concerns.

Historically, the Supreme Court has used the rationale of presence within geographic localities — such as differences in physicality (high seas), social, or governmental structures — to determine whether to

extend provisions of the Constitution to individuals from abroad.[27] Indeed, the Constitution was drafted under the attendant circumstance that it would apply primarily to "territorial nation-states" within the United States.[28] Therefore, the "distinction between being inside and outside the borders of the United States is not a constitutional irrelevancy."[29] The U.S. government has also expressed a heightened interest in regulating the conduct of those individuals — especially non-citizens —within and outside its borders.[30] Since the time of Constitution's ratification, the U.S. government acted to protect aliens, not through the allocation of constitutional rights, but by exercising Congress's power to enact legislation such as those relating to naturalization.[31]

The limited geographic reach of the Constitution can be traced back to the nineteenth-century idea that the legal obligations of the United States beyond its territory were "incomplete" — constitutional rights can "follow the flag," but they "go no further."[32] However, there are strong arguments that the text of the Constitution does in some form demonstrate an intent or willingness to extend its force beyond the territory of the United States. For instance, the Constitution grants Congress the power to define and punish piracy and felonies "on the high Seas and Offenses against the Law of Nations,"[33] to regulate commerce "with foreign Nations,"[34] and to make all laws which shall be "necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."[35] Its discussion of the supremacy of treaties also implies some degree of constitutional power beyond the territory of the United States.[36]

As the United States grew to be a world power, many aspects of its legal system expanded beyond its borders, including statutes, criminal enforcement procedures, regulatory laws, and of course, specific

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27. *See* Gerald L. Neuman, *The Extraterritorial Constitution After* Boumediene v. Bush, 82 S. CAL. L. REV. 259, 269 (2009) [hereinafter Neuman, *The Extraterritorial Constitution*].

28. *See* Neuman, *Whose Constitution?*, *supra* note 2, at 979.

29. *Id.*

30. *See* Neuman, *Extraterritoriality*, *supra* note 7, at 1444, 1469.

31. *See* Kent, *A Textual and Historical Case*, *supra* note 2, at 524

32. *See* Neuman, *Whose Constitution?*, *supra* note 2, at 977.

33. U.S. CONST. art. I, § 8, cl. 10.

34. U.S. CONST. art. I, § 8, cl. 3.

35. U.S. CONST. art. I, § 8, cl. 18.

36. *See* U.S. CONST. art. VI, cl. 2.

constitutional guarantees.[37] This expansion initially gained traction after the World Wars and continued into the Cold War era. During the onset of the War on Terror, the focus on regulation shifted internally, with a more domestic orientation.[38] National security mechanisms presented a complicated issue for the Executive: how to react swiftly to threats to the United States and not be bound or constrained by the mandates of the Constitution.

Beginning in the 1990s and into the early 2000s, the Executive sought increased discretion to hold enemy combatants, whether they were U.S. nationals or not.[39] The Supreme Court, in response, tended to cut back such Executive discretion and based their reasoning on a combination of territory, citizenship, and enemy status considerations.[40]

A. The Supreme Court's Early Jurisprudence on Extraterritoriality

To determine a claimants constitutional rights, some of the earliest Supreme Court cases relating to extraterritorial application of the U.S. Constitution focused primarily on the particular territory in which a claimant was located when the conduct at issue occurred and the claimant's citizenship. For instance, the Supreme Court's 1891 *In re Ross* decision held that U.S. nationals who are abroad do not enjoy the same protections as U.S. nationals *in* the United States — a position based on purely formalistic reasoning relating to territory, rather than citizenship.[41] The Court noted that "[t]he Constitution can have no operation in another country," and to hold otherwise would simply "be impracticable from the impossibility of obtaining a competent grand or petit jury."[42] Here, the Supreme Court's completely formalistic approach restricted constitutional protections to the territory of the United States.

Twenty years after *In re Ross* was decided, the Supreme Court addressed a series of cases between 1901 and 1922 — known as the

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37. *See* RAUSTIALA, *supra* note 1, at 189.

38. *Id.* at 188–90.

39. *See infra* Section I.D. (discussing the legislative efforts to strip courts of jurisdiction to hear certain cases, producing Executive discretion with little constitutional bounds in Guantanamo).

40. *Id.* (referring to invalidating the attempts by the Legislature and Executive to strip judicial authority to adjudicate these cases and avoid the mandates of the Constitution).

41. *In re* Ross, 140 U.S. 453, 464 (1891) (asserting that the Constitution was established for the United States, and not for countries beyond its territorial reach).

42. *Id.* at 464.

Insular Cases — regarding territories acquired by the United States during the Spanish-American War.[43] These decisions created distinctions regarding the treatment of incorporated and unincorporated territories.[44] The territories at issue were Puerto Rico, Guam, Hawaii, American Samoa, and the Philippines.[45]

One of the particularly significant *Insular Cases*, *Downes v. Bidwell*, involved the question of whether Congress could tax imports from Puerto Rico, an unincorporated territory, and whether the Uniformity Clause of the Constitution applied to Puerto Rico.[46] The Court held that Congress was able to tax the imports, subject only to the fundamental limitations of the Constitution, which "exist rather by inference and the general spirit of the Constitution from which Congress derives all its powers, [rather] than by any express and direct application of its provision."[47] The Court held so even though it had previously ruled that Puerto Rico was considered a state and the Constitution prohibited taxing imports from any state.[48] Ultimately, the Court explained that territories like Puerto Rico were not considered part of the United States.[49]

Justice White's concurrence articulated the distinction between congressional authority when dealing with incorporated territories — or those that are designed for statehood — and unincorporated territories — where only those rights deemed fundamental would be applicable.[50] Thus, the takeaway from the *Insular Cases* in general appears to be that the Constitution applies in territories that will become a part of the Union, but will only apply in other territories if the Court determines those constitutional provisions are "fundamental."[51] The distinction made by Justice White's

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43. *See* De Lima v. Bidwell, 182 U.S. 1 (1901). *See also* Goetze v. United States, 182 U.S. 221 (1901); Dooley v. United States, 182 U.S. 222 (1901); Armstrong v. United States, 182 U.S. 243 (1901); Downes v. Bidwell, 182 U.S. 244 (1901); Huus v. N.Y. & Porto Rico Steamship Co., 182 U.S. 392 (1901).

44. *See* Netta Rotstein, Note, Boumediene *vs.* Verdugo-Urquidez*: The Battle for Control over Extraterritoriality at the Southwestern Border*, 93 WASH. U. L. REV. 1371, 1376 (2016).

45. *Id.* at 1375–76.

46. *See* Downes, 182 U.S. at 247–49.

47. *Id.* at 268, 287.

48. *Id.* at 256, 287.

49. *See id.* at 250–51.

50. *Id.* at 311–12.

51. *See* Christina Duffy Burnett, *Untied States: American Expansion and Territorial Deannexation*, 72 U. CHI. L. REV. 797, 800 (2005).

concurrence informs the doctrine of territorial incorporation.[52] Over one hundred years later, in *Boumediene v. Bush*, the Supreme Court reaffirmed Justice White's *Downes* concurrence and declared that the Constitution applied completely to incorporated territories, but only in part for unincorporated territories.[53]

The *Insular Cases* and *Boumediene*'s holdings, however, are not without disapproval. Harvard Law Professor Gerald Neuman criticized the *Insular Cases* as an exercise of illegitimate government power that resulted from acquiring power over new territories without the consent of the population and without affording them the rights guaranteed under the Constitution.[54] These cases, and *In re Ross*, stood for the proposition that "American citizens cannot be tried by the federal government for capital offenses without jury trial in Japan, but can be so tried in Puerto Rico."[55]

These holdings meant that the United States could retain sovereignty over these island territories, but would only be bound by the constitutional provisions that the Court determined to be "fundamental."[56] This was less of a territorial distinction than *In re Ross* had exhibited, though the *Insular Cases* still did not generally distinguish between U.S. nationals and foreign nationals.[57]

B. World War II and Changes in Extraterritorial Jurisprudence

The United States's emergence as a world leader gave it both the confidence and power to regulate extraterritorially. In *Johnson v. Eisentrager*, for example, the Supreme Court refused to grant habeas relief to enemy combatants held in a German prison by the U.S. Army in the American sector of occupied Germany, because alien combatants have no right to constitutional protections.[58] Justice Jackson described the protections afforded to foreign nationals within

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52. *See* Christina Duffy Burnett, *A Convenient Constitution? Extraterritoriality After Boumediene*, 109 COLUM. L. REV. 973, 988 (2009) [hereinafter Burnett, *A Convenient Constitution?*].

53. *See* Boumediene v. Bush, 553 U.S. 723, 757 (2008).

54. *See* Neuman, *Whose Constitution?*, *supra* note 2, at 978.

55. *Id.* at 979.

56. *Id.* at 915.

57. *See* Kent, *Citizenship and Protection*, *supra* note 10, at 2127–28.

58. *See generally* Johnson v. Eisentrager, 339 U.S. 763 (1950). The petitioners argued that their imprisonment violated Articles I and III of the Constitution and the Fifth Amendment. *See id.* at 767; *see also id.* at 776 ("[T]he nonresident enemy alien, especially one who has remained in the service of the enemy, does not have even this qualified access to our courts, for he neither has comparable claims upon our institutions nor could his use of them fail to be helpful to the enemy.").

U.S. history as having been on a "generous and ascending scale of rights" that increase as the foreign national increases his or her ties to the United States.[59] A foreign national's presence within the United States gives the courts the authority to extend constitutional protections.[60] In other words, habeas relief could not be granted here, because the prisoners were not within a territory over which the United States exercised sovereignty and the circumstances at issue "were all beyond the territorial jurisdiction of any court of the United States."[61] Thus, *Eisentrager* demonstrates the strength of the connection between the individual and the state and asserts the dominance of a territorial nexus over one based on citizenship.[62]

The Court faced a contradiction between *Eisentrager*'s holding and an earlier case involving enemy combatants, *Ex parte Quirin.*[63] *Ex parte Quirin*, decided in 1942, involved the constitutionality of a German saboteurs' trial in the United States.[64] Similarly, *Eisentrager* involved German nationals held as enemy combatants; thus, a distinction between enemy and non-enemy combatant could not be maintained after *Ex parte Quirin*'s assertion of jurisdiction over enemy combatants.[65] Therefore, even though the territorial distinction — the physical presence in the United States — was critical, *Eisentrager* also made clear that certain constitutional protections will not extend abroad whether one is an enemy alien or non-enemy alien. Rather, constitutional protections are applicable abroad only to U.S. citizens. Justice Jackson pronounced this territorial distinction to justify the Court's refusal to extend jurisdiction to foreign nationals.[66]

Justice Jackson's formalistic holding in *Eisentrager* is considered a pretext by some scholars who maintain that "the Court's objection to hearing the habeas petitions at issue did not turn on the fact that Landsberg lies outside the 'sovereignty' of the United States," but was instead based on the concern that "the petitions were being filed

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59. *Id.* at 770 (noting that the foreign national's identity with U.S. society increases first by "[m]ere lawful presence in the country," then by the "preliminary declaration of intention to become a citizen," and finally expand in full "to those of full citizenship upon naturalization").

60. *Id.* at 771.

61. *Id.* at 778 (quoting, "the scenes of their offense, their capture, their trial and their punishment").

62. *Id.* at 769.

63. *Id.* at 779–80; *see also Ex parte* Quirin, 317 U.S. 1 (1942).

64. *See Ex parte* Quirin, 317 U.S. at 20–21, 48.

65. *See* Eisentrager, 339 U.S. at 779–80; *see also Ex parte* Quirin, 317 U.S. at 48.

66. *See* Eisentrager, 339 U.S. at 780–81.

by enemy aliens, during a time of war, in a place outside United States territory or its 'territorial jurisdiction.'"[67] Other scholars have cautioned that states may use *Eisentrager*'s territorial limitation of habeas "to intentionally place detainees beyond the reach of courts."[68] Justice Black's dissent foreshadowed a similar concern when he asserted that denying habeas solely because the petitioners were convicted and imprisoned abroad created a "broad and dangerous principle," which would deny courts the power to afford constitutional protections to aliens abroad.[69] In other words, under formalistic reasoning, the need to consider context is obviated: the United States could easily have placed suspects in territories without access to the judiciary, in an effort to advance its own interests, cover up potential abuses, and evade criticism.

Reid v. Covert marks an important turning point: the Court held that the Constitution applies in its entirety to U.S. nationals living abroad in a foreign state.[70] In Justice Black's plurality opinion, the Court "reject[ed] the idea that, when the United States acts against citizens abroad, it can do so free of the Bill of Rights."[71] When the United States seeks to regulate the conduct of its nationals abroad, the Bill of Rights operates as the "shield" that protects the U.S. national's "life and liberty."[72] This protection is not stripped away even when that U.S. national is in another land.[73] Thus, these protections do operate to restrict the conduct of the U.S. government; after all, as the Court stated, "[t]he United States is entirely a creature of the Constitution. Its power and authority have no other source. It can only act in accordance with all the limitations imposed by the Constitution."[74]

Reid's significance lies in its abandonment of the strict, formalistic approach adhered to by the judiciary in prior cases. The Constitution applies wherever the U.S. government acts: it serves as the source of

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67. *See, e.g.*, Baher Azmy, Rasul v. Bush *and the Intra-Territorial Constitution*, 2 N.Y.U. ANN. SURV. AM. L. 369, 387 (2007).

68. *See* BRIAN R. FARRELL, HABEAS CORPUS IN INTERNATIONAL LAW 150 (2017).

69. *See* Eisentrager, 339 U.S. at 795.

70. *See* Reid v. Covert, 354 U.S. 1, 18–19 (1957). Here, civilian wives of military men were denied the constitutional right to a jury trial and were instead tried in a U.S. military court for the murders of their husbands while overseas. The women sought a writ of habeas, claiming they were entitled to a trial before a civilian jury. *Id.* at 3–5.

71. *Id.* at 5.

72. *Id.* at 6.

73. *Id.*

74. *Id.* at 5–6.

the government's *authority* to act.[75] While this appears to represent the end of the "regime of strict territoriality,"[76] as set forth below, this is not always true, especially when foreign nationals are involved.

C. Fourth Amendment and Fifth Amendment Application in Extraterritorial Jurisprudence

The extraterritorial application of the Fourth and Fifth Amendments has been interpreted more formalistically by courts, complicating the issue of the Constitution's extended reach and resulting in confusion regarding guidance for the lower courts. In *Verdugo-Urquidez* and *Hernandez*, the Court's approach seems counter to the jurisprudence of the *Detainee Cases*.[77]

In *Verdugo-Urquidez*, a Mexican national was prosecuted for his role in a Mexican narcotics-trafficking organization that smuggled narcotics into the United States and for allegedly participating in the murder of a DEA agent.[78] The Mexican police seized Verdugo-Urquidez and extradited him to the United States.[79] The next day, DEA agents conducted a warrantless search of his home in Mexico while he was in U.S. custody and found records relating to his smuggling business.[80] Verdugo-Urquidez moved to suppress the evidence seized during the search, claiming the search by U.S. agents violated the Fourth Amendment's prohibition against warrantless searches and seizures.[81] The district court granted the motion to suppress, and the Ninth Circuit affirmed, holding that the warrantless search violated the Fourth Amendment.[82]

The Supreme Court, however, disagreed. Protections against arbitrary searches and seizures only apply to "the people" of the United States and were not "intended to restrain the actions of the Federal Government against aliens outside of the United States territory."[83] The term "the people," unlike the Fifth and Sixth Amendments, applied only to the "class of persons who are part of a national community or who have otherwise developed sufficient

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75. *See* Neuman, *Whose Constitution?*, *supra* note 2, at 915.

76. *Id.* at 965.

77. *See infra* Section I.D. (discussing *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), *Rasul v. Bush*, 542 U.S. 466 (2004), and *Boumediene v. Bush*, 553 U.S. 723 (2008)).

78. *See* United States v. Verdugo-Urquidez, 494 U.S. 259, 262–63 (1990).

79. *Id.* at 262.

80. *Id.* at 262–63.

81. *See id.* at 263.

82. *Id.*

83. *Id.* at 265–66.

connection with this country to be considered part of that community."[84] Because Verdugo-Urquidez did not meet any of these prerequisites, the Fourth Amendment constitutional protection did not extend to him.[85]

The Chief Justice grounded his conclusions in a "slippery slope" argument: that extending the Fourth Amendment abroad in these circumstances would have "significant and deleterious consequences for the United States in conducting activities beyond its boundaries."[86] For instance, a holding in favor of Verdugo-Urquidez could have affected the government's ability to "respond to foreign situations involving our national interest" and could have allowed aliens with no connection to the United States to assert Fourth Amendment violations in U.S. courts based on conduct in "foreign countries or in international waters."[87] The case seems to suggest that foreign nationals cannot assert any constitutional protections unless they demonstrated a connection to the territory of the United States, which likely referred to residency or at least something more than mere temporary custody in the United States.[88] Thus, this opinion reflected a strict and formalistic approach to constitutional extensions that draw a clear line between the guarantees afforded to U.S. nationals and foreign nationals.[89] Nevertheless, a more functional approach was on the horizon, since "pure territoriality was no longer an option."[90]

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84. *Id.* at 265 (citing United States *ex rel.* Turner v. Williams, 194 U.S. 279, 292 (1904)).

85. *Id.* at 274–75 ("At the time of the search, he was a citizen and resident of Mexico with no voluntary attachment to the United States, and the place searched was located in Mexico. Under these circumstances, the Fourth Amendment has no application.").

86. *See id.* at 273.

87. *Id.* at 273–74 (citing Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971)).

88. *See id.* at 272 ("When the search of his house in Mexico took place, he had been present in the United States for only a matter of days. We do not think the applicability of the Fourth Amendment to the search of premises in Mexico should turn on the fortuitous circumstance of whether the custodian of its nonresident alien owner had or had not transported him to the United States at the time the search was made."). The Court noted that in the future, restrictions on such searches and seizures could exist, but "they must be imposed by the political branches through diplomatic understanding, treaty, or legislation." *Id.* at 275.

89. *See* Bitran, *supra* note 2, at 236 ("*Reid* and *Verdugo-Urquidez* drew a clear fault line between citizens, whose participation in the polity entitled them to a degree of constitutional protection abroad, and noncitizens, who were not granted such protection.").

90. *See* Kermit Roosevelt III, *Guantanamo and the Conflict of Laws:* Rasul *and Beyond*, 153 U. PA. L. REV. 2017, 2038 (2005).

In 2017, the Supreme Court considered the extraterritorial applicability of Fourth and Sixth Amendment protections. In 2010, Sergio Adrian Hernandez Guereca was fatally shot and killed by a Customs and Border Protection (CBP) agent on U.S. territory, while Hernandez was on Mexican soil.[91] The Fifth Circuit held that foreign nationals may invoke the constitutional protections of the Fifth Amendment for an injury caused by a U.S. agent that occurred outside the *de jure* sovereignty of the United States.[92] However, the Fifth Circuit declined to extend the protections of the Fourth Amendment to foreign nationals in Mexico, as the foreign national here did not have any significant voluntary connection to the territory of the United States.[93]

The Supreme Court sidestepped the Fourth Amendment issue, noting that the question is "sensitive and may have consequences that are far reaching."[94] Regarding the Fifth Amendment claim, the Court noted that qualified immunity is limited by what the officer knew at the time of the conduct and that facts learned after the incident is over "are not relevant."[95] Justice Breyer dissented, noting that the Court's decision runs afoul of *Boumediene*'s functional approach dealing with issues of extraterritorial extensions of the Constitution.[96]

Hernandez was criticized for failing to affirmatively decide whether the claimant had a Fourth or Fifth Amendment right or whether Mesa violated those rights.[97] Most importantly, the holding of *Hernandez* ignored one crucial factor underscored in *Boumediene*: "the examination of the nature of the site where the constitutional violation took place, with the emphasis on US control of the territory in question."[98]

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91. *See* Hernandez v. Mesa, 137 S. Ct. 2003, 2004–05 (2017).

92. *Id.* at 2005 ("The panel held that Hernández lacked any Fourth Amendment rights under the circumstances, but that the shooting violated his Fifth Amendment rights."); *see also* Hernandez v. United States, 757 F.3d 249, 272 (2014). *But see* Hernandez v. United States, 785 F.3d 117, 120 (5th Cir. 2015) (wherein the Fifth Circuit conducted a rehearing en banc, and while the court was divided as to whether Mesa's actions constituted a violation of the Fifth Amendment, the panel unanimously concluded that any Fifth Amendment right Hernandez may have had was not clearly established at the time of the incident).

93. *See Hernandez*, 757 F.3d at 266.

94. *Id.* at 2007.

95. *Id.* (citing White v. Pauly, 137 S. Ct. 548, 550 (2017)).

96. *Id.* at 2008–09.

97. *See* Rotstein, *supra* note 44, at 1391 n.138.

98. *Id.* at 1392. *See infra* Section I.D.

Scholars have pointed out that *Hernandez* was improperly analogized to *Verdugo-Urquidez* in that the concerns over the warrant requirement are "inapplicable to excessive deadly force claims against U.S. government agents," since there is "no concern for potential conflict of laws or conflicts with foreign sovereigns" in the latter situation regardless of whether the foreign national is technically within U.S. territory or on the Mexico side of the border.[99] Instead of considering where the constitutional violation took place as mandated by *Boumediene*, the Court analyzed only the citizenship and status of the petitioner, which inevitably led to a formalistic analysis based mostly on citizenship.[100] Consequently, lower courts have no guidance on how to apply the Constitution abroad to settle such disputes.[101]

D. The Detainee Cases and Extraterritoriality

Following the War on Terror, a new series of cases regarding the applicability of constitutional protections to enemy combatants made their way to the Supreme Court, resulting in several opinions that tested executive authority to designate individuals as enemy combatants and hold them without counsel or judicial review.[102] These cases have been notorious for their rejection not only of absolute territorialism, but also of the Executive's claim of power to detain these suspects without certain Constitutional restraints.[103] The conflict between individual liberties and the authority of the Executive was prevalent during this era.[104] The result was simply the decision that the Executive is not exempt from judicial scrutiny.[105]

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99. *See* Rotstein, *supra* note 44, at 1396.

100. *Id.* at 1399–1400.

101. *See* Alexandra A. Botsaris, Note, Hernandez v. Mesa*: Preserving the Zone of Constitutional Uncertainty at the Border*, 77 MD. L. REV. 832, 832 (2018).

102. *See* Hamdi v. Rumsfeld, 542 U.S. 507 (2004); *see also* Rasul v. Bush, 542 U.S. 466 (2004). *See generally* Boumediene v. Bush, 553 U.S. 723 (2008).

103. Congress passed the Authorization for Use of Military Force (AUMF) after 9/11, which authorized the President to "use all necessary and appropriate force" against those determined to have "planned, authorized, committed, or aided the terrorist attacks" of 9/11 or those who "harbored such organizations or persons" in order to prevent future acts of terrorism against the United States. *See* Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 224 (2001). It was the position of the Bush Administration that the AUMF provided the military with the authorization to hold and detain military combatants. *See Hamdi*, 542 U.S. at 509–11, 517.

104. *See* Roosevelt III, *supra* note 90, at 2017.

105. *Id.* at 2018.

In *Rasul*, the Supreme Court held that the federal habeas statute[106] extended to detainees at Guantanamo Bay.[107] The foreign national detainees filed habeas corpus petitions, claiming that they were detained in Guantanamo without being charged with a crime and without access to counsel.[108] Here, the Court refused to delineate a distinction between foreign nationals and U.S. nationals for purposes of the habeas statute's coverage.[109] The statute's grant of jurisdiction to federal courts, coupled with U.S. control over Guantanamo, led the Court to conclude that the detainees at Guantanamo had the right to habeas under the statute.[110] The Court distinguished the present case from *Eisentrager*, finding that the *Rasul* petitioners "[were] not nationals of countries at war with the United States"; they "den[ied] . . . acts of aggression against the United States," "[had] never been afforded access to any tribunal," and for over two years "[were] imprisoned in territory over which the United States exercises exclusive jurisdiction and control."[111] Because of this, the foreign nationals at Guantanamo were "no less than American citizens," and, as such, were "entitled to invoke the federal courts' authority under § 2241."[112]

The Supreme Court also decided *Hamdi v. Rumsfeld* the same year. Hamdi was a U.S. national who the U.S. government alleged was an enemy combatant.[113] Importantly, the Court acknowledged that "the threats to military operations posed by a basic system of

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106. 28 U.S.C. § 2241 (2018). The Habeas Corpus Statute grants federal courts jurisdiction over habeas petitions to "any person" as opposed to "any citizen" who is "held in custody in violation of the Constitution or laws or treaties of the U.S. or United States." *Id.* §§ 2241(a), (c)(3); *see Rasul*, 542 U.S. at 471. Justice Stevens, writing for the majority, noted that the Lease Agreement from 1903 states that the United States recognizes Cuba as the ultimate sovereign over Guantanamo, with the United States able to exercise complete jurisdiction over the area. *Rasul*, 542 U.S. at 480.

107. *See Rasul*, 542 U.S. at 484.

108. *Id.* at 471–72.

109. *Id.* at 474–75 ("Consistent with the historic purpose of the writ, this Court has recognized the federal courts' power to review applications for habeas relief in a wide variety of cases involving executive detention, in wartime as well as in times of peace. The Court has, for example, entertained the habeas petitions of an American citizen who plotted an attack on military installations during the Civil War . . . and of admitted enemy aliens convicted of war crimes during a declared war and held in the United States . . . .").

110. *Id.* at 484 ("We therefore hold that § 2241 confers on the District Court jurisdiction to hear petitioners' habeas corpus challenges to the legality of their detention at the Guantanamo Bay Naval Base.").

111. *Id.* at 476.

112. *Id.* at 481.

113. *See* Hamdi v. Rumsfeld, 542 U.S. 507, 510 (2004).

independent review are not so weighty as to trump a citizen's core rights to challenge meaningfully the Government's case and to be heard by an impartial adjudicator."[114] It is the responsibility of the judiciary, absent suspension of the writ by Congress, to review the legality of executive detentions whether in times of military conflict or not.[115] Therefore, detainees who are U.S. citizens are "entitled at a minimum to notice of the Government's claimed factual basis for holding him, and to a fair chance to rebut it before a neutral decisionmaker."[116]

Some scholars have noted that there was no need to distinguish between places where the United States has *control* and places where the United States has *sovereignty*, since the Court has clearly stated that "Guantanamo is functionally U.S. territory that our government controls and, as such, the federal courts are authorized to grant relief under the habeas statute."[117] These holdings direct courts to treat Guantanamo as a United States territory for purposes of habeas relief.[118] However, territoriality is not a helpful standard since the consideration of the Constitution's applicability "will produce different answers depending on whether we define territory by technical notions of sovereignty or by practical considerations of jurisdiction and control."[119] Nevertheless, other scholars contend that these opinions have not clearly addressed why detainees have constitutional rights in Guantanamo.[120] Is it merely based on the fact that the detainees are human beings, or because of the unique character of the authority of the United States over Guantanamo?[121]

As a direct response to *Rasul*, Congress passed the Detainee Treatment Act of 2005 (DTA), a jurisdiction-stripping statute designed to prevent federal courts from adjudicating petitions for writs of habeas corpus from detainees at Guantanamo Bay.[122]

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114. *Id.* at 535.

115. *See id.* at 535, 537.

116. *Id.* at 533.

117. *See, e.g.*, Azmy, *supra* note 67, at 405.

118. *See* Roosevelt III, *supra* note 90, at 2059.

119. *Id.* at 2060 (noting that this approach "might also depend on how we construe the location of the acts complained of").

120. *See* Gerald L. Neuman, *Extraterritorial Rights and Constitutional Methodology After* Rasul v. Bush, 153 U. PA. L. REV. 2073, 2074 (2005) [hereinafter Neuman, *Extraterritorial Rights and Constitutional Methodology*].

121. *Id.*

122. *See* Pub. L. No. 109-148, §§ 1001–06, 119 Stat 2680 (2005).

Hamdan v. Rumsfeld clarified the legality of this statute in 2006.[123] Here, Hamdan, a Yemeni national, filed a petition for habeas, claiming first that the military commission convened by the President lacks authority under congressional acts and the common law of war, and second, that the procedures used to try him violate martial and international law.[124] The Supreme Court grappled with the issue of whether the military commission had the authority to try Hamdan and whether the Geneva Convention could be relied on in such proceedings.[125] The Supreme Court held that the DTA did not apply to cases that had already been pending at the time Congress passed the statute.[126] The procedures of the military commission violated the Uniform Code of Military Justice (UCMJ) and Common Article 3 of the Third Geneva Conventions.[127] Justice Stevens noted that the President does not have the authority to promulgate an executive order creating military commission procedures that depart from the Uniform Code of Military Justice.[128] Justices Kennedy and Breyer, in concurring opinions, noted that the President could always get the necessary approval from Congress.[129]

In response to the *Hamdan* decision, Congress enacted the Military Commission Act (MCA) in 2006.[130] Section 7 of the MCA amended the federal habeas statute to strip the jurisdiction from federal courts over pending and future habeas petitions to entertain petitions for writs of habeas on behalf of an individual detained by the United States "who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination."[131]

In 2008, the Supreme Court decided *Boumediene v. Bush*, where the Court was tasked with determining whether the jurisdiction-stripping provision of Section 7 of the MCA was constitutional and,

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123. *See* Hamdan v. Rumsfeld, 548 U.S. 557, 593–94 (2006) ("Neither [the AUMF or the DTA], however, expands the President's authority to convene military commissions.").

124. *Id.* at 567.

125. *Id.* at 571.

126. *Id.* at 575–76.

127. *Id.* at 613, 635.

128. *Id.* at 613, 623 ("The UCMJ conditions the President's use of military commissions on compliance not only with the American common law of war, but also with the rest of the UCMJ itself . . . . The procedures that the Government has decreed will govern Hamdan's trial by commission violate these laws.").

129. *Id.* at 636.

130. *See* 28 U.S.C. § 2241 (2008).

131. *See id.* § 2241(e).

ultimately, whether the Suspension Clause extended habeas to detainees at Guantanamo.[132] *Boumediene* ultimately confirmed that foreign nationals detained at Guantanamo as unlawful alien combatants have the constitutional right to challenge the lawfulness of their detentions via habeas corpus petition before U.S. district courts.[133] While the majority accepted the fact that the United States did not have *de jure* sovereignty over Guantanamo, it noted that this has not always been the "touchstone of habeas corpus jurisdiction."[134] In other words, even though Cuba had ultimate sovereignty over Guantanamo, the United States was still found to exercise "complete jurisdiction and control."[135]

The *Boumediene* Court identified three factors to consider when determining the propriety of extending constitutional rights to foreign nationals: "(1) the citizenship and status of the detainee and the adequacy of the process through which that status determination was made; (2) the nature of the sites where apprehension and then detention took place; and (3) the practical obstacles inherent in resolving the prisoner's entitlement to the writ."[136] This test has been promoted as a functional, pragmatic, multi-factor balancing test and regarded as a rejection of the prior formalistic, absolute approach to determining the geographic scope of constitutional rights.[137] Considering these factors, the Court concluded that "Art. I, § 9, cl. 2, of the Constitution has full effect at Guantanamo Bay."[138]

Justice Kennedy based his conclusions on the control that the United States did exercise over Guantanamo Bay.[139] The petitioners were not U.S. nationals, but rather enemy combatants whose detentions occurred outside the sovereignty of the United States; however, U.S. control over Guantanamo was different than the situation presented in *Eisentrager*.[140] Thus, the Supreme Court

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132. *Id.* at 732 ("Petitioners present a question not resolved by our earlier cases relating to the detention of aliens at Guantanamo: whether they have the constitutional privilege of habeas corpus, a privilege not to be withdrawn except in conformance with the Suspension Clause, Art. I, § 9, cl. 2.").

133. *Id.* at 793, 795.

134. *Id.* at 755.

135. *Id.* at 753.

136. *Id.* at 766.

137. *Id.* at 764 ("[Q]uestions of extraterritoriality turn on objective factors and practical concerns, not formalism.").

138. *Id.* at 771 (concluding that the detainees were "entitled to the privilege of habeas corpus to challenge the legality of their detention").

139. *Id.* at 755.

140. *Id.* at 766–67.

concluded that an extension of the Suspension Clause would not be "impracticable and anomalous" under these circumstances.[141] Furthermore, the precedents from the *Insular Cases* and *Reid v. Covert* were found to "undermine the Government's argument that, at least as applied to noncitizens, the Constitution necessarily stops where de jure sovereignty ends."[142]

Boumediene was celebrated because it allowed detainees to resort to the courts to determine the lawfulness of their detention, and the government was no longer exempt from judicial scrutiny.[143] Habeas has traditionally been, and remains, the "sword and shield in the long struggle for freedom and constitutional government," which acts as "a potent weapon against tyranny in every form and guise."[144] *Boumediene* was also significant in that the functional approach — the "impracticable and anomalous" standard — that had been urged in prior concurrences had finally found expression in Justice Kennedy's majority.[145] However, the opinion appears to be based less on citizenship as it would initially seem, and instead more on an expanded definition of territory.[146] It should be noted that the result may differ if the detainee is outside *both* the United States and Guantanamo. This implies that *Boumediene* did not set forth a clear mandate to utilizing the functional approach, since it "did not explicitly overrule the formalist approach," and may also — whether

141. *Id.* at 770.

142. *Id.* at 755.

143. *See* FARRELL, *supra* note 68, at 10 (tracing the history of how the "writ of habeas corpus was transformed by judges from a tool to exert state authority to one that would be used to regulate government power").

144. *See* United States *ex rel.* Montgomery v. Regan, 86 F. Supp. 382, 388 (N.D. Ill. 1949).

145. *See* Botsaris, *supra* note 101, at 843 ("Evidently, this decision declined to follow the formalist precedent and relied primarily on functionalist thinking."); *see also* Neuman, *The Extraterritorial Constitution*, *supra* note 27, at 282 ("With regard to citizens, in one sense the *Boumediene* opinion merely repeats what both Kennedy and Rehnquist seemed to be saying in *Verdugo-Urquidez*. Rehnquist explicitly described the selective (functional) approach articulated in the concurrences by Harlan and Frankfurter in *Reid v. Covert* — rather than Black's plurality opinion — as controlling the overseas application of the Bill of Rights to citizens."); Rotstein, *supra* note 44, at 1392 ("First, the sufficient connections test proposed by *Verdugo-Uriquidez*, which the *Hernandez* court relied exclusively upon, is not good law as Boumediene essentially overruled it.").

146. *See* Boumediene, 553 U.S. at 754 ("Indeed, it is not altogether uncommon for a territory to be under the de jure sovereignty of one nation, while under the plenary control, or practical sovereignty, of another. This condition can occur when the territory is seized during war, as Guantanamo was during the Spanish-American War.").

inadvertently or not — have left the door open for other formalistic approaches.[147]

Several inconsistencies remain even after *Boumediene*. For instance, the opinion does not directly answer the question of "what entitles someone to constitutional protection."[148] *Boumediene* did, however, effectively repudiate *Verdugo-Urquidez*'s holding that noncitizens with no connection to the United States have no constitutional protections.[149] But in doing so, *Boumediene* inevitably "opened the door for a wider range of noncitizens to claim rights . . . ."[150] It also left unclear the applicability of this functional approach to situations involving locations other than Guantanamo, where the United States holds and detains foreign national terrorism suspects.[151] Professor Anthony Colangelo has noted that, if the Court continues to use *de facto* sovereignty — which he describes as "both complete control *and* complete jurisdiction such that U.S. law and the U.S. legal system govern the territory" — then those in *other* sites holding detainees will likely not be extended the same habeas protections afforded to those at Guantanamo.[152] In moving forward after *Boumediene*, some scholars have offered theories that promote the starting of judicial analyses with "examining the nature of the control of the United States over the foreign territory in question"[153] or "first address[ing] the scope of government power on its own terms before discussing applicable rights."[154]

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147. *See* Botsaris, *supra* note 101, at 843 (noting that "the Court left open two routes to the extraterritorial analysis based on opposing theories of legal interpretation").

148. *See* Bitran, *supra* note 2, at 240; *see also* Neuman, *Extraterritoriality*, *supra* note 7, at 1460 ("Still, for the sake of other rights it would have been helpful if the majority had hinted at the circumstances that can provide a starting point for applying the functional approach to the rights of noncitizens.").

149. Bitran, *supra* note 2, at 248.

150. *Id.* at 248–49 ("If the Court was willing to grant constitutional protections to alleged enemies of the state, surely it would consider extending rights to noncitizens outside U.S. custody who are far from a battlefield and unlikely enemies.").

151. *See* Zachary M. Vaughan, Note, *The Reach of the Writ:* Boumediene v. Bush *and the Political Question Doctrine*, 99 GEO. L.J. 869, 870 (2011); *see also* Neuman, *The Extraterritorial Constitution*, *supra* note 27, at 278.

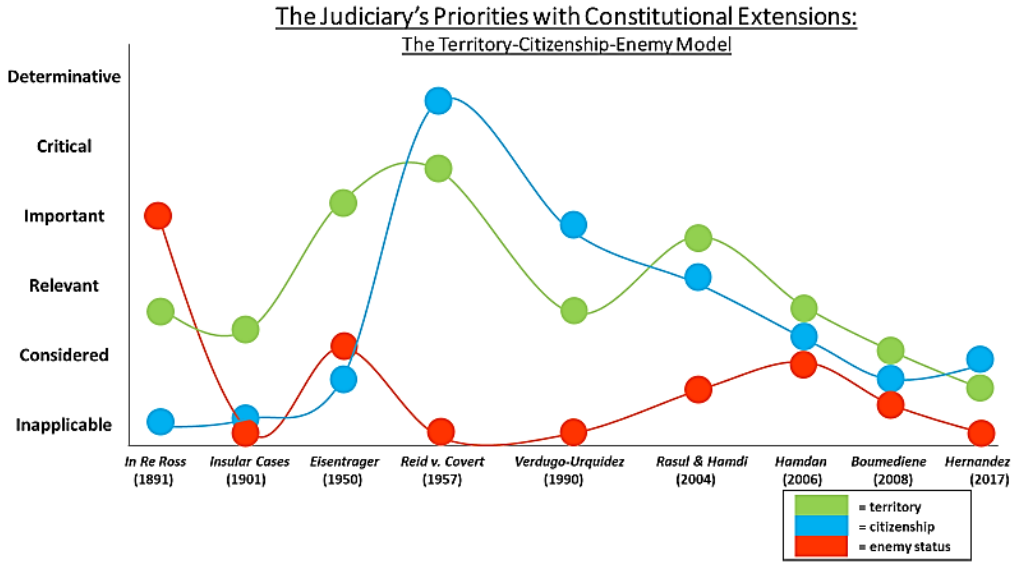
152. *See* Anthony J. Colangelo, *"*De facto *Sovereignty":* Boumediene *and Beyond*, 77 GEO. WASH. L. REV. 623, 663, 667–68 (2009) ("Thus, if the Court continues to use the jurisdictional aspect of de facto sovereignty to inform the constitutional scope of habeas, as it did in *Boumediene*, noncitizen government-designated enemy combatants detained in Afghanistan and Iraq likely will not constitutionally have access to the writ.").

153. *See* Rotstein, *supra* note 44, at 1398.

154. *See* Falkoff & Knowles, *supra* note 22, at 884.

E. The Territory-Citizenship-Enemy Model

The Territory-Citizenship-Enemy Model proposes a means of organizing and analyzing the Court's rationale at various jurisprudential junctures, when the Court was tasked with deciding whether, and how, to extend constitutional protections in different situations. It traces the evolution of the Court's priorities as between territory, citizenship, and enemy status considerations. This Model characterizes the holdings of only the Supreme Court and does not account for the analyses of the lower courts in each case.



As suggested by the Model, *In re Ross* turned more on territory rather than citizenship.[155] Later, in the *Insular Cases*, territorial considerations continued to take center stage in the Court's analysis. This trend continued in *Eisentrager* — a case in which the Court's prioritization of territory considerations, over citizenship and enemy status, was perhaps the most evident.

Reid, however, departed from this trend, with the opinion focusing on citizenship as the determinative factor. *Reid* started a movement based on the notion that courts "reject the idea that when the United States acts against citizens abroad it can do so free of the Bill of Rights."[156] In Justice Harlan's concurrence, U.S. jurisprudence first

155. *See In re* Ross, 140 U.S. 453, 464 (1891).
156. *See* Reid v. Covert, 354 U.S. 1, 5 (1957).

hears the words "impracticable and anomalous"[157] as a standard for determining when and to what extent the Constitution should be applied extraterritorially in certain circumstances. *Reid* marked the end of the formalistic approach and the beginning of an era of the functional approach.

Interestingly, in the *Verdugo-Urquidez* opinion, the Court seemed to revert to a more formalistic approach in its holding: the Fourth Amendment only protects "the people" of the United States and is not intended to apply its protections to "aliens outside of the United States territory."[158] However, the case is somewhat inconsistent with precedent, as it failed to appreciate the significance of the "generous and ascending scale of rights" from *Eisentrager* regarding the connections of a foreign national to the United States.[159]

Again, the Court pivoted meaningfully in the early 2000s, when faced with a series of cases regarding the War on Terror. These cases seem to reject territorialism or at least the general understanding of what a United States territory is. *Rasul* and *Hamdi* both demonstrated the willingness of the Supreme Court to extend rights to foreign nationals outside the United States.[160] *Hamdan* may be considered somewhat of an anomaly that does not clearly advance the analysis proposed by this Model, as the decision turned mainly on separation of powers principles.[161] *Boumediene*, which tested the Executive's ability to gain more power in detaining suspects at Guantanamo, reflected the Court's attempt at balancing considerations of territory, citizenship, and enemy status in its analysis. However, the territory prong retained its expanded definition, since in *Boumediene*, territory was based on U.S. control over Guantanamo.[162] Finally, in 2017, *Hernandez* saw a return to the formalistic approach, with a greater emphasis on the citizenship prong than on territory.[163]

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157. *Id.* at 74.

158. *See* United States v. Verdugo-Urquidez, 494 U.S. 259, 266 (1990).

159. *See* Johnson v. Eisentrager, 339 U.S. 763, 770 (1950).

160. *See generally* Rasul v. Bush, 542 U.S. 466 (2004); Hamdi v. Rumsfeld, 542 U.S. 507 (2004).

161. *See generally* Hamdan v. Rumsfeld, 548 U.S. 557 (2006).

162. *See* Boumediene v. Bush, 553 U.S. 723, 754–55 (2008).

163. *See* Hernandez v. Mesa, 137 S. Ct. 2003, 2008 (2017).

II. APPROACHES TO EXTRATERRITORIAL EXTENSIONS OF CONSTITUTIONAL PROTECTIONS

Part II discusses the three approaches the Supreme Court has considered when adjudicating the scope and extent of the Constitution's application. These three approaches are best demonstrated in the majority, concurring, and dissenting opinions of *Verdugo-Urquidez*.[164] Cases similar to *Verdugo-Urquidez* have turned largely on context — namely, on the Court's approach at a given historical moment and the specific facts of each case.[165] This Part also analyzes a matrix of possible solutions, dependent upon the territory or citizenship prongs, to illuminate the subtle differences in case outcomes.

A. The Majority, Concurring, and Dissenting Opinions of *Verdugo-Urquidez*

The first approach was demonstrated in Justice Rehnquist's majority — or more appropriately, the plurality — opinion.[166] Under this first approach, U.S citizens have some (but not absolute) extraterritorial constitutional rights, while foreign nationals do not.[167] This approach recognizes the importance of extending the Constitution's protections to its own nationals but stops short of providing those same guarantees to foreign nationals.

The second approach derives from Justice Kennedy's concurrence in *Verdugo-Urquidez*.[168] Under the second approach, "[f]or both citizens and aliens, a contextual, due-process-style analysis" is utilized to determine which constitutional guarantees would apply and whether adherence to that constitutional guarantee would be "impracticable and anomalous."[169]

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164. *See supra* Section I.C. *See generally* United States v. Verdugo-Urquidez, 494 U.S. 259 (1990).

165. For a discussion of other cases where the holding was dependent upon the time it was decided, see *supra* Part I.

166. *Id.* Neuman, *Extraterritorial Rights and Constitutional Methodology*, *supra* note 120, at 2075.

167. Neuman, *Extraterritorial Rights and Constitutional Methodology*, *supra* note 120, at 2075–76 ("U.S. citizens have extraterritorial constitutional rights and foreign nationals do not. Even as to citizens, the Bill of Rights does not apply fully and literally overseas.").

168. *Id.* at 2076.

169. *Id.*

The third approach appears in Justice Brennan's dissent in *Verdugo-Urquidez*,[170] where he argues that it is counterintuitive for the United States to be able to enforce laws abroad but not be bound by the mandates of the Constitution. Professor Neuman notes that this approach "presumes that the extension of U.S. constitutional rights accompanies the assertion of an obligation to obey U.S. law."[171] While the Constitution should apply to *all* persons — including non-U.S. nationals — within the United States and territories and all U.S. citizens extraterritorially, it should only apply extraterritorially to foreign nations when the United States "seeks to impose and enforce its own law."[172] Ultimately, however, it must be noted that the application of a constitutional right could produce different results in domestic and foreign locations.[173]

B. Matrix of Possible Situations and Corresponding Outcomes

Extraterritorial extensions of federal statutes primarily analyze the location of the conduct that was subject to regulation.[174] In contrast, when dealing with the extraterritorial extensions of certain provisions of the Constitution, a claimant's citizenship status has also been a consideration, in addition to territoriality.[175] Therefore, depending on the claimant's nationality and the location of the conduct, the results will differ substantially. The four situations are displayed below along with the most notable cases that have characterized each situation.[176]

(1) **U.S. National** **U.S. Conduct**	**(2)** **Non-U.S. National** **U.S. Conduct**
Incorporation Cases; *Insular Cases*	*Insular Cases*

170. *Id.*

171. *Id.* at 2077.

172. *Id.* ("[C]onstitutional rights should presumptively apply to all persons within U.S. territory, and to all U.S. citizens in any location, but that extraterritorial rights of foreign nationals presumptively arise only in contexts where the United States seeks to impose and enforce its own law.").

173. *Id.*

174. *See* CLYDE SPILLENGER, PRINCIPLES OF CONFLICT OF LAWS 409 (2010).

175. *Id.*

176. *Id.* This chart has been adapted from Spillenger's book.

(3)	**(4)**
U.S. National **Non-U.S. Conduct**	**Non-U.S. National** **Non-U.S. Conduct**
Reid v. Covert	*Verdugo-Urquidez*

As demonstrated above, because Situations (1) and (2) involve U.S. conduct within the territory of the United States, the Bill of Rights is fully applicable to both U.S. and foreign nationals.[177] This makes citizenship irrelevant where the conduct is *in* the United States and has been reflected in judicial and legislative precedent.[178] Situation (3) involves conduct not in the United States, but as pertaining to a U.S. national. While the right to a trial by jury and indictment by grand jury extended to the claimants in *Reid*, the Court held that constitutional extensions do not apply in every circumstance when a U.S. national is abroad.[179] Situation (4), denoting non-U.S. nationals and non-U.S. conduct, is the arguably most problematic, because it involves the least connections to the United States. Such incidents usually arise with the United States-Mexico border.[180] *Verdugo-Urquidez* is an example of Situation (4). While the Fourth Amendment did not extend in that case, the Court held that it is not necessarily the case that *no* provisions of the Bill of Rights could ever be applicable to non-U.S. nationals in situations involving conduct not in the United States.[181]

III. THE PROPRIETY OF, AND BASIS FOR, EXTENDING CONSTITUTIONAL PROTECTIONS

The key issue surrounding these debates of whether to construe constitutional extensions formalistically or functionally rests on the question: What is the propriety of, and basis for, extending constitutional protections to foreign nationals abroad? Rather, why

177. *Id.*

178. *See* Kent, *Citizenship and Protection*, *supra* note 10, at 2128 ("[B]y the accumulation of judicial and political precedent we have implicitly adopted a rebuttable presumption that noncitizens peacefully in the United States can claim the same constitutional protections for civil liberties as citizens.").

179. *See* SPILLENGER, *supra* note 174, at 411.

180. *See generally* Hernandez v. Mesa, 137 S. Ct. 2003 (2017).

181. *See* United States v. Verdugo-Urquidez, 494 U.S. 259, 274 (1990).

restrict the extension of constitutional protections to citizens?[182] The Court has used many different approaches, with no one prevailing theory. These inconsistencies in rationales are reflected by the *Insular Cases*, *Reid*, and *Verdugo-Urquidez*.[183]

The Supreme Court has found support for extending protections to foreign nationals under certain circumstances. The War on Terror cases[184] demonstrated the judicial receptiveness to extending constitutional guarantees to foreign nationals, even enemy combatants, and hold the Administration liable for attempts to circumvent the Constitution or the separation of powers principles. The Court went so far as to either discount the traditional considerations of citizenship and territoriality.[185] This resulted in *Boumediene*, a controversial case for its adoption of the functional approach. Additionally, promoting a global due process approach to constitutional rights fails for "its lack of textual anchor and its unpredictability."[186]

There are also arguments supporting the functional approach. These arguments are mostly based on morals and on the notion that people feel secure under the law by "[k]eeping [the] U.S. as a zone of civil liberty for both citizens and noncitizens" and ensuring that "all humans have equal dignity."[187] This "equal dignity" argument has been prevalent among academics and advanced as a means of "balance[ing] liberty and security."[188] Furthermore, restricting the current functional approach or returning to a purely formalistic standard ignores the impact of globalization in exterritorial regulation, law enforcement, and information technology.[189]

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182. *See* Neuman, *Whose Constitution?*, *supra* note 2, at 981 ("Once the taboo against treating constitutional rights as effective beyond the nation's boundaries has been overcome, the question arises whether this development should be restricted to citizens.").

183. *Id.* at 975.

184. *See supra* Section I.D. *See also* Hamdan v. Rumsfeld, 548 U.S. 557 (2006); Hamdi v. Rumsfeld, 542 U.S. 507 (2004); *see also* Rasul v. Bush, 542 U.S. 466 (2004).

185. For a discussion of case law relying on citizenship considerations, territorial considerations, or a combination of both, see *supra* Section I.E.

186. *See* Neuman, *Extraterritorial Rights and Constitutional Methodology*, *supra* note 120, at 2083.

187. *See* Kent, *Citizenship and Protection*, *supra* note 10, at 2126, 2133.

188. *See* Cole, *supra* note 5, at 388 (noting that "we should respect the equal dignity and basic human rights of all persons").

189. *See* Neuman, *Extraterritorial Rights and Constitutional Methodology*, *supra* note 120, at 2078.

Therefore, scholars promoting these arguments conclude that territoriality is "a poor fit in an increasingly interconnected world."[190]

However, these considerations are quickly dismissed, since the ability of the judiciary to consider these would likely lead to great judicial deference.[191] The courts would be required to make "complex factual assessments and predictions about which rights would be workable to observe in which extraterritorial national security settings, untethered from any textual guidance."[192] This type of power lies outside the competence of the judiciary and could potentially hinder the government's ability to react quickly and flexibly to sensitive matters.[193] It is imperative that the Executive be given the latitude to swiftly respond to threats to U.S. national security. But it does not follow that the government may act free of the Constitution under certain circumstances, as *Boumediene* demonstrated. Nevertheless, there are some issues that *Boumediene* did not dispel.

As mentioned, *Boumediene* created a vacuum, which resulted in a circuit split. Currently, there are two approaches courts utilize when analyzing the geographic scope of the Constitution: (i) the "voluntary connections" test established in *United States v. Verdugo–Urquidez*, and (ii) the objective factor analysis of *Boumediene v. Bush*.[194] These seemingly opposite approaches – the formalistic and functional interpretations, respectively — are problematic in that the Court has not been forceful in asserting which predominates.[195] By the time the Supreme Court decided *Hernandez*, instead of embracing the opportunity to either promulgate an appropriate standard or affirmatively mandate either the formalistic or functional approach, it instead incorrectly applied *Boumediene*'s objective factor analysis and returned exclusively to *Verdugo-Urquidez*.[196] Thus, by ignoring precedent, the *Hernandez* decision creates more inconsistencies in the lower courts, has "unfoundedly restricted, rather than expanded, the rights of foreign plaintiffs" from seeking relief under the Constitution, and "perpetuates a system of lawless law enforcement at the border at the expense of innocent human lives."[197]

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190. *See* Roosevelt III, *supra* note 90, at 2032.
191. *See* Kent, *Citizenship and Protection*, *supra* note 10, at 2131–32.
192. *Id.* at 2132.
193. *See id.*
194. *See* Botsaris, *supra* note 101, at 853.
195. *See id.*
196. *See* Rotstein, *supra* note 44, at 1400.
197. *Id.*

IV. RECOMMENDATIONS

Globalization implies — if not mandates — harmonization: protecting due process with consistency, while simultaneously remaining wary of venturing too close to infringing on the sovereignty of other foreign states,[198] respecting international comity, and observing jurisdictional barriers. Therefore, an approach that allows U.S. agents to operate in a foreign state without *any* accountability is clearly not the solution. In some instances, the Constitution must be applied abroad not only to extend protections to foreign nationals, but also to provide assurances that U.S. conduct will be subject to the constraints of the Constitution. The result is two-fold: (1) extend constitutional protections to foreign nationals abroad, and (2) supplement those extensions with accountability and constraints when U.S. agents are acting abroad. To accomplish this, the Supreme Court must settle the matter conclusively: whether the primary emphasis should be on territory or citizenship.[199] This Essay argues that territory — albeit a more expansive definition of territory — is superior.

The importance of the citizenship distinction is decreasing, as are the barriers of territory and enemy status as impediments to extraterritorial constitutional extensions.[200] Consequently, the extension of protection is becoming more uniform throughout U.S. national security policies.[201] But should the United States provide constitutional protections to *all* persons, regardless of citizenship, in the United States during times of peace?[202] Should "the right to habeas corpus at the international level . . . be available to everyone, *regardless of location or status*"?[203] The United States still needs some predictability and consistency — and this would likely be going too far.[204]

It is incumbent on the courts to strike the right balance between the need to respond swiftly to national security threats, and the need

198. *See* RAUSTIALA, *supra* note 1, at 121 ("Having one sovereign intrude upon the domain of another was widely seen as not only wrong, but dangerous.").

199. For a discussion of case law detracting emphasis away from enemy status and focusing instead on the prongs of citizenship and territory, see *supra* Section I.E.

200. *See* Kent, *Citizenship and Protection*, *supra* note 10, at 2135.

201. *Id.*

202. *Id.* at 2128.

203. *See* FARRELL, *supra* note 68, at 221 (emphasis added).

204. For a discussion of the most recent cases that provide either a functional approach for consistency or a formalistic approach for predictability, see *supra* Section I.C.

for flexibility in policies designed to ensure that due process rights are afforded to those the United States seeks to hold, detain, target, or regulate. The "sufficient connections" test from *Verdugo-Urquidez* ignores territoriality to the point of denying constitutional extensions to areas where the United States exercises control but is not sovereign.[205] *Boumediene* ignores both the situations where the conduct has occurred outside the *de jure* or *de facto* sovereignty of the United States and claimants with arguably sufficient connections to the United States. However, neither approach is incorrect; territorial considerations require a more functional approach, while citizenship — or whether the claimant has sufficient connections to the United States — should take a more formalistic approach. Thus, the solution is not to *select* a single approach; because these kinds of cases demand context-specific evaluation and solutions, one approach should function as a supplement the other.

A. The Proposed Framework for Constitutional Protections

An approach that analyzes the facts of each case using a clear, multi-step framework would promote consistency and predictability in judicial decision-making and administration. Netta Rotstein advances a three-step balancing test regarding the *Boumediene-Verdugo-Urquidez* debate: first, look to *where* the constitutional violation occurred; second, consider the appellant's *legal status* under the "sufficient connections" test; and third, "evaluate the practical obstacles" of extending the constitutional guarantee.[206] Distilled down to two steps, this Section proposes a framework that expands on Rotstein's approach, as it: (1) allows for a consideration of *de facto* and *de jure* sovereignty when determining the territory of the United States for purposes of the place of the conduct; (2) provides an extended categorization of nationality to encompass those claimants who have attained sufficient connection to the territory — such as U.S. permanent legal residents; (3) limits extensions to those constitutional provisions already established by precedent; and (4) includes built-in safeguards where the specific constitutional guarantee does not extend extraterritorially under the framework, such as diplomatic relations and cooperation among states.

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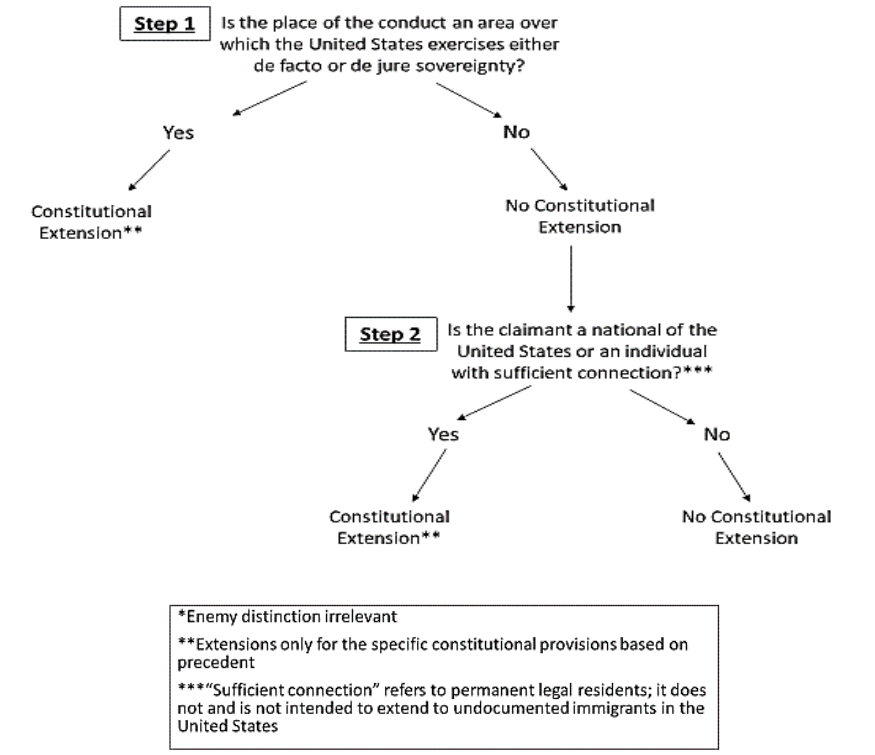
205. *See* Boumediene v. Bush, 553 U.S. 723, 841–42 (2008).

206. *See* Rotstein, *supra* note 44, at 1392 (advancing this three-step framework to provide more consistency in the application of the Constitution abroad and to attempt to resolve the *Boumediene-Verdugo-Urquidez* debate).



This simplified framework recognizes the importance primarily of territory, and secondarily of nationality. The territoriality prong at Step 1 is a more functional approach, since it embraces *Boumediene*'s expanded definition of territory. This basis for asserting the relevant constitutional right is the expanded definition of territory as that which the United States has either *de facto* or *de jure* sovereignty.[207] Thus, the Guantanamo Bay cases would be resolved by Step 1; the Suspension Clause now appropriately extends to the detainees in Guantanamo.[208] Similarly, if the area in question is not under the *de facto* or *de jure* sovereignty of the United States, like Mexico, then the specific constitutional guarantee will not be extended.[209] If the constitutional guarantee is not reached at Step 1, then the analysis proceeds to Step 2, which addresses the nationality or connection of

207. *See generally* Boumediene v. Bush, 553 U.S. 723 (2008).
208. *Id.*
209. *Id.*

the claimant to the United States.[210] Step 2 provides a more formalistic approach, since it would extend protections abroad only to U.S. nationals or permanent legal residents. It is important not to be too subjective in this step with respect to what it means to have a sufficient connection. Therefore, logically, only permanent legal residents of the United States would be able to satisfy the sufficient connection to the United States under Step 2.[211]

Hernandez is perhaps the most challenging case to fit into the proposed framework. On the one hand, the conduct at issue[212] occurred in the United States, with the effects taking place marginally outside U.S. territory. On the other hand, Hernandez was not a U.S. national or a permanent legal resident of the United States. Following the proposed framework above precisely would lead to the conclusion that the Fourth Amendment should have been extended in favor of Hernandez, because the conduct took place on the U.S. side of the border. Instead, the Supreme Court side-stepped the issue altogether by noting that extending the Fourth Amendment could have far-reaching consequences.[213] Thus, lower courts are left without a clear standard to guide them when interpreting the geographic scope of these constitutional provisions under the facts of each case.[214]

B. Reflections on the Proposed Framework and Other Considerations

The United States does not occupy the same position it did over 200 years ago. The United states is now a global leader — economically, politically, and socially. Most importantly, it is the home of a great diversity of people.[215] A balance must be struck

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210. Likewise, Step 2 also involves the cases involving Mexico. For instance, the Constitution was not extended in *Verdugo-Urquidez* because the alleged illegal search took place in Mexico.

211. This step here is similar to the circumstances of *Reid v. Covert*, where the Constitution was extended in favor of U.S. nationals abroad. *See* 354 U.S. 1, 17 (1957).

212. *See* Hernandez v. United States, 785 F.3d 117, 136 (5th Cir. 2015).

213. *See* Hernandez v. Mesa, 137 S. Ct. 2003, 2007 (2017).

214. For a brief discussion of the circuit split after *Hernandez*, see *supra* Section I.E.

215. *See Quick Facts: All Topics*, U.S. CENSUS BUREAU (2017), https://www.census.gov/quickfacts/fact/table/US/RHI225217#RHI225217 [https://perma.cc/N3LP-DEW9]. As of 2017, the U.S. Census Bureau reports a population of 50.8% female. *Id.* Race origins include White alone (non-Hispanic): 60.7%; Asian alone: 5.8%; black or African American alone: 13.4%; and Hispanic or Latino: 18.1%. *Id.*

between retaining some degree of sovereignty for the United States and foreign states, and maintaining predictability in the Constitution's application. Courts should interpret the Constitution's scope within the bounds of international law.[216] This method of interpretation recognizes the inevitability of being part of a globalized world, the importance of flexibility to the Executive, and the need for consistency in the extension of certain constitutional provisions to claimants, particularly foreign claimants.

It is important to recognize, however, that various checks on the extension of constitutional protections exist. For example, although the claimant in *Verdugo-Urquidez* likely had Fourth Amendment rights and those rights were likely violated, it is also important to remember that Mexican officials *did* approve the search of Verdugo-Urquidez's apartment in Mexico.[217] Thus, principles such as diplomatic relations can "check the degree to which the U.S. pursues criminal investigations abroad."[218]

Other checks that affect whether constitutional protections will be extended extraterritorially include "statutes, executive orders, and discretionary policy decision[s]" that are based on both "reciprocity [and] legitimacy."[219] These work to enable the protection of non-U.S. nationals, while also granting the U.S. government the requisite flexibility to take other action where necessary.[220] Furthermore, such an approach encourages multi-lateral cooperation and coordination among states, as well as between the Legislature and Executive.

Ultimately, the approach adopted should be one of fairness and practicality. If one views the Constitution as a rigid document impervious to change, then the United States will be forced to justify its decisions with rationales that are outdated and ill-suited for a modern world. This inflexible approach would undoubtedly hinder international cooperation and prevent "harmoniz[ation]" of "divergent national rules."[221] However, if one views the Constitution

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216. *See* RAUSTIALA, *supra* note 1, at 189 (observing how "[e]xtraterritoriality was no longer limited to weak or peripheral states; it was now used against some of the most powerful states in the international system . . . ").

217. *See* SPILLENGER, *supra* note 174, at 415.

218. *Id.*

219. *See* Kent, *Citizenship and Protection*, *supra* note 10, at 2132.

220. *Id.*

221. *See* RAUSTIALA, *supra* note 1, at 120–21 (while observing that "[t]he most familiar way to harmonize divergent national rules . . . is the negotiation of international agreements," the United States' "expansion of extraterritoriality in the postwar era is best understood as an alternative to more familiar cooperative efforts").

as a living document that changes with every judicial opinion, every president, or every major political era, then its vitality and strength as a governing document of stability will be severely undermined. This view subjects the United States to the whims of popular opinion.[222] Thus, the answer should lie between these two extreme ends.

V. URBAN POLICY: FEDERAL INACTION AND THE PROBLEMS FACED BY STATES AND CITIES

The Constitution's reach has been extended to provide protections to U.S. nationals who were charged with crimes abroad and to cover foreign nationals within the territory of the United States. It was logical for the Constitution to follow its nationals abroad and guarantee to them the same protections had they been within the territory of the United States. It was similarly logical for the Constitution's protections to extend to foreign nationals within the United States who had begun to form a bond with the territory, utilize its resources, and contribute to its development. But if these extensions are accepted as logical, then how can opinions such as *Verdugo-Urquidez* or *Hernandez* be justified?

States and cities can – and should – play a role in resolving this issue. Change often starts small, and begins locally, before a more sweeping national movement can be advanced. States and municipalities occupy a uniquely powerful position as actors, given their ability to understand, and respond to, particular local realities, given their proximity to the people.

Some maintain that state governments *should* be involved in determining and facilitating the extension of constitutional protections, because both the Constitution and the principles of federalism grant them that right. For instance, states have "sovereign rights regarding the treatment of individuals within their borders"; they can make autonomous law enforcement decisions to promote public safety.[223] The Constitution carves out space for the states to

222. *Id.* at 216 (noting that Boumediene's focus on practicality, for example, implies that constitutional issues are not fixed in time and that certain factors are "subject to change given technological and political developments" and that "[w]hat was impractical one day might become practical in a future day").

223. Cara Cunningham Warren, *Sanctuary Lost? Exposing the Reality of the Sanctuary-City Debate and Liberal States- Rights Litigation*, 63WAYNE L. REV. 155, 171 (2018).

exercise police power.[224] Each state has a legitimate interest in protecting and promoting the health and safety of all residents within its jurisdiction; this naturally includes those undocumented noncitizens residing within a state's borders.[225]

But state-centric solutions may not be feasible. Under the doctrine of preemption, federal law governs the entire field of immigration, based on expressed congressional intent to do so.[226] Should states attempt to bypass federal law, they will likely be met with hostility.[227] On the other hand, it is difficult for Congress to develop a comprehensive immigration plan that considers the varying circumstances of those it will encompass via its regulatory scope. If Congress will not act, and the states are either forbidden from or interrupted in proactively taking the first step, it is hard to imagine how and whether consistency in the Constitution's administration will be achieved. Additionally, states are not themselves immune from the effects of the sharp political divide in the United States today, which presents one of the greatest hurdles to making serious plans for extended and harmonized constitutional guarantees.[228] Invariably, state efforts to deal with these problems have fallen short. Localities have responded by taking matters into their own hands and serving as sanctuary cities, declaring themselves as safe-havens for immigrants and guardians of the rights of "outsiders." Sanctuary city laws are "designed to embrace a diverse and inclusive vision of community."[229] Sanctuary cities are a prominent example of how local jurisdictions have resisted the enforcement of federal immigration laws. Many localities see sanctuary as necessary to prevent harm to their communities, as well as to express their disagreement with federal

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224. Peter Margulies, *Deconstructing "Sanctuary Cities": The Legality of Federal Grant Conditions that Require State and Local Cooperation on Immigration Enforcement*, 75 WASH. & LEE L. REV. 1508, 1510 (2018).

225. *Id.*

226. *See* I.N.S. v. Chadha, 462 U.S. 919, 940 (1983) ("The plenary authority of Congress over aliens under Art. I, § 8, cl. 4, is not open to question . . . .").

227. *See* Mark S. Grube, Note, *Preemption of Local Regulations Beyond* Lozano v. City of Hazleton*: Reconciling Local Enforcement with Federal Immigration Policy*, 95 CORNELL L. REV. 391, 394 (observing that in some contexts, such as employment, courts have tended to use the "preemption doctrine to reach a desired result" as opposed to utilizing a more "principle-based analysis").

228. *See* RAUSTIALA, *supra* note 1, at 225 (asserting that some critical issues within the United States create a tendency to move those activities offshore and demonstrating "how territoriality has been manipulated to strategic advantage").

229. Christopher N. Lasch et al., *Understanding "Sanctuary Cities"*, 59 B.C. L. REV. 1703, 1709 (2018).

immigration policies.[230] Local efforts to provide protection to vulnerable foreign nationals in a particular jurisdiction has also been grounded in the rationale that immigration is inherently a local matter: namely, policies to protect immigrants "preserve local sovereignty, define local priorities, and enhance community trust in law enforcement."[231]

But as cities promote sanctuary policies, there has been simultaneous legislation to strip the states of federal funding.[232] This is further evidence of the "deepening divide" between the federal, state, and local governments and the American people regarding the issue of unauthorized immigration.[233] Despite these tensions, states and cities continue to push back, motivated by the "concern that entangling police with immigration enforcement erodes trust among minority community members," the "commitment to preventing improper discrimination in policing based on race, ethnicity, or national origin, and the "wish to express disagreement with federal immigration policy."[234] Therefore, it is evident that a comprehensive analysis of U.S. immigration law requires recognition of the role played not only by the federal government, but by proactive non-federal stakeholders – "states, cities, individuals, and other private actors."[235]

CONCLUSION

This Essay has presented an in-depth analysis of trends in the rationales of the U.S. Supreme Court when deciding the geographic scope of the Constitution as applied to U.S. and foreign nationals. The Court's approach to the extraterritorial scope of the Constitution has changed, with earlier cases adopting an approach based on territorialism, followed by considerations of the claimant's citizenship. Recent cases tend to ground their holdings in domestic concerns, such as the separation of powers or national security matters. This is particularly evident in the wake of 9/11, with the War on Terror cases.

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230. *Id.* at 1708–09.

231. *Id.* at 1709.

232. Christopher N. Lasch, *Sanctuary Cities and Dog-Whistle Politics*, 42 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 159, 161 (2016).

233. *See* Elizabeth M. McCormick, *Federal Anti-Sanctuary Law: A Failed Approach to Immigration Enforcement and a Poor Substitute for Real Reform*, 20 LEWIS & CLARK L. REV. 165, 171 (2016).

234. *See, e.g.*, Lasch et al., *supra* note 229, at 1753.

235. Rose Cuison Villazor & Pratheepan Gulasekaram, *The New Sanctuary and Anti-Sanctuary Movements*, 52 U.C. DAVIS L. REV. 549, 553 (2018).

However, the measures taken by the executive and legislative branches have been too extensive and arguably intrusive in the era of the War on Terror.

It has been unclear whether the determinative factor in judicial analyses for extraterritorial extensions of the Constitution should be based on territory or citizenship. The uncertainty peaked with *Hernandez*, because the Court obviated any consideration of reciprocity by avoiding a resolution of constitutional issues altogether. Cases involving Guantanamo Bay and the United States-Mexico border have been, and continue to be, the subject of significant controversy. Scholars continue to struggle as to whether a formalistic approach is superior over the functional approach.

This Essay promotes a balanced approach to account for present-day realities: a combination of *Verdugo-Urquidez*'s formalistic approach and *Boumediene*'s functional approach. Context matters. Territory is the single-most significant consideration that the Supreme Court needs to evaluate. A combination of these theories supports consistency in the application of the Constitution abroad, provides a clear standard for lower courts to follow, gives the Executive its needed flexibility in dealing with national security matters, respects foreign states' sovereignty by avoiding unnecessary infringements, and affords foreign claimants the fair administration of certain constitutional guarantees.