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COMMENT

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INJUSTICE AT THE BORDER: APPLICATION OF THE  
CONSTITUTION ABROAD THROUGH  
THE CONFLICT OF LAWS

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*Deciding whether the U.S. Constitution applies abroad is a complicated question and one that is not easily answered by looking at Supreme Court precedent. The problems of the current approach have been highlighted in recent years by the cases of Hernandez v. Mesa and Rodriguez v. Swartz, two cross-border shooting cases where courts were unsure as to how or why different Amendments could protect noncitizen children killed in Mexico by U.S. government agents shooting from within the United States. This Comment surveys the precedents as well as the leading theories in extraterritorial application of the Constitution and shows why the landscape as we face it is unsatisfactory for dealing with cases like Hernandez and Rodriguez. Interest analysis, within the conflict of laws, asks courts to look at the purpose of a law domestically and to extend that law abroad if its domestic purpose would be served by doing so. I argue that under this approach, the Due Process Clause of the Fifth Amendment should be extended abroad because its domestic purpose in restraining arbitrary executive action is served by restraining that Executive no matter where it acts.*

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## INTRODUCTION

On June 7, 2010, a Mexican teenager named Sergio Hernandez was playing with his friends near the U.S.–Mexico border, running back and forth along the narrow concrete culvert that separates the two countries.<sup>1</sup> Border Patrol Agent Jesus Mesa was patrolling the area on bike, and grabbed one of the boys as they ran down the culvert.<sup>2</sup> Sergio ran and hid behind a concrete pillar on the Mexico side of the border.<sup>3</sup> “Within seconds,” Agent Mesa shot Sergio in the head, killing him instantly.<sup>4</sup> Mesa was standing on the U.S. side of the border and Sergio, a mere sixty feet away, was on the Mexico side.<sup>5</sup> Agent Mesa initially claimed that the boys had been throwing rocks at him and that he acted in self-defense, but cellphone video later surfaced disproving this story.<sup>6</sup>

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<sup>1</sup> See Petition for Writ of Certiorari at \*4, *Hernandez v. Mesa*, 137 S. Ct. 2003 (2017) (No. 15-118).

<sup>2</sup> See *id.*

<sup>3</sup> See *id.* at \*5.

<sup>4</sup> See *id.*

<sup>5</sup> See *id.*

<sup>6</sup> See *id.* at \*5-6.

As is often the case, only the executive branch was left responsible for determining the consequences of this killing, a process that has largely immunized the U.S. Customs and Border Patrol.<sup>7</sup> Perhaps unsurprisingly, the Department of Justice did not find sufficient evidence to prosecute, and so the only consequences for Agent Mesa were determined by an internal agency review.<sup>8</sup> The Mexican government attempted to extradite Agent Mesa, but the U.S. government denied that request.<sup>9</sup> And, in what will be the focus of this Comment, when Sergio's family brought suit in federal court, as their only remaining avenue for redress, their suit was ultimately dismissed, leaving Agent Mesa with no legal consequences and the family of Sergio with no justice for the seemingly unjustified killing of their child.<sup>10</sup>

In this Comment, I will examine the constitutional jurisprudence that led to *Hernandez v. Mesa*, which shows an obvious lack of cohesion and guiding theory. I will also survey some of the leading theories as to extraterritorial application of the U.S. Constitution, none of which are satisfactory in a case like *Hernandez*. I will first argue that in this and similar cases, the plaintiffs' claims can be analyzed under the Fifth Amendment, rather than exclusively under the Fourth Amendment. I will then argue that the best theory to use in analyzing extraterritorial application of the Constitution is interest analysis, from conflict of laws theory, which asks whether a law's domestic purpose would be served by its application abroad. Under this analysis, the Due Process Clause of the Fifth Amendment, designed to restrain executive action no matter against whom it is directed, has clear applicability in cases like *Hernandez*. By using interest analysis, we can create a more cohesive constitutional theory and develop more robust protections for those harmed by U.S. executive action at home and abroad.

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<sup>7</sup> See *Hernandez v. United States*, 757 F.3d 249, 271 (5th Cir. 2014) ("If the Constitution does not apply here, the only check on unlawful conduct would be that which the Executive Branch provides."); Roxanna Altholz, *Elusive Justice: Legal Redress for Killings by U.S. Border Agents*, 27 BERKELEY LA RAZA L.J. 1, 4 (explaining that despite the large number of border shootings, not one civil plaintiff has prevailed at trial, federal prosecutors have failed to bring charges in all cases but one, and all extradition requests by Mexico have been denied).

<sup>8</sup> See Petition for Writ of Certiorari, *supra* note 1, at \*6-7.

<sup>9</sup> See *id.* at \*7.

<sup>10</sup> I say "seemingly unjustified" because defendants filed a 12(b)(1) motion to dismiss, and so even though the case reached the Supreme Court, the discovery and investigation were halted at a very early stage of the case.

## I. THE HISTORY OF EXTRATERRITORIAL APPLICATION OF THE CONSTITUTION

The history of the Supreme Court's approach to whether and when the Constitution extends abroad is muddled to say the least.<sup>11</sup> The cases have gone back and forth between extending or declining to extend different provisions. The factual contexts of these cases vary wildly; they involve U.S. territories, alien enemy combatants, U.S. citizens, aliens held in detention abroad, and aliens detained in the United States but arrested abroad.<sup>12</sup> Furthermore, many of these cases do not have clear majority opinions but are a combination of pluralities and multiple concurring opinions, with disagreement as to which opinion controls. As such, it is not surprising that academic articles, and courts themselves, tend to pick and choose among the cases for those that suit their needs most favorably. This lack of precedent or predictability highlights the need for an understanding of constitutional theory by the Court, and a move away from the functional, case-by-case decisionmaking that has led to this whiplash for more than a century.

In a series of cases during the early twentieth century, known as the *Insular Cases*, the Court decided which parts of the Constitution extend to newly acquired territories after the Spanish-American War, such as Puerto Rico and the Philippines. The Court took a largely territorial approach, holding that “[f]ull constitutional protection was reserved for territories that Congress had incorporated into the United States, as opposed to those merely acquired.”<sup>13</sup> While declining to extend rights the Court saw as “procedural”, such as Sixth Amendment rights, the Court maintained that there were certain constitutional provisions deemed to be so fundamental that they might always apply, regardless of the status of a territory.<sup>14</sup>

In *Johnson v. Eisentrager*,<sup>15</sup> twenty-one German nationals were detained for violating war crimes for continuing aggression in China after the surrender

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<sup>11</sup> See GERALD L. NEUMAN, STRANGERS TO THE CONSTITUTION 73 (1996) (“Developments since [the nineteenth century] have produced a mosaic of inconsistent rules and rationales rather than a true synthesis . . . .”); Eva L. 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, 233 (2014) (“The Court has oscillated between rights-granting and rights-restricting views of the Constitution abroad.”).

<sup>12</sup> Throughout this Comment, I use the term “alien” to describe noncitizens. I do this for the sake of clarity, as this is the term the Supreme Court uses in all of the cases discussed here, but I am cognizant that this word is “patently offensive” as a descriptive label, as it “conjures images of invasion, danger, and otherworldness.” CESAR CUAUHEMOC GARCIA HERNANDEZ, CRIMMIGRATION LAW 18 (Am. Bar Ass’n. 2015).

<sup>13</sup> Gerald L. Neuman, *Whose Constitution?*, 100 YALE L.J. 909, 961 (1991).

<sup>14</sup> See *Downes v. Bidwell*, 182 U.S. 244, 282 (1901) (“[T]here may be a distinction between certain natural rights, enforced in the Constitution by prohibitions against interference with them, and what may be termed artificial or remedial rights, which are peculiar to our own system of jurisprudence.”).

<sup>15</sup> 339 U.S. 763 (1950).

of Germany during World War II. The prisoners were tried by a military commission, found guilty, and detained in Germany, where they petitioned for writs of habeas corpus, alleging violations of the Fifth and Sixth Amendments.<sup>16</sup> The Supreme Court found that the petitioners did not have standing to seek the writ.<sup>17</sup> The case is often cited for the proposition that it supports a territorial view of the Constitution.<sup>18</sup> At the same time, however, the Court focused extensively on the fact that the petitioners were alien enemy combatants, and contrasted the “relative vulnerability” of the enemy alien’s status during war, compared to the “security and protection” that same alien enjoys “while the nation of his allegiance remains in amity” with the United States<sup>19</sup> The *Johnson* opinion could be viewed more narrowly, as denying constitutional protections to active alien combatants, during wartime, who nonetheless still received some due process.<sup>20</sup>

Setting the stage for future decisions, Justice Black’s dissent discussed the fact that the U.S. government controlled the German prison where the petitioners were detained, even though it was outside U.S. territory.<sup>21</sup> At the same time, he lamented the “broad and dangerous principle”<sup>22</sup> being adopted that allowed for the Executive to control a prisoner’s constitutional rights based on the Executive’s chosen location of detention, asking “Does a prisoner’s right to test legality of a sentence then depend on where the Government chooses to imprison him?”<sup>23</sup> Black pointed to the arbitrary results that would flow from constitutional rights being decided by the

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<sup>16</sup> See *id.* at 765-767.

<sup>17</sup> See *id.* at 776 (“[T]he nonresident enemy alien . . . does not have even this qualified access to [American] courts.”).

<sup>18</sup> *Id.* at 771 (“[I]n extending constitutional protections beyond the citizenry, the Court has been at pains to point out that it was the alien’s presence within its territorial jurisdiction that gave the Judiciary power to act.”).

<sup>19</sup> *Id.* at 771.

<sup>20</sup> Indeed, *Johnson* was distinguished in later cases by the fact that the petitioners did not receive no process at all, but had gone through three tribunals, albeit two of them military. See *Boumediene v. Bush*, 553 U.S. 723, 767 (2008) (“The *Eisenrager* petitioners [had] detailed factual allegations against them . . . they were entitled to representation by counsel, allowed to introduce evidence on their own behalf, and permitted to cross-examine the prosecution’s witnesses.” (internal citations omitted)).

<sup>21</sup> See *Johnson*, 339 U.S. at 798 (Black, J., dissenting) (“Our Constitution has led people everywhere to hope and believe that wherever our laws control, all people, whether our citizens or not, would have an equal chance before the bar of criminal justice.”).

<sup>22</sup> *Id.* at 795.

<sup>23</sup> *Id.*

location of detention.<sup>24</sup> He also highlighted the erosion of separation of powers that this decision would allow.<sup>25</sup>

Seven years later, Justice Black wrote the Court's opinion in *Reid v. Covert*,<sup>26</sup> which extended constitutional rights to U.S. citizens abroad. Two U.S. citizen women (not in the military), who had been living at military bases with their enlisted husbands in England and China had killed their husbands and subsequently been tried and convicted by military commissions.<sup>27</sup> The citizens petitioned for a writ of habeas, alleging denial of their Fifth and Sixth Amendment rights.<sup>28</sup>

Justice Black's forceful opinion began by stating "[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."<sup>29</sup> He went on to disavow any analysis that might focus on practical factors,<sup>30</sup> or that would extend rights in a piecemeal manner.<sup>31</sup> Justice Harlan's concurring opinion, meanwhile, focused explicitly on the practical, functional analysis that would extend constitutional provisions one-by-one, depending on the context.<sup>32</sup>

While the *Reid* opinion is important in marking a turn from the territorial perspective of *Johnson v. Eisentrager*, and explicitly limiting the effect of the *Insular Cases*,<sup>33</sup> *Reid*'s scope is arguably limited, given that it was directed only at U.S. citizens abroad, and that Justice Black was writing for a plurality.<sup>34</sup>

<sup>24</sup> *See id.* ("The Court is fashioning wholly indefensible doctrine if it permits the executive branch, by deciding where its prisoners will be tried and imprisoned, to deprive all federal courts of their power to protect against a federal executive's illegal incarcerations.")

<sup>25</sup> *See id.* at 798 ("Habeas corpus, as an instrument to protect against illegal imprisonment, is written into the Constitution. Its use by courts cannot in my judgment be constitutionally abridged by Executive or by Congress.")

<sup>26</sup> 354 U.S. 1 (1957).

<sup>27</sup> *See id.* at 4-5.

<sup>28</sup> *See id.*

<sup>29</sup> *Id.* at 5-6.

<sup>30</sup> *Id.* at 14 ("The concept that the Bill of Rights and other constitutional protections against arbitrary government are inoperative when they become inconvenient . . . is a very dangerous doctrine and if allowed to flourish would destroy the benefit of a written Constitution and undermine the basis of our Government.")

<sup>31</sup> *Id.* at 9 ("[W]e can find no warrant, in logic or otherwise, for picking and choosing among the remarkable collection of 'Thou shalt nots' which were explicitly fastened on all departments and agencies of the Federal Government by the Constitution and its Amendments.")

<sup>32</sup> *Id.* at 75 (Harlan, J., concurring) ("[T]he question is *which* guarantees of the Constitution *should* apply in view of the particular circumstances, the practical necessities, and the possible alternatives which Congress had before it.")

<sup>33</sup> *Id.* at 14 (distinguishing the *Insular Cases* based on their dealing with "rules and regulations" for territories with "wholly dissimilar traditions and institutions").

<sup>34</sup> *See, e.g.,* *United States v. Verdugo-Urquidez*, 494 U.S. 259, 270 (1990) (writing that *Reid* cannot be used to support the broad proposition that the Constitution constrains all government

Over thirty years later, in *United States v. Verdugo-Urdiquez*,<sup>35</sup> the Court declined to apply the Warrant Clause of the Fourth Amendment<sup>36</sup> to operations by Drug Enforcement Agency Agents in Mexico. DEA Agents had arrested Verdugo-Urdiquez, a Mexican citizen, and held him in custody in the United States. While in custody, they searched his home in Mexico City, without a warrant, and Verdugo-Urdiquez filed a motion to suppress the evidence resulting from this search. Chief Justice Rehnquist, in his majority opinion, wrote that because the Fourth Amendment references the rights of “the people,”<sup>37</sup> it thus does not protect foreigners like Verdugo-Urdiquez, who had no “voluntary attachment” to the United States.<sup>38</sup>

Justice Kennedy wrote a concurring opinion in which he stated that the holding of *Reid v. Covert*, constraining the U.S. government wherever it acts in the world, is correct, but that it is only the first step in the analysis.<sup>39</sup> The analysis must also consider whether application of a constitutional provision in any given case would be “impracticable and anomalous” under the circumstances.<sup>40</sup>

Justice Brennan’s dissent focused on the limited and enumerated powers of the U.S. Government, arguing that the Constitution is the only source of the Executive’s power to act, and thus is also the source of limitations on all of that action, whether at home or abroad.<sup>41</sup>

The next decision to extend the Constitution abroad, and the last thus far, was *Boumediene v. Bush*.<sup>42</sup> The Court extended the Suspension Clause<sup>43</sup> to Guantanamo Bay, enabling all detained there, both citizen and noncitizen, to petition for habeas.<sup>44</sup> Justice Kennedy spent large parts of his majority decision writing about the fundamental nature of the writ, and the importance of separation of powers.<sup>45</sup> The ultimate test he provided, however, sounded more

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activity abroad, but applies only to U.S. citizens, and that the narrower concurring opinion limits even that reading).

<sup>35</sup> 494 U.S. 259 (1990).

<sup>36</sup> U.S. CONST. amend. IV. (“[N]o Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”).

<sup>37</sup> See *Verdugo-Urdiquez*, 494 U.S. at 265.

<sup>38</sup> See *id.* at 274.

<sup>39</sup> See *id.* at 277-278 (Kennedy, J., concurring).

<sup>40</sup> See *id.* at 278.

<sup>41</sup> See *id.* at 281 (Brennan, J. dissenting.) (“The Constitution is the source of . . . the Executive’s authority to investigate and prosecute such conduct. But the same Constitution also prescribes limits on our Government’s authority to investigate, prosecute, and punish criminal conduct, whether foreign or domestic.”).

<sup>42</sup> 553 U.S. 723 (2008)

<sup>43</sup> U.S. CONST. art. I, § 9 cl. 2 (“The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.”).

<sup>44</sup> *Boumediene*, 553 U.S. at 798 (“We hold that petitioners may invoke the fundamental procedural protections of habeas corpus.”).

<sup>45</sup> See *id.* at 739-53.

like his “impracticable or anomalous” inquiry from *Verdugo-Urdiquez*.<sup>46</sup> The Court used a three-factor test to reach its result that the Suspension Clause applied in Guantanamo, which considered (1) the citizenship and status of the plaintiff, (2) the nature of the location, and (3) the practical obstacles inherent in extending the constitutional provision abroad.<sup>47</sup>

As I will discuss below, this three-factor test fails to create a coherent constitutional theory and does not provide guidance for how and when the constitution should apply abroad in a case like *Hernandez*.

## II. THE *HERNANDEZ* CASE

Operating in the muddled context of this Supreme Court precedent, Sergio Hernandez’s family brought suit in the only forum possibly available to them,<sup>48</sup> the United States District Court for the Western District of Texas. They alleged, among other claims, violation of Sergio’s Fourth and Fifth Amendment rights.<sup>49</sup> The District Court granted Agent Mesa’s motion to dismiss.<sup>50</sup>

At the Fifth Circuit, Judge Prado, writing for the court, upheld the petitioners’ Fifth Amendment claim, but dismissed the Fourth Amendment claim.<sup>51</sup> The court used the three-factor test from *Boumediene v. Bush*.<sup>52</sup> Based on this test, the court found that the Due Process Clause of the Fifth Amendment extends abroad, and that Sergio’s family had stated a claim regarding his deprivation of life without due process.<sup>53</sup> Because of *United States v. Verdugo-Urdiquez*, however, which held that parts of the Fourth Amendment do not extend abroad, and which was not explicitly overruled by *Boumediene*, the court found the potential extraterritorial application Fourth Amendment more nuanced than the Fifth Amendment and dismissed that claim.<sup>54</sup>

Sitting en banc, the Fifth Circuit then affirmed the dismissal of the Fourth Amendment claim, but also dismissed the Fifth Amendment claim, holding that Sergio’s Fifth Amendment rights were not “clearly established,” as was required to overcome qualified immunity.<sup>55</sup> The en banc panel wrote

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<sup>46</sup> See *id.* at 764 (“[Q]uestions of extraterritoriality turn on objective factors and practical concerns, not formalism.”).

<sup>47</sup> See *id.* at 766.

<sup>48</sup> See Altholz, *supra* note 7, at 4 and accompanying text (“[N]o [Customs and Border Protection] agent has faced legal consequences in Mexico because the United States has refused to extradite the accused.”).

<sup>49</sup> *Hernandez v. United States*, 802 F. Supp. 2d 834, 838 (W.D. Tx. 2011).

<sup>50</sup> See *id.* at 837.

<sup>51</sup> *Hernandez v. United States*, 757 F.3d 249, 267-72 (5th Cir. 2014).

<sup>52</sup> See *Id.*

<sup>53</sup> See *Id.* at 272.

<sup>54</sup> See *Id.* at 267.

<sup>55</sup> *Hernandez v. United States*, 785 F.3d 117, 120-21 (5th Cir. 2015) (en banc) (per curiam) (“[T]he court . . . is unanimous in concluding that any properly asserted right was not clearly



that *Boumediene* was expressly limited to the Suspension Clause and thus had not extended other the Fifth Amendment abroad.<sup>56</sup>

The Supreme Court of the United States granted certiorari in *Hernandez v. Mesa*, but did not reach the constitutional issue.<sup>57</sup> Rather, the Court remanded with instructions for the Fifth Circuit to reconsider the *Bivens* aspect of the Fourth Amendment claim<sup>58</sup> and the qualified immunity aspect of the Fifth Amendment claim.<sup>59</sup>

On remand, the Fifth Circuit held that under *Bivens*, neither the Fourth nor the Fifth Amendment claims could proceed.<sup>60</sup> Hernandez has filed a petition for certiorari to the Supreme Court, which the Court granted in May, 2019.<sup>61</sup> The question is still left open, therefore, as to (1) whether claims must be analyzed under the Fourth Amendment rather than, and exclusively from, the Fifth Amendment in cross-border shooting cases and (2) whether either of these Amendments has force extraterritorially.

Recently, a factually analogous case, *Rodriguez v. Swartz*, decided these constitutional questions explicitly.<sup>62</sup> The facts of *Rodriguez* are in some ways even more stark than those in *Hernandez*. In October, 2012, a Mexican teenager was walking down a street that runs alongside the U.S.-Mexico border fence.<sup>63</sup> Without warning, and with no interaction between the two parties, the agent fired ten shots into the teenager's back and killed him.<sup>64</sup> The district court denied the agent's motion to dismiss, holding that the Fourth Amendment *did* apply to victims of cross-border shootings.<sup>65</sup> The court employed a combination functional test from *Boumediene* and *Verdugo-Urdiquez*.<sup>66</sup>

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established to the extent the law requires.”). Qualified immunity is a doctrine that grants immunity to government officials from damages liability unless they have violated a plaintiff's “clearly established” constitutional right. *Camreta v. Greene*, 563 U.S. 692, 705 (2011).

<sup>56</sup> *Id.* at 121 (stating that nothing in *Boumediene* “presages. . . whether the Court would extend the territorial reach of a different constitutional provision- the Fifth Amendment.”)

<sup>57</sup> *Hernandez v. Mesa*, 137 S.Ct. 2003, 2006-07 (2017).

<sup>58</sup> In *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), the Court implied a private right of action directly under the Constitution. The test for whether a *Bivens* claim can exist has been massively restricted since 1980. See *Ziglar v. Abbasi*, 137 S. Ct. 1843 (2017).

<sup>59</sup> This Comment is arguing for a novel approach to applying the constitution. I am therefore not arguing that Hernandez's claim was “well-established” for purposes of qualified immunity, or whether the case presents novel questions that would preclude a *Bivens* claim in general.

<sup>60</sup> See *Hernandez v. Mesa*, 885 F.3d 811, 823 (5th Cir. 2018) (en banc).

<sup>61</sup> *Hernandez v. Mesa*, 885 F.3d 811 (5th Cir. 2018), *cert granted*, 139 S. Ct. 2636 (U.S. May 28, 2019) (No. 17-1678).

<sup>62</sup> *Rodriguez v. Swartz*, 111 F. Supp. 3d 1025 (D. Ariz. 2015).

<sup>63</sup> See *id.* at 1028.

<sup>64</sup> See *id.* at 1029.

<sup>65</sup> See *id.* at 1041.

<sup>66</sup> See *id.* at 1037.

Because the court held that the Fourth Amendment applied, it did not reach the issue as to whether the Fifth Amendment applied abroad.<sup>67</sup>

The Ninth Circuit affirmed this ruling.<sup>68</sup> The court concluded that following *Boumediene*, its task was to analyze the victim's citizenship and status, the location of the shooting, and "any practical concerns that arise" from applying the Fourth Amendment in this context.<sup>69</sup> The court then easily distinguished *Verdugo-Urduquez*, as the seizure of a person abroad did not involve any of the same "practical" considerations as applying the Warrant Clause abroad.<sup>70</sup> Rather, the court found that "[a]pplying the Constitution in this case would simply say that American officers must not shoot innocent, nonthreatening people for no reason. Enforcing that rule would not unduly restrict what the United States could do either here or abroad," and it found that the victim here was thus entitled to the protections of the Fourth Amendment.<sup>71</sup> Agent Swartz has petitioned the United States Supreme Court, but the Court has not granted certiorari as of this writing.<sup>72</sup> If it does, the Court may have to squarely confront the constitutional question it avoided in *Hernandez*.

In a slightly different context, in *Ibrahim v. Department of Homeland Security*,<sup>73</sup> a PhD student at Stanford was placed on the "No Fly List" and barred from returning to the United States after leaving to present her research results in Malaysia. The Ninth Circuit held that "the border of the United States is not a clear line that separates aliens who may bring constitutional challenges from those who may not," and that under *Boumediene* and *Verdugo-Urduquez*, Ibrahim was permitted to bring her First and Fifth Amendment claims in federal court.<sup>74</sup>

*Hernandez*, *Rodriguez*, and *Ibrahim* show the uncertainty that has resulted from the Court's jurisprudence as to extraterritorial application of the Constitution, and the ways in which *Boumediene* has been inadequate at resolving that uncertainty.

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<sup>67</sup> See *id.* at 1038 ("In dismissing Rodriguez' Fifth Amendment claim, this Court does not reach Rodriguez' argument that J.A. should be entitled to protection under the Fifth Amendment's prohibition against arbitrary deprivation of life if this Court were to find that the Fourth Amendment did not protect J.A.").

<sup>68</sup> See *Rodriguez v. Swartz*, 899 F.3d 719, 748 (9th Cir. 2018).

<sup>69</sup> *Id.* at 729.

<sup>70</sup> *Id.* at 731 ("There are many reasons not to extend the Fourth Amendment willy-nilly to actions abroad, as *Verdugo-Urquidez* explains. But those reasons do not apply to Swartz. He acted on American soil subject to American law."). See also *infra* discussion and notes 75-84.

<sup>71</sup> *Id.*

<sup>72</sup> See Petition for Writ of Certiorari, *Swartz v. Rodriguez* No. 18-309 (appeal docketed Sept. 11, 2018).

<sup>73</sup> 669 F.3d 983 (9th Cir. 2012).

<sup>74</sup> *Id.* at 995.

## III. FOURTH VS. FIFTH AMENDMENT

The earlier line of cases, from the *Insular Cases* through *Reid v. Covert*, do not provide a clear answer to a case like *Hernandez v. Mesa*. Large parts of *Johnson v. Eisentrager* focused on the petitioners' enemy status, and large parts of *Reid v. Covert* focused on the petitioners' citizenship status and the need for military courts to be "subservient" to civilian courts.<sup>75</sup> That is to say, none of those cases directly addressed the status of someone who is neither a U.S. citizen nor an enemy combatant in a non-U.S. territory. The cases in the past two decades, culminating with *Boumediene v. Bush*,<sup>76</sup> also developed in the context of war and questions of enemy status. It makes sense in some ways, then, why courts now would look to *Verdugo-Urdiquez*,<sup>77</sup> which also dealt with a non-enemy alien in a nonmilitary context within a friendly country, to guide them in a case like *Hernandez*.

Relying on *Verdugo-Urdiquez*, both the Fifth Circuit appellate panel and the *en banc* bench handily dismissed Hernandez's Fourth Amendment claims. The primary concurring opinion to the *en banc* panel additionally held that deadly force claims can *only* be analyzed under the Fourth Amendment, and so the Fifth Amendment claims must be dismissed as well.<sup>78</sup> This analysis is flawed in two ways: (1) Application of *Verdugo-Urdiquez* does not preclude all application of Fourth Amendment abroad, and (2) A deadly force claim does not have to be analyzed under the Fourth Amendment, but could instead be analyzed under the Fifth Amendment.

A. *Verdugo-Urdiquez Does Not Hold That the Reasonableness Requirement in Deadly Force Cases is Limited Geographically.*

The right at issue in *Verdugo-Urdiquez* was freedom from government searches without a warrant. Justice Kennedy's concurring opinion, which many take to be the controlling opinion after *Boumediene*,<sup>79</sup> discusses how "impracticable and anomalous" it would be to require the U.S. government to go seek a warrant from a magistrate in furtherance of searches abroad. Kennedy did not doubt that the Fourth Amendment itself was designed to

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<sup>75</sup> 354 U.S. 1, 40 (1957).

<sup>76</sup> 553 U.S. 723 (2008).

<sup>77</sup> 494 U.S. 259 (1990).

<sup>78</sup> *Hernandez v. United States*, 785 F.3d 117, 121 (2015).

<sup>79</sup> *Verdugo-Urdiquez* has been viewed by some as a case with no majority opinion, and because Justice Kennedy then wrote the majority opinion in the next extraterritorial application case, *Boumediene*, relying in large parts on his own concurring opinion from *Verdugo-Urdiquez*, some view that opinion as the controlling precedent. See, e.g., Neuman, *supra* note 13, at 975 ("*Verdugo-Urdiquez* reflects the same lack of consensus about the proper scope of American constitutionalism . . . Substantial blocs of Justices subscribe to opposing theories, and no single approach attracts a majority.>").

ensure that “the Government may act only as the Constitution authorizes, whether the actions in question are foreign or domestic.”<sup>80</sup> And yet, he saw this principle as only the first step of an analysis that would also take into account the practical difficulties in enforcing certain provisions abroad.<sup>81</sup> The “conditions and considerations” that made the Fourth Amendment’s warrant requirement impracticable and anomalous included the lack of American magistrates situated abroad, the differences in expectations of privacy between countries, and the need to cooperate with foreign officials.<sup>82</sup>

Deadly force cases involving police shootings are also analyzed under the Fourth Amendment, although obviously not under the Warrant Clause. Rather, the shooting officer’s actions are examined through a highly deferential lens of reasonableness.<sup>83</sup> Deadly force claims do not need to take account of the location of magistrate judges, cooperation with other officials leading searches, or expectations of privacy.

In a case like *Hernandez*, the interaction looks a lot like other police shooting cases; according to Mesa, he felt threatened and shot a fleeing suspect. There would be nothing impracticable or anomalous about applying the reasonableness requirement to scrutinizing Mesa’s actions that day.<sup>84</sup> Nothing about the officer’s state of mind should turn on the difference of sixty feet of distance across the border. The applicability of the Fourth Amendment’s reasonableness requirement in deadly force cases should not have been determined by the nonapplicability of the warrant requirement in search cases. The factors simply do not align, and the impracticable and anomalous standard cannot justify denial of the right at issue here. For lower courts to extend the *Verdugo-Urduquez* analysis so far beyond its facts, to the extent that it prohibits claims based on deadly force, which involve absolutely none of the same considerations driving Justice Kennedy’s analysis, is illogical.

B. *Deprivation of Life Cases do not Need to Be Analyzed Exclusively Under the Fourth Amendment.*

The amalgam of decisions coming from the Fifth Circuit in this case leaves room for doubt about whether the Fourth Amendment must control this analysis.

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<sup>80</sup> *Verdugo-Urquidez*, 494 U.S. at 277.

<sup>81</sup> *Id.* (“But this principle is only a first step in resolving this case.”).

<sup>82</sup> *Id.* at 278.

<sup>83</sup> See *Tennessee v. Garner*, 471 U.S. 1, 7 (1985) (“[T]here can be no question that apprehension by the use of deadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment.”).

<sup>84</sup> See Brief in Opposition to Petition for a Writ of Certiorari at 19, *Swartz v. Rodriguez*, No. 18-309 (appeal docketed Sept. 11, 2018) (noting that federal regulations already require agents to treat citizens and noncitizens on both sides of the border equally in terms of use of force, and so it could hardly be impracticable or anomalous to impose the same limits through the Fourth Amendment).

The per curiam en banc decision dismissed the Fourth Amendment claim, relying on *Verdugo-Urdiquez*. Without deciding whether the Fifth Amendment applied abroad, the court dismissed that claim on the basis of qualified immunity, as the right was not clearly established at the time of the shooting.<sup>85</sup>

The first concurring opinion, written by Judge Jones, disputed the per curiam opinion's consideration of the Fifth Amendment at all due to the precedent of *Graham v. Connor*.<sup>86</sup> *Graham v. Connor* was a § 1983 suit against a police officer for using excessive force. The petitioner claimed protection under the Fourth and Fifth Amendments, but the Supreme Court held that “all claims that law enforcement officers have used excessive force—deadly or not—in the course of an arrest, investigatory stop, or other ‘seizure’ of a free citizen should be analyzed under the Fourth Amendment . . . rather than under a ‘substantive due process’ approach.”<sup>87</sup> Using this language, Judge Jones thus wrote that Hernandez could not avail himself of the Fifth Amendment's protections, and that his claims must be analyzed under the Fourth Amendment alone.

This total denial of access to the Fifth Amendment, however, “is rooted in a strained and incorrect reading of *Graham*.”<sup>88</sup> As Judge Prado wrote in his majority opinion for the original Fifth Circuit opinion, and in his concurring opinion for the *en banc* court, *Graham* makes no such categorical mandate. In cases such as this one, where the court holds that the more explicit amendment is not applicable to the facts at hand, it is irrational to say that this is the only amendment that can apply. If the Fourth Amendment does not apply to cases like that of Hernandez, because of *Verdugo-Urdiquez*, “then it cannot provide ‘an explicit textual source of constitutional protection’ to persons in Hernández's position, and *Graham*'s directive to apply the Fourth Amendment . . . is simply inapt.”<sup>89</sup>

In *United States v. Lanier*,<sup>90</sup> the Supreme Court explicitly stated that *Graham v. Connor* does not require that all claims of abuse by government officials be brought under the Fourth Amendment, but rather “simply requires that *if* a constitutional claim is covered by a specific constitutional provision, such as the Fourth Amendment . . . the claim must be analyzed under the standard appropriate to that specific provision, not under the rubric of substantive due process.”<sup>91</sup> In *County of Sacramento v. Lewis*,<sup>92</sup> the Supreme Court applied the

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<sup>85</sup> *Hernandez v. United States*, 785 F.3d 117, 121 (2015) (“There are cases in which it is plain that a constitutional right is not clearly established but far from obvious whether in fact there is such a right.” (quoting *Pearson v. Callahan*, 555 U.S. 233, 237 (2009))).

<sup>86</sup> 490 U.S. 386 (1989).

<sup>87</sup> *See id.* at 395.

<sup>88</sup> *Hernandez*, 785 F.3d 117, 134 (Prado, J., concurring).

<sup>89</sup> *Id.*

<sup>90</sup> 520 U.S. 259 (1997).

<sup>91</sup> *Id.* at 272 n.7 (emphasis added).

<sup>92</sup> 523 U.S. 833 (1998).

ruling from *Lanier* in allowing a claim to be brought under the Due Process Clause of the Fifth Amendment, because the death of a civilian by a police officer had not taken place during a seizure, and thus could not be analyzed under the Fourth Amendment.<sup>93</sup> In *Hernandez*, because the court held that the constitutional claim is *not* covered by the Fourth Amendment, *Graham* does not control and the Fifth Amendment analysis should be allowed to continue.

In cross-border shooting cases, where federal court review is the only real opportunity plaintiffs have for redress, it is particularly inappropriate to use this type of catch-22 framework. Scholars have likewise noted the inherent contradiction in holding that Hernandez's claim must be analyzed under the Fourth Amendment, and yet that the Fourth Amendment does not even reach the situs of the injury. It is explained as follows:

The US government may not have its cake and eat it too. Either the [cross-border shooting] was a valid police action in terms of an investigatory stop because the United States was exercising de facto sovereignty at the border, and thus the Constitution should apply there . . . or it was not a seizure because there was no power to arrest, seize or stop the individual, and thus it becomes a question of not depriving an individual of life absent adequate due process. In either instance, the matter should be justiciable before a U.S. federal court.<sup>94</sup>

Part of the difficulty in a case like *Hernandez* is that its facts do not comfortably situate it within either Fourth or Fifth Amendment jurisprudence. In many ways it looks like a normal police shooting case, and yet the fact that the death took place abroad leads to an overly-complicated analysis under *Verdugo-Urdiquez*.

On the other hand, the line of cases that has most directly dealt with government killings abroad, and has used the Fifth Amendment's Due Process Clause to do so, also does not perfectly square with the facts of *Hernandez*. This line of cases has to do with the use of drones to kill suspected terrorists abroad. In these cases, courts have held that no one is being "seized" in the Fourth Amendment use of the word; since unmanned aerial drones perform the killing, and there is never an intention to detain or seize the person being killed. As such, these cases have proceeded under the Due Process Clause of the Fifth Amendment.<sup>95</sup> A suspected terrorist being targeted by the federal government, perhaps surprisingly, has more due process rights than a fifteen-year-old child in Mexico, since in the case of a

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<sup>93</sup> *Id.* at 843.

<sup>94</sup> Guinevere E. Moore & Robert T. Moore, *The Extraterritorial Application of the Fifth Amendment: A Need for Expanded Constitutional Protections*, 46 ST. MARY'S L.J. 1, 22 (2014).

<sup>95</sup> See, e.g., *Al-Aulaqi v. Panetta*, 35 F. Supp. 3d 56, 71 (2014) (holding that the plaintiff was not seized in the Fourth Amendment sense of the word, and so the claim should be analyzed under the Fifth Amendment).

drone killing, there are certain criteria the government must meet to satisfy due process.<sup>96</sup> Like *Hernandez*, these drone cases also involve the allegedly arbitrary deprivation of life by the Executive against a civilian of a friendly country. The process of identifying a suspect and ordering a drone strike, however, is obviously different than an officer shooting someone during a face-to-face interaction. In many ways, *Hernandez* looks more like a police shooting case than a drone strike case, and yet there is no clear jurisprudence to dictate how it should be analyzed.

For the remainder of this Comment, I will argue that in the context of these cross-border shootings, and extended executive nonmilitary action abroad generally, it is time to rethink the theories of the extraterritorial constitution. I will propose a purposive-oriented solution that would extend the Due Process Clause of the Fifth Amendment to cases like *Hernandez* and beyond.

#### IV. THEORIES OF CONSTITUTIONAL APPLICATION ABROAD

##### A. *Boumediene Fails to Provide a Theory of Constitutional Application Abroad*

As discussed above, *Boumediene* is the most recent Supreme Court case applying the Constitution abroad. *Boumediene* can be criticized both in its methodology and in its results, which are closely entwined. The functional test to decide whether a constitutional provision extends abroad takes into account (1) the citizenship of the detainee, (2) the nature of the site where detention took place, and (3) the practical obstacles inherent in extending the provision abroad.<sup>97</sup> This test, flexible in nature and ripe for manipulation, seems strange following a discussion about the fundamental structure of the Constitution and the separation of powers, which presumably would be implicated regardless of the factors present in a given scenario.<sup>98</sup> Moreover, in the usual course of constitutional analysis, pragmatic and policy concerns are rarely the “primary metric” for determining whether a right is applicable at all, but rather are applied in determining *how* the right will be applied and enforced.<sup>99</sup>

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<sup>96</sup> See Moore & Moore, *supra* note 94, at 17 (quoting Attorney General Eric Holder in explaining that a drone attack comports with due process when three elements are met: “the U.S. government has determined, after a thorough and careful review, that the individual poses an imminent threat . . . capture is not feasible; and . . . the operation would be . . . consistent with applicable law of war principles.”).

<sup>97</sup> *Boumediene v. Bush*, 553 U.S. 723, 766 (2008).

<sup>98</sup> See Jules Lobel, *Fundamental Norms, International Law, and the Extraterritorial Constitution*, 36 YALE J. INT’L L. 307, 317 (“Indeed, the Court’s three-factor functional test for determining the reach of the Suspension Clause virtually ignores the separation of powers concerns that purportedly were crucial to its analysis.”).

<sup>99</sup> See *id.* at 318 (“[P]ragmatic considerations normally enter constitutional analysis to determine how to apply and enforce a right, and not whether the right is applicable at all. [I]t is unusual for a court to use pragmatic, policy considerations as the primary metric for determining whether constitutional principles should be applicable . . .”).

From the results perspective, the functionally focused test, separated from core constitutional concerns, has led to doubt about the extent of *Boumediene*. Subsequent cases have reached results at odds with Justice Kennedy's constitutional concerns about separation of powers. A prominent example of *Boumediene*'s failings is the Executive's use of detention in other countries. Learning the lessons of *Boumediene*, the Executive has engaged in exactly the type of manipulation it was admonished against. It does this by holding prisoners not at Guantanamo, but at far-flung locations such as Afghanistan, where it is able to avoid any constitutional accountability.<sup>100</sup>

In the context of *Hernandez v. Mesa*, some have argued that *Boumediene* overrules *Verdugo-Urduquez* in generally extending the Constitution abroad,<sup>101</sup> and have argued that under the three-factor test, the Constitution should have effect at the Southwestern border.<sup>102</sup> The functional test from *Boumediene* is not a theory, however, and as we have seen from subsequent cases, it provides limited guidance for the future. The functional test has led and will lead to arbitrary results that will only increase the already unpredictable "mosaic" of extraterritorial constitutional application.

Moreover, the functional approach does not provide enough protection to confront the reality of extensive U.S. government activity abroad. Because of the second factor, it is limited to very strange "constitutional black holes"<sup>103</sup> like Guantanamo, or potentially the span of a few hundred feet on the southern side of the border.<sup>104</sup> With the U.S. government operating extraterritorially, including in nonmilitary capacities, to a degree never seen before, and certainly never anticipated by the Founders, a stronger and more cohesive constitutional theory is needed to address the rights of those brought into the long shadow of the government.

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<sup>100</sup> See *Maqaleh v. Gates*, 605 F.3d 84, 87 (D.C. Cir. 2010) (holding that the Suspension Clause does not extend to U.S. military detention sites at the Bagram Airfield in Afghanistan).

<sup>101</sup> See, e.g., Netta Rostein, Note, *Boumediene vs. Verdugo-Urduquez: The Battle for Control Over Extraterritoriality at the Southwestern Border*, 93 WASH. U.L. REV. 1371, 1392-93 (2016) (arguing that *Verdugo-Urduquez*'s formalistic test was incorporated as one of *Boumediene*'s factors).

<sup>102</sup> See generally Moore & Moore, *supra* note 94; Eva L. 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 (2014); Brittany Davidson, Note, *Shoot First, Ask Later: Constitutional Rights at the Border After Boumediene*, 64 AM. U.L. REV. 1547 (2015).

<sup>103</sup> See Philip Mayor, Note, *Borderline Constitutionalism: Reconstructing and Deconstructing Judicial Justifications for Constitutional Distortion in the Border Region*, 46 HARV. C.R.-C.L. L. REV. 647, 647 (2011) ("The United States border functions like a sort of constitutional black hole: the closer one gets to it, the more constitutional norms are bent and warped.").

<sup>104</sup> See Joseph C. Alfe, *Extraterritorial Constitutionalism: A Rule Proposed*, 50 J. MARSHALL L. REV. 787, 791-92 (2017) (proposing a rule that the Constitution applies only when there has been an unreasonable seizure under the Fourth Amendment in close proximity to or at a jointly-maintained U.S. Mexico Border area "as far as the bullet travels").



### B. A Survey of the Leading Theories

The leading theories as to whether and when the Constitution should apply abroad do not satisfactorily address the issues described above. I will focus on the theories expounded by Gerald L. Neuman, in his book *Strangers To The Constitution*<sup>105</sup> and his later article, *Whose Constitution?*<sup>106</sup> Each theory has found support from Supreme Court Justices in different cases. Because Justice Kennedy wrote *Boumediene*, based on his own concurring opinion in *Verdugo-Urduquez*, his theory, which Neuman calls “Global Due Process” might be seen as the leading theory right now, but there in no way is consensus throughout the courts or even among the current justices about which theory is superior.<sup>107</sup>

#### 1. Strict Territoriality

Strict territoriality is the idea that the Constitution extends as far as the U.S. border and no further. It is most exemplified by a case called *In re Ross*,<sup>108</sup> which denied constitutional rights to someone serving on an American ship in Japan, convicted of murdering an American.<sup>109</sup> For the period that strict territoriality held sway, it was rarely justified and was just accepted as the norm.<sup>110</sup> Since *Reid v. Covert*, strict territoriality has been repudiated<sup>111</sup> (and even before that, the *Insular Cases* introduced a more nuanced analysis through their discussion of fundamental rights). In *Reid*, the majority took the opportunity to note that *Ross* “cannot be understood except in its peculiar setting” and that “[a]t best, the *Ross* case should be left as a relic from a different era.”<sup>112</sup>

#### 2. Universalism

Universalism holds that the Constitution should be applicable to every person on earth “in all the contexts in which (the U.S. government) interacts with them; not just when it seeks to apply its law, but also when it exercises

<sup>105</sup> NEUMAN, *supra* note 11.

<sup>106</sup> Neuman, *supra* note 13.

<sup>107</sup> See NEUMAN, *supra* note 11, at 97 (“In the case of American constitutionalism, conflicting conceptions of geographical scope have led to serious indeterminacy in the modern period.”).

<sup>108</sup> 140 U.S. 453 (1891).

<sup>109</sup> See *id.* at 464 (“By the Constitution a government is . . . established ‘for the United States of America,’ and not for countries outside of their limits. The guarantees it affords . . . apply only to citizens and others within the United States . . . [t]he Constitution can have no operation in another country.”).

<sup>110</sup> Neuman, *supra* note 13, at 918.

<sup>111</sup> See Kermit Roosevelt III, *Guantanamo and the Conflict of Laws: Rasul and Beyond*, 153 U. PA. L. REV. 2017, 2044-45 (2005) (“[T]erritoriality suffered a crippling blow in *Reid v. Covert* . . .”).

<sup>112</sup> *Reid v. Covert*, 354 U.S. 1, 10-12 (1957).

military force against them or interacts consensually in a commercial or foreign aid context.”<sup>113</sup> Neuman identifies Justice Brennan’s dissent in *United States v. Verdugo-Urdiquez* as exemplifying this theory. In his dissent, Justice Brennan focused on natural rights, and the idea that it is not the Constitution that gives humans their rights; those rights already existed, and the Constitution operates merely to restrain government action from infringing on those rights.<sup>114</sup> Neuman criticizes universalism “on both historical and normative grounds.”<sup>115</sup> He argues that nothing in the history or text of the Constitution suggests that it was designed to bind the U.S. government to a world order.<sup>116</sup>

From a practical perspective, Universalism, in deciding that laws apply everywhere to everyone, without providing *why*, is “abdication, not analysis.”<sup>117</sup> It could be that in certain situations, applying a foreign government’s law, and not the Constitution, would serve to better restrain the U.S. Government.<sup>118</sup> It is also true that some parts of the Constitution make more sense to extend abroad than others. Universalism, and the natural rights ideas that imbue it, is a viable baseline from which to begin constitutional analysis. But it cannot replace the analysis itself.

### 3. Membership

Membership theory holds that constitutional rights depend on a contract between the governed and the governors. Neuman identifies Chief Justice Rehnquist’s majority opinion in *Verdugo-Urdiquez* as exemplifying this, in that it required voluntary ties from aliens in order for them to benefit from constitutional protections. This theory simply does not work for all constitutional provisions, however, many of which are not defined by who they apply to, such as the Equal Protection Clause of the Fourteenth Amendment, which protects everyone within U.S. territory regardless of citizenship status.<sup>119</sup> This also ignores the natural law arguments, cited in the Brennan

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<sup>113</sup> NEUMAN, *supra* note 11, at 110.

<sup>114</sup> See *United States v. Verdugo-Urquidez*, 494 U.S. 259, 288 (1990) (“[T]he Framers of the Bill of Rights did not purport to ‘create’ rights. Rather, they designed the Bill of Rights to prohibit our Government from infringing rights and liberties presumed to be pre-existing.”).

<sup>115</sup> See NEUMAN, *supra* note 11, at 110.

<sup>116</sup> *Id.*

<sup>117</sup> Roosevelt, *supra* note 111, at 2043.

<sup>118</sup> See, e.g., Anna Su, *Speech Beyond Borders: Extraterritoriality and the First Amendment*, 67 VAND. L. REV. 1373, 1378 (2014) (arguing that while the First Amendment could properly be extended abroad in some contexts, such as in using free speech principles to constrain U.S. government action, there are other contexts in which it would be an exercise of “cultural imperialism” to do so, such as “claiming its benefit in opposing foreign libel judgments that were obtained under laws that do not approximate First Amendment protections.”).

<sup>119</sup> See, e.g., *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886) (explaining that the Fourteenth Amendment “is not confined to the protection of citizens” and its provisions “are universal in their application”).

*Verdugo-Urduquez* dissent, that the Bill of Rights does not give individuals their rights, but rather tells the government what it can and cannot do.

#### 4. Municipality

Municipality is Neuman's preferred theory, and holds that constitutional rights apply in three contexts: "(i) [W]ithin United States territory, to all persons, (ii) to citizens of the United States everywhere in the world, and (iii) to aliens outside United States territory *only* in those circumstances in which the United States seeks to impose obligations upon them under United States law."<sup>120</sup> The *Reid v. Covert* plurality embodies this theory, in holding that U.S. citizens have constitutional rights no matter where they are in the world.<sup>121</sup> This theory is also embodied by Justice Blackmun's dissent in *Verdugo-Urduquez*, where he wrote that once a foreign national is being punished for violations of U.S. law, he is now one of "the governed" and falls within the ambit of the Fourth Amendment.<sup>122</sup> While an attractive model, it rests on the assumption that the government's powers operate identically domestically and abroad. Centuries of jurisprudence have held the opposite—that a general power in foreign affairs derives from ideas of "sovereignty" and is distinct from the enumerated powers operating domestically.<sup>123</sup>

#### 5. Global Due Process

Global Due Process has been described as "harmless universalism."<sup>124</sup> Rather than apply all constitutional rights abroad, one would "recognize constitutional rights as potentially applicable worldwide, and then balance them away."<sup>125</sup> This could be done either on an ad hoc basis, or more categorically. The ultimate idea is that all extraterritorial constitutional rights "boil down" to the right of procedural due process.<sup>126</sup>

Global Due Process is essentially what Justice Kennedy advocated in his concurring opinion in *Verdugo-Urduquez*, where he proposed a balancing test: apply

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<sup>120</sup> See Neuman, *supra* note 13, at 919.

<sup>121</sup> *Reid v. Covert*, 354 U.S. 1, 18-19 (1980) ("[T]he Constitution in its entirety applied to the trials of Mrs. Smith and Mrs. Covert.").

<sup>122</sup> *United States v. Verdugo-Urquidez*, 494 U.S. 259, 297 (1990) ("[T]he enforcement of domestic criminal law seems to me to be the paradigmatic exercise of sovereignty over those who are compelled to obey.") (Blackmun, J., dissenting).

<sup>123</sup> See Roosevelt, *supra* note 111, at 2050-51 (discussing the problems with this theory and the Supreme Court precedent on general foreign affairs powers including *United States v. Curtiss-Wright Export Corp.*).

<sup>124</sup> Neuman, *supra* note 13, at 920.

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

the constitutional provision, unless it is too “impracticable and anomalous.”<sup>127</sup> The three-factor test Justice Kennedy developed in *Boumediene* has different considerations than the *Verdugo-Urdiquez* test.<sup>128</sup> Ultimately, however, both these tests are doing the type of balancing from Global Due Process.

The problems with Global Due Process are also the problems in the Kennedy-style balancing embodied in *Boumediene*. This approach “embodies judicial discretion to reject” potentially applicable constitutional rights, and “[t]he precise content of this standard cannot presently be specified.”<sup>129</sup>

As elaborated by Justice Kennedy, this approach focuses on the practical consequences for the U.S. government of applying certain constitutional provisions. The individual rights of the Constitution were not written, however, to accommodate the convenience of the government as to if and when they might have to be respected. Neuman wrote, over twenty years ago, that the Global Due Process approach could create incentives for the U.S. government to undertake certain actions abroad, where it will be less accountable.<sup>130</sup> This has obviously been borne to fruition—from Guantanamo, to the use of sites like the Bagram Airfield in Afghanistan.<sup>131</sup> Even in cross-border shooting cases, it is important for the U.S. government to show that the bullet actually entered the child’s body on the Mexican, rather than on U.S. soil.<sup>132</sup> The difference of sixty feet is what gives an officer impunity rather than liability, thanks to the balancing away of rights that comes when we start looking at the Constitution this way.<sup>133</sup> The existence of constitutional rights begins to look more like the judicial branch’s accommodation of political compromise, and less like an inquiry into principles of constitutional interpretation.<sup>134</sup> The result is an “unwritten constitution with a vengeance” that courts are ill-suited to apply.<sup>135</sup>

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<sup>127</sup> *Verdugo-Urdiquez*, 494 U.S. at 278.

<sup>128</sup> *Boumediene v. Bush*, 553 U.S. 723, 766 (2008) (“(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.”).

<sup>129</sup> NEUMAN, *supra* note 11, at 114.

<sup>130</sup> *Id.* at 115.

<sup>131</sup> See *Maqaleh v. Gates*, 605 F.3d 84, 99 (D.C. Cir. 2010) (holding that the Suspension Clause does not extend to aliens held by the Executive at Bagram.).

<sup>132</sup> See *Rodriguez v. Swartz*, 111 F. Supp. 3d 1025, 1033 (2015) (holding that the decedent was not seized when Swartz shot at him, but when the bullets entered his body, and “[a]s such, any constitutional violation that may have transpired materialized in Mexico”).

<sup>133</sup> See NEUMAN, *supra* note 11, at 116 (“[T]he global due process approach is asking the wrong question: the Court should not be inquiring as to which restraints present problems of practicality, but rather as to which rights a government must respect in order to justify its claim to obedience.”).

<sup>134</sup> *Id.*

<sup>135</sup> *Id.* at 117. (“It is hard to see why the justices would think that this task has been assigned to them or that they could perform it well.”).

Advocates for those abroad might see some due process as better than none.<sup>136</sup> This is what is done when they argue that the three-factor test from *Boumediene* should apply to the border.<sup>137</sup> On this one narrow strip of land, then, maybe one day the justices will find that there is enough control of the land to end categorical exclusion of children to constitutional protections from law enforcement officers.<sup>138</sup>

## V. CONFLICT OF LAWS APPROACH

But rather than the *ad hoc* functionalist approach, which will inevitably lead to arbitrary results and government manipulation, we should instead look at the purpose of the constitutional provision to determine its applicability abroad. We can accomplish this using Interest Analysis, through the conflict of laws perspective. Interest analysis is better than the previously described theories, because it addresses the fairness, purpose, and practicability concerns of all these theories by focusing on the purpose of a constitutional provision and the results of its application in a specific circumstance.

Conflict of laws has some analogies to the extraterritorial constitutional enterprise; over the course of the twentieth century, it has moved from formalism to functionalism,<sup>139</sup> and it also lacks a clear and cohesive uniting theory.<sup>140</sup>

### A. Territoriality/Vested Rights Approach

In the earliest version of choice-of-law theory, courts made decisions purely based on territoriality, while ignoring the content of the laws they were choosing between.<sup>141</sup> The vested-rights/territorial approach, and its inherent problems, are shown by the case of *Alabama Great Southern Railroad Co. v. Carroll*.<sup>142</sup> In this case, an Alabama worker employed by an Alabama railroad

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<sup>136</sup> *Id.* at 116 (“Advocates who consider half a loaf better than none may accept it.”).

<sup>137</sup> I believe this is what authors like Bitran and Moore are doing when they argue that the *Boumediene* framework applies at the border; it is an imperfect framework, but even so, it should apply to this highly unusual geographic location. It was also the analysis relied upon by the Ninth Circuit in *Rodriguez*.

<sup>138</sup> De facto control of land is a critical factor under the second factor from *Boumediene*, which looks at “the nature of the sites where apprehension and then detention took place”. See *Boumediene*, 533 U.S. at 766.

<sup>139</sup> See generally Roosevelt, *supra* note, 111 (tracking the history of the extraterritorial application of the Constitution, and the history of conflict of laws methodology).

<sup>140</sup> See Kermit Roosevelt, *Annual Brainerd Currie Lecture: Brainerd Currie’s Contribution to Choice of Law: Looking Back, Looking Forward*, 65 MERCER L. REV. 501, 502 (2014) (“Many people think choice of law is a mess.”).

<sup>141</sup> *Id.* at 503 (“The law of that place creates rights—it vests them in the appropriate parties . . . theory is often called the vested-rights approach.”).

<sup>142</sup> 97 Ala. 126 (1893).

was injured while passing through the state of Mississippi.<sup>143</sup> Mississippi's only connection to the case was as the situs of where the injury occurred. Nevertheless, under a territorial perspective, the Alabama court held that Mississippi law applied, which was less protective of workers than Alabama law, and the worker was thus barred from recovery.<sup>144</sup> The decision is criticized for displaying how a person can arbitrarily be deprived of his rights. Instead of giving weight to the fact that an Alabama law was written for the purpose of protecting Alabama workers employed by Alabama companies, the mere location of the injury controlled.<sup>145</sup> This territorial approach to conflicts of laws has largely faded away,<sup>146</sup> and yet in a case like *Hernandez v. Mesa*, we can see the arbitrary results dictated by location of injury arise again. In *Hernandez*, each court had to address the location of the injury, acknowledging the fact that Mesa stood in the United States when he fired the shots, and was separated by mere feet from the supposed end of U.S. jurisdiction.<sup>147</sup> The notion that constitutional rights designed to protect everyone, citizen and noncitizen alike, from executive government action would apply on one end of a sixty foot spectrum and not the other, is just as arbitrary as the much criticized and now dismissed logic of the *Alabama* case.<sup>148</sup>

### B. *The Second Restatement*

The Second Restatement of the Conflict of Laws has moved toward a more functionalist approach than the early vested-rights/territorial approach. The Restatement provides seven factors that courts should consider in choosing the applicable law:

- (a) the needs of the interstate and international systems, (b) the relevant policies of the forum, (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue, (d) the protection of justified expectations, (e) the basic policies underlying the particular field of law, (f) certainty, predictability and

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<sup>143</sup> *Id.* at 127.

<sup>144</sup> *Id.* at 140.

<sup>145</sup> See Patrick J. Borchers, *Legal Developments: The Return of Territorialism to New York's Conflicts Law: Padula v. Lilarn Properties Corp.*, 58 ALB. L. REV. 775, 785 (1995) (describing the "deficiencies" of a purely territorial approach, with the "inevitable result" of "a serious misjustice").

<sup>146</sup> See Michael S. Green, *The Return of the Unprovided-for Case*, 51 GA. L. REV. 763, 765 (2017) ("Although dominant in the late nineteenth and early twentieth centuries, [the vested rights approach] is now retained by only around ten states.").

<sup>147</sup> *Hernandez*, 757 F.3d 249, 269 (stating that Mesa stood in the United States when he fired the shots).

<sup>148</sup> See Eva Bitran, *supra* note 11, at 251 (noting that CBP agents cannot shoot someone in the United States without consequences, and how strange it would be if the Constitution did "not govern identical conduct by a border agent, simply because the victim was a few feet over the territorial boundary").

uniformity of result, and (g) ease in the determination and application of the law to be applied.<sup>149</sup>

The Second Restatement suffers from the same problems as, and is in many ways analogous to, the Global Due Process theory, and therefore with the functional test from *Boumediene*. The Second Restatement “lacks an underlying theory” and these seven factors (much like the three factors of *Boumediene*) leave courts to “grapple with the Section 6 factors on an ad hoc and intuitive basis.”<sup>150</sup>

The problem with this approach as applied to *Hernandez v. Mesa*, is that the factors address priority (which of two laws should take precedence), but not scope (how far any given law extends). The *Hernandez* court does not need to ask about whether Mexican or U.S. law applies. Indeed, by refusing to extradite, the United States has not even allowed that possibility. We are simply asking what the scope is of what we know to be the applicable law: the U.S. Constitution. The Second Restatement cannot provide a guiding theory to give this field any more predictability or coherence than already exists post-*Boumediene*.

### C. *Interest Analysis*

In contrast to the other approaches that make the substance of the laws secondary, interest analysis, now the leading approach,<sup>151</sup> puts substance and policy “center stage.”<sup>152</sup> Under this analysis, “court[s] should determine what policy a law was enacted to achieve in wholly domestic cases, and . . . whether its application to a case with foreign elements will promote its domestic purpose.”<sup>153</sup> Unlike the Second Restatement, interest analysis allows us to consider the scope of a single law. Decisions about scope are “made in a way that advances the purposes” of the law in question.<sup>154</sup> In order to decide the purpose of a provision, and whether it should apply in any given situation, the courts should engage in standard statutory interpretation and the decision should be made the same way as any other legal decision.<sup>155</sup> This means that interest analysis, unlike the theories considered above, actually engages in

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<sup>149</sup> RESTATEMENT SECOND CONFLICT OF LAWS § 6 (AM. L. INST. 1969)

<sup>150</sup> KERMIT ROOSEVELT, CONFLICT OF LAWS 85 (2d ed. 2015).

<sup>151</sup> See Green, *supra* note 146, at 770 (“[F]orty states, as well as the District of Columbia, have adopted some form of . . . interest analysis . . . [t]o find out whether a jurisdiction’s officials have chosen to extend their law to the facts of a conflicts case.”).

<sup>152</sup> Roosevelt, *supra* note 140, at 507.

<sup>153</sup> Roosevelt, *supra*, note 111, at 2065.

<sup>154</sup> See Jeffrey M. Shaman, *The Vicissitudes of Choice of Law: The Restatement (First, Second) and Interest Analysis*, 45 BUFF. L. REV. 329, 336 (1997).

<sup>155</sup> *Id.* at 349-50 (explaining how “interest analysis brings nothing more than the standard method of modern legal interpretation to choice of law”).

constitutional interpretation by considering the substance, context and purpose of the law at issue.

D. *Application of Interest Analysis to Hernandez v. Mesa*

Under interest analysis, we need to look at the domestic purpose of the constitutional provision at issue and ask whether that purpose would be served by extending the provision abroad.

The Due Process Clause of the Fifth Amendment holds that “No person shall . . . be deprived of life, liberty, or property, without due process of law.”<sup>156</sup> It is widely accepted that the use of the word “person” connotes a broad reading, applicable to citizens and noncitizens alike, and so within the United States, there is no question that the this clause applies to noncitizens.<sup>157</sup> Knowing that the power of the Due Process Clause does not diminish within the United States depending on whom the executive action is directed against, interest analysis would have us ask why that purpose of the constitutional provision suddenly switches off once we move beyond the U.S. border? If we, via the Constitution, are interested in keeping the Executive from arbitrarily killing someone, why would sixty feet of distance differentiate between behavior we restrain and behavior we do not? If we are interested in an Executive that in general is held accountable for arbitrary killings, then the purpose behind the Clause is served by enforcing that accountability no matter where the Executive acts.<sup>158</sup>

The core of the Due Process Clause is to “secure the individual from the arbitrary exercise of the powers of government.”<sup>159</sup> This remains true whether that arbitrariness is caused by a lack of procedure (procedural due process) or by executive action that is so unjustified as to “shock[] the conscience,” also called substantive due process.<sup>160</sup> By requiring that the Executive adhere to

<sup>156</sup> U.S. CONST. amend. V.

<sup>157</sup> See, e.g., *Wong Wing v. United States*, 163 U.S. 228, 242, (1896) (“The term ‘person,’ used in the [F]ifth [A]mendment, is broad enough to include any and every human being within the jurisdiction of the republic . . . . This has been decided so often that the point does not require argument.”) (citations omitted); see also Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 YALE L.J. 1672, 1721 (2012) (“The Fifth Amendment is silent about whom it prohibits from depriving rights ‘without due process of law.’ The passive voice suggests that the Amendment is not limited as to ‘who,’ but only as to ‘what.’”); Major David C. Collver, *Judging Alleged Terrorists: Applying the Fifth Amendment’s Due Process Clause to Lethal Deliberate Targeting*, 223 MIL. L. REV. 897, 912 (“The Fifth Amendment uses the term ‘person,’ instead of ‘citizen’ or ‘the people,’ and it means something different from those two latter terms.”).

<sup>158</sup> This is especially true (1) in close geographic proximity to the United States and (2) when the action is carried out by a nonmilitary, domestic police force that is not engaged in any act of war.

<sup>159</sup> *County of Sacramento v. Lewis*, 523 U.S. 833, 845 (1998). See also Collver, *supra* note 157, at 899-900 (“Nowhere is killing by executive whim so clearly confronted as in the Fifth Amendment, which mandates that the federal government provide due process before depriving any person of life.”).

<sup>160</sup> *Lewis*, 523 U.S. at 846.



the procedural and substantive requirements of the Clause, fair decisions are more likely to be promoted, and the Executive is kept from “being used for purposes of oppression.”<sup>161</sup> The concept of Due Process and its purpose to restrain executive action dates back to Magna Carta.<sup>162</sup>

Within U.S. territory, citizens and noncitizens alike are entitled to the protections of the Due Process Clause.<sup>163</sup> Procedural due process requirements follow the familiar three factor test from *Mathews v. Eldridge*,<sup>164</sup> and substantive due process claims are examined under the “shock the conscience” test.<sup>165</sup> Both these analyses are highly context specific, and allow a wide deference to the executive actor.<sup>166</sup> While in the administrative immigration context, the *Mathews v. Eldridge* test leads to relaxed procedural requirements,<sup>167</sup> it has not seriously been debated that noncitizens are entitled to Due Process since at least 1896.<sup>168</sup>

Knowing that citizenship does not matter for purposes of the Due Process Clause, the question then becomes why there should be a territorial boundary on restraining arbitrary government action. In *Boumediene v. Bush*, the Court spoke of the dangers that would flow from defining the scope of constitutional rights solely based on formal sovereignty of a territory. To allow constitutional rights to change depending on whether the land was controlled by the United States or not would be to give the political branches “the power

<sup>161</sup> *Daniels v. Williams*, 474 U.S. 327, 331 (1986) (internal quotations omitted).

<sup>162</sup> *Id.* (explaining the “traditional and common-sense notion that the Due Process Clause, like its forebear in the Magna Carta . . . was ‘intended to secure the individual from the arbitrary exercise of the powers of government’”); see also Edward S. Corwin, *The Doctrine of Due Process of Law Before the Civil War*, 24 HARV. L. REV. 366, 368 (1911) (tracing the history of the Due Process Clause to Magna Carta).

<sup>163</sup> See *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001) (“[O]nce an alien enters the country . . . the Due Process Clause applies to all ‘persons’ within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent.”); *Mathews v. Diaz*, 426 U.S. 67, 77 (1976) (“Even (an alien) whose presence in this country is unlawful, involuntary, or transitory is entitled to that constitutional protection.”).

<sup>164</sup> 494 U.S. 319, 335 (1975) (requiring consideration of “the private interest that will be affected by the official action,” “the risk of an erroneous deprivation of such interest through the procedures used,” and “the Government’s interest, including the . . . burdens that the additional or substitute procedural requirement would entail.”).

<sup>165</sup> *Rochin v. California*, 342 U.S. 165, 172 (1952).

<sup>166</sup> See *Al-Aulaqi v. Panetta*, 35 F. Supp. 3d 56, 72-73 (D.D.C. 2014) (“Conduct that ‘shocks in one environment may not be so patently egregious in another,’” and the “concern with preserving the constitutional proportions of substantive due process demands an exact analysis of circumstances before any abuse of power is condemned as conscience shocking.”).

<sup>167</sup> See *Diaz*, 426 U.S. at 77-79 (“The fact that all persons, aliens and citizens alike, are protected by the Due Process Clause does not lead to the further conclusion that all aliens are entitled to enjoy all the advantages of citizenship. . . .”).

<sup>168</sup> See *Wong Wing*, *supra* note 157. See also *United States ex rel. Vajtauer v. Comm’r of Immigration*, 273 U.S. 103, 106 (1927) (“Deportation without a fair hearing or on charges unsupported by any evidence is a denial of due process. . . .”).

to switch the Constitution on or off at will.”<sup>169</sup> In *Boumediene*, the provision at issue, the Suspension Clause, was also designed in order to restrain the executive. As such, the Court wrote that “the test for determining the scope of this provision must not be subject to manipulation by those whose power it is designed to restrain.”<sup>170</sup> These words of warning ring just as true for the Due Process Clause. The Fifth Amendment is essential in maintaining the separation of powers and preventing an unrestrained, oppressive executive.<sup>171</sup> To allow it to be “switched on and off” because a bullet entered a body sixty feet from the end of formal sovereignty is a perversion of its purpose. It is exactly the manipulation that *Boumediene* warned of and that we have seen time and time again since that decision.

Our domestic interest in a restrained executive is served by restraining arbitrary action wherever it takes place. Agents in these cross-border shooting cases have no idea whether they are shooting a U.S. citizen or not when they so quickly fire their weapons.<sup>172</sup> It is antithetical to the purpose of the Fifth Amendment that their entire legal liability should depend on their “luck” that the person they killed was sixty feet away and not a U.S. citizen.<sup>173</sup>

Those who favor a territorial Constitution often warn of the unspeakable liability that could be created by extending the Constitution abroad. The United States government is active across the globe, and they claim that the floodgates would open if we allow everyone who interacts with our government to share in our constitutional protections. Where the United States has taken some sort of positive action against a foreign citizen, however, it seems that constitutional rights must be the “unavoidable correlative” of the government’s power to enforce laws in the first place.<sup>174</sup>

If we, as U.S. citizens, wish to be governed by the type of restrained, limited government envisioned by the Founders, there must be constraints on that government in any action it takes. Even recent history can show us the ways that U.S. citizens are harmed when the executive is given *carte blanche* to act abroad.<sup>175</sup> We see time and time again that what the

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<sup>169</sup> *Boumediene v. Bush*, 553 U.S. 723, 765 (2008).

<sup>170</sup> *Id.* at 765-66.

<sup>171</sup> This is especially true in cases where the Executive effectively prevents other recourse, as described above.

<sup>172</sup> See *Rodriguez v. Swartz*, 111 F. Supp. 3d 1025, 1028-29 (2015) (describing how the agent opened fire on the minor child, on the other side of a twenty foot wall, at night, with no visual on who he was killing).

<sup>173</sup> See Roosevelt, *supra* note 108, at 2068 (“The United States government . . . is the agent of the people, and it wields in our name the powers we have seen fit to give it. . . . Did we unleash upon the world an agent with no obligation to respect even the most basic rights of our alien friends?”).

<sup>174</sup> *United States v. Verdugo-Urquidez*, 494 U.S. 259, 282 (1990) (Brennan, J., dissenting).

<sup>175</sup> See, e.g., *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (Striking down the U.S. Government’s attempts to indefinitely hold a U.S. citizen on U.S. soil with no due process or habeas).

government does “to aliens today provides a precedent for what can and will be done to citizens tomorrow.”<sup>176</sup>

Moreover, the Due Process Clause is flexible enough to account for context; demanding that the executive adhere to its standards is the minimum we should be able to expect from a government that is “entirely a creature of the Constitution.”<sup>177</sup>

Because the purpose of the Due Process Clause is served domestically by restraining arbitrary executive action full stop, interest analysis holds that the Clause should apply abroad.

#### CONCLUSION

Interest analysis, unlike the *Boumediene* test, would extend the scope of the Fifth Amendment beyond the strange “constitutional black hole” of the Southwestern Border. It would create predictability and eliminate the arbitrary and inconsistent results that have stemmed from that case. Unlike other theories, interest analysis engages in constitutional interpretation in deciding which provisions apply abroad based on their purpose, without bowing to the practical and political concerns that have no rightful place in constitutional theory.

It is federal courts that are responsible for ensuring justice for victims’ families in these cases. As the Executive increases its activities at the border and beyond, we must recognize the inadequacy of the precedent up to this date, and make a thoughtful inquiry into what we, as U.S. citizens, demand and expect from our government. By using interest analysis and examining the domestic purpose of our Constitution, we can ensure that grave miscarriages of justice, like that imposed on the Hernandez family, do not continue.

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<sup>176</sup> David Cole, *Their Liberties, Our Security: Democracy and Double Standards*, 31 INT’L J. LEGAL INFO. 290, 304 (2003).

<sup>177</sup> Reid v. Covert, 354 U.S. 1, 5-6 (1957).

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