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Hard Cases Make Bad Law: Extraterritorial Application of the United States Constitution

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ABSTRACT

The Constitution's extraterritorial scope does not arise often in litigation. Two recent decisions broached the issue. Both arrived at opposite conclusions. And these decisions share a common thread: They confuse more than they clarify while begetting novel questions of law. Does the Constitution protect noncitizens abroad? If so, how? If not, why not? This Note addresses each of these questions in turn. Ultimately, this Note concludes that the Constitution does not have any extraterritorial application whatsoever to noncitizens abroad.

I. INTRODUCTION

Today, courts are conflicted about the Constitution's application to noncitizens in extraterritorial disputes.[1] Although the Supreme Court has made

[1] *Compare* Rodriguez v. Swartz, 899 F.3d 719 (9th Cir. 2018) (holding that the Fourth Amendment protects noncitizens who lack any substantial ties to the United States), *petition for*

clear that "certain constitutional protections" do not reach noncitizens abroad,[2] it has not (recently) held that constitutional protections are *wholly* unavailable.[3] This judicial indecisiveness—though seemingly innocuous—proved immensely consequential in two recent cases.[4]

In *Hernandez v. Mesa*,[5] the Fifth Circuit tacitly held that a noncitizen who resides abroad cannot claim Fourth Amendment protection.[6] Soon after, the Ninth Circuit reached the opposite conclusion in *Rodriguez v. Swartz*.[7] Surprisingly, these courts arrived at their conflicting conclusions based upon indistinguishable facts: Both cases involved tragic cross-border shootings where Border Patrol agents (on U.S. soil) killed Mexican nationals (on Mexican soil).

Since *Hernandez* and *Rodriguez* both involved "Mexican citizen[s] with no ties to [the United States],…the very existence of any 'constitutional' right

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cert. pending, No. 18-309, *with* Hernandez v. Mesa, 885 F.3d 811 (5th Cir. 2018) (en banc) (holding that the Fourth Amendment does not protect a noncitizen who lacks any substantial ties to the United States), *cert. granted*, 139 S. Ct. 2636 (2019). The Solicitor General filed briefs in both cases. Brief for the United States as Amicus Curiae, Swartz v. Rodriguez, 139 S. Ct. 445 (2018); Hernandez v. Mesa, 139 S. Ct. 306 (U.S. Apr. 11, 2019) (No. 17-1678), 2019 WL 1579640.

2 Zadvydas v. Davis, 533 U.S. 678, 693 (2001).

3 *See, e.g.*, *Hernandez*, 885 F.3d at 817 (noting the lack of "direct judicial guidance concerning the extraterritorial scope of the Constitution and its potential application to foreign citizens on foreign soil"). *But see* United States v. Verdugo-Urquidez, 494 U.S. 259, 261 (1990) ("The question presented . . . is whether the Fourth Amendment applies to . . . a nonresident alien . . . in a foreign country. We hold that it does not."); United States v. Meza-Rodriguez, 798 F.3d 664, 670 (7th Cir. 2015) ("For Fourth Amendment rights to attach, the alien must show 'substantial connections' with the United States."); United States v. Ali, 71 M.J. 256, 268 (C.A.A.F. 2012) ("Ultimately, we are unwilling to extend constitutional protections granted by the Fifth and Sixth Amendments to a noncitizen who is neither present within the sovereign territory of the United States nor established any substantial connections to the United States."); Kiyemba v. Obama, 555 F.3d 1022, 1026 (D.C. Cir. 2009) ("[T]he due process clause does not apply to aliens without property or presence in the sovereign territory of the United States."); Atamirzayeva v. United States, 524 F.3d 1320, 1322 (Fed. Cir. 2008) ("The Supreme Court has long taken the view that the Constitution is subject to territorial limitations."); *In re* Terrorist Bombings of U.S. Embassies in E. Africa, 552 F.3d 157, 168 (2d Cir. 2008) ("[T]he Fourth Amendment affords no protection to aliens searched by U.S. officials outside of our borders."); United States v. Bravo, 489 F.3d 1, 8 (1st Cir. 2007) ("[T]he Fourth Amendment does not apply to activities of the United States against aliens in international waters.").

4 *Compare Rodriguez*, 899 F.3d at 752–53 (Smith, J., dissenting) ("[N]o court has previously extended *Bivens* to cases involving either the extraterritorial application of constitutional protections or in the national security domain, let alone a case implicating both." (citations omitted)), *with Hernandez*, 885 F.3d at 817 ("There has been no direct judicial guidance concerning the extraterritorial scope of the Constitution and its potential application to foreign citizens on foreign soil.").

5 885 F.3d 811 (5th Cir. 2018).

6 *Id.* at 817.

7 899 F.3d 719 (9th Cir. 2018).

benefitting [them] raises novel and disputed issues."[8] And from these cases, a legal paradox arose: "[A]n alien injured on Mexican soil by a Border Patrol agent shooting from Texas lacks recourse . . . [while] an alien injured . . . by an agent shooting from California or Arizona may sue for damages."[9]

To resolve the paradox—and to prevent similar ones from arising— this Note takes aim at its sole precondition: judicial uncertainty about the Constitution's extraterritorial scope.[10] This Note contends that the Constitution has no extraterritorial application whatsoever to noncitizens residing abroad (save for rare and peculiar circumstances[11]). This position finds its support in constitutional text, history, and law.[12] Indeed, the position is implicit in the very word *constitution*.[13]

At the outset, however, it is important to distinguish between what this Note is and what it is not. This Note is descriptive, not prescriptive. It describes what the law is and makes no prescriptive claims about what the law should be. This Note intends to resolve a disputed legal issue by relying on precedent—not by proposing new law.

That said, this Note is not entirely devoid of prescription. It echoes William Blackstone's view[14] that courts must *apply* the law (defects and all).[15] As such, courts should not supplant inadequate law with more inadequate law. Nor should they distort existing law to reach conclusions they deem desirable. The judiciary does not pronounce new law; it maintains and expounds the old.[16] This restraint incentivizes legislative action that fosters meaningful change. And those who write the laws—not those who interpret them—tend to be better equipped to make policy decisions.[17]

This Note proceeds in three parts. First, Part II provides an overview of the competing perspectives in constitutional extraterritoriality.[18] Second, Part III

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8 *Hernandez*, 885 F.3d at 817.

9 *Rodriguez*, 899 F.3d at 758 (Smith, J., dissenting).

10 *Hernandez*, 885 F.3d at 817 (noting the lack of "direct judicial guidance concerning the extraterritorial scope of the Constitution and its potential application to foreign citizens on foreign soil").

11 Boumediene v. Bush, 553 U.S. 723, 724 (2008) (holding that the Suspension Clause had full legal force at Guantanamo Bay because the United States was the area's de jure sovereign).

12 *See infra* Section III.B.

13 *See infra* Section IV.B.1.i.

14 1 WILLIAM BLACKSTONE, COMMENTARIES *69.

15 *See infra* Part III.

16 1 BLACKSTONE, *supra* note 14.

17 Ziglar v. Abbasi, 137 S. Ct. 1843, 1857 (2017) (quoting Bush v. Lucas, 462 U.S. 367, 380 (1983)).

18 *See infra* Section II.A (describing the Traditional Perspective of constitutional extraterritoriality); *infra* Section II.B (describing the Contemporary Perspective of constitutional extraterritoriality).

traces the origins of the *Hernandez–Rodriguez* paradox. Finally, Part IV explains why the Court must reaffirm Traditional-Perspective precedent to resolve the *Hernandez–Rodriguez* paradox.

Because "[a]ny one setting out to dispute anything ought . . . to begin by saying what he does not dispute,"[19] a disclaimer seems justified: This Note's only concern is the *extraterritorial scope* of the Constitution; this Note *does not dispute* that noncitizens residing in the United States have constitutional rights.

II. THE EXTRATERRITORIAL SCOPE OF A NATIONAL DOCUMENT

Historically, neither courts nor commentators gave much thought to the Constitution's extraterritorial scope.[20] Today, opinions on the subject abound.[21] Yet consensus dictates that noncitizens' constitutional rights have traditionally stopped at the borders.[22] And in the realm of constitutional extraterritoriality, the devil is *not* in the detail. The entire debate boils down to a single question: Does the Constitution apply to noncitizens abroad?

To answer this question, this Part posits two views of constitutional extraterritoriality.[23] One perspective (the "Traditional Perspective") maintains that the Constitution has no extraterritorial application to noncitizens abroad; the other perspective (the "Contemporary Perspective") relies upon the facts of particular cases to determine whether the Constitution should apply.[24] Although these respective labels—"Traditional" and "Contemporary"—carry temporal

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19 G.K. CHESTERTON, ORTHODOXY 3 (Image Books 1959) (1908).

20 The Supreme Court did not even consider the issue until 1891. *See* Ross v. McIntyre (*In re* Ross), 140 U.S. 453, 463 (1891) (rejecting the petitioner's contention that "the same protection and guaranty against an undue accusation or an unfair trial secured by the constitution to citizens of the United States at home should be enjoyed by them abroad"). And subsequent decisions remarked on how infrequently the topic arose. *See, e.g.*, Johnson v. Eisentrager, 339 U.S. 763, 784 (1950) ("Such extraterritorial application of organic law would have been so significant an innovation in the practice of governments that, if intended or apprehended, it could scarcely have failed to excite contemporary comment. Not one word can be cited. No decision of this Court supports such a view. None of the learned commentators on our Constitution has even hinted at it. The practice of every modern government is opposed to it." (citations omitted)).

21 *See, e.g.*, Shawn E. Fields, *From Guantánamo to Syria: The Extraterritorial Constitution in the Age of "Extreme Vetting"*, 39 CARDOZO L. REV. 1123, 1151 (2018); Earl M. Maltz, *The Constitution and the Trump Travel Ban*, 22 LEWIS & CLARK L. REV. 391 (2018); Jules Lobel, *Fundamental Norms, International Law, and the Extraterritorial Constitution*, 36 YALE J. INT'L L. 307 (2011).

22 Nathan S. Chapman, *Due Process Abroad*, 112 NW. U. L. REV. 377, 380–81 (2017).

23 *See infra* Section II.A (outlining the Traditional Perspective); *infra* Section II.B (outlining the Contemporary Perspective).

24 *See infra* Section II.A; *infra* Section II.B.

connotations, neither should be understood to reference a specific time period: Courts actively express both views today.[25]

Below, Section II.A examines the Traditional Perspective. This view holds that the Constitution does not apply to noncitizens abroad.[26] Section II.B explores the Contemporary Perspective. This view maintains that courts should undertake case-by-case analyses when determining the scope of constitutional extraterritoriality.[27] And Section II.C discusses cases that unsuccessfully sought to reconcile the Traditional and Contemporary perspectives.

A. The Traditional Perspective

Ever since nation-states arose, they "have avoided subjecting people to conflicting laws (and disrupting one another's legal systems) by international consensus that a nation's law governs action *within* its territorial jurisdiction."[28] Although countries *may* enact extraterritorial legislation,[29] it "is the exception rather than the rule."[30] Therefore, courts generally presume that statutes do not apply extraterritorially.[31]

Likewise, in the constitutional arena, the Traditional Perspective holds that "'the protection of noncitizens under the Constitution . . . [stops] at the

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[25] *Compare* Castro v. Cabrera, 742 F.3d 595, 599 (5th Cir. 2014) (exemplifying the Traditional Perspective) (finding that the Fourth Amendment "does not apply to the search and seizure of nonresident aliens on foreign soil"), *with* Bayo v. Chertoff, 535 F.3d 749, 756 (7th Cir. 2008) (exemplifying the Contemporary Perspective) (relying upon *Boumediene* to permit limited extraterritorial application of the Constitution), *reh'g granted sub nom.* Bayo v. Napolitano, 593 F.3d 495 (7th Cir. 2010).

[26] Trump v. Hawaii, 138 S. Ct. 2392, 2424 (2018) (Thomas, J., concurring) ("The plaintiffs cannot raise any other First Amendment claim, since the alleged religious discrimination in this case was directed at aliens abroad." (citing United States v. Verdugo-Urquidez, 494 U.S. 259, 265 (1990))).

[27] *See* Boumediene v. Bush, 553 U.S. 723 (2008).

[28] ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 268 (2012) (emphasis added).

[29] *Id.* (citing RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 402(1)(c) (AM. LAW INST. 1987)) ("[A] state has jurisdiction to prescribe law with respect to . . . conduct outside its territory that has or is intended to have substantial effect within its territory.").

[30] *Id.*

[31] *See, e.g.*, WesternGeco L.L.C. v. ION Geophysical Corp., 138 S. Ct. 2129, 2136 (2018) ("Courts presume that federal statutes 'apply only within the territorial jurisdiction of the United States.'"); Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 255 (2010) ("When a statute gives no clear indication of an extraterritorial application, it has none."); Sandberg v. McDonald, 248 U.S. 185, 195 (1918) ("Legislation is presumptively territorial and confined to limits over which the law-making power has jurisdiction."); Pope v. Nickerson, 19 F. Cas. 1022, 1026 (C.C.D. Mass. 1844) ("The general rule . . . is, 'Statuta suis clauduntur territoriis, nec ultra territorium disperantur.'").

border,' even with respect to the acts of state officials that operate abroad."[32] And this perspective—which sees constitutional rights as strictly territorial—"prevailed as dogma for most of American constitutional history . . . [so] courts rarely saw any need to justify it."[33]

1. Tracing the Traditional Perspective's Lineage

In "the first great constitutional case"[34]—*Chisholm v. Georgia*[35]—Chief Justice John Jay recognized that "[e]very State Constitution is a compact made by and between the citizens of a State *to govern themselves* in a certain manner; and the Constitution of the United States is likewise a compact made by the people of the United States *to govern themselves* . . . in a certain manner."[36]

This conception of the Constitution—"the social compact theory"[37]—plays a pivotal role in the Traditional Perspective of extraterritoriality. If the Constitution is a compact between the people of the United States and their government[38]—as Chief Justice John Jay claims—the argument against its extraterritorial application to noncitizens abroad becomes self-evident: Those

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[32] Eyal Benvenisti & Mila Versteeg, *The External Dimensions of Constitutions*, 57 VA. J. INT'L L. 515, 530 (2018); *see also* Sarah H. Cleveland, *Embedded International Law and the Constitution Abroad*, 110 COLUM. L. REV. 225, 229 (2010) ("Traditional doctrines regarding the geographic scope of U.S. constitutional protections derive from nineteenth-century international law principles of jurisdiction, which largely limited the lawful jurisdiction of a sovereign state to its geographic territory.").

[33] GERALD L. NEUMAN, STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW 7 (1996).

[34] Randy E. Barnett, *The People or the State?:* Chisholm v. Georgia *and Popular Sovereignty*, 93 VA. L. REV. 1729, 1730 (2007).

[35] 2 U.S. 419 (1793).

[36] *Id.* at 471 (emphasis added).

[37] Fields, *supra* note 21, at 1149 ("[S]upporters of the social compact theory [believe] that the Constitution represents a voluntary contract between a government and its people . . . .").

[38] *See, e.g.*, C.C. Langdell, *The Status of Our New Territories*, 12 HARV. L. REV. 365, 372–73 (1899) ("[T]here is a very strong presumption that when a constitution is made by a sovereign people, it is made exclusively for the country inhabited by that people, and exclusively for that people regarded as a body politic . . . . [T]he same thing is true, *mutatis mutandis*, of a constitution made by the people of several sovereign States united together for that purpose. The [United States Constitution's] preamble, however, does not leave it to presumption to determine for what regions of country and what people the Constitution of the United States was made; for it expressly declares that its purposes and objects are, first, to form a more perfect union . . . . [And] to secure the blessings of liberty to the people by whom it is ordained and established, and their successors . . . . According to the preamble, therefore, the Constitution is limited to . . . States [that] have been admitted upon an equal footing with the original thirteen.").

who are not party to a compact (*viz.*, noncitizens abroad) cannot reap benefits therefrom.[39]

i. The Court Embraces the Traditional Perspective

Although the Traditional Perspective's rudiments trace to 1793,[40] the Court did not expressly embrace the view until its 1891 decision in *In re Ross*.[41] The case concerned a sailor who was convicted of murder after slitting a man's throat on an American ship docked in Yokohama, Japan.[42] After his conviction, the sailor sought a writ of habeas corpus because he had been denied a trial by jury.[43] The Supreme Court held that "[t]he [C]onstitution can have no operation in another country."[44] In an opinion by Justice Field, the Court explained that "the [C]onstitution . . . ordained and established [a government] 'for the United States of America,' . . . not for countries outside [its] limits."[45]

Notably, a contemporaneous case established that "aliens residing in the United States . . . are entitled, so long as they are permitted by the government of the United States to remain in the country, to the safeguards of the [C]onstitution, and to the protection of the laws."[46]

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39 J. Andrew Kent, *A Textual and Historical Case Against a Global Constitution*, 95 GEO. L.J. 463, 504–05 (2007) ("Given the strong influence of the social compact theory of constitutional government on many Founders, it is not surprising that some Americans, particularly Federalists, disputed that aliens, even those within the United States, were protected by the most important municipal law, the Constitution, because aliens were not parties to the Constitution's social compact.").

40 *Chisholm*, 2 U.S. at 473.

41 140 U.S. 453, 464 (1891).

42 *Id.* at 454–57.

43 *Id.* at 458.

44 *Id.* at 464.

45 *Id.*

46 Fong Yue Ting v. United States, 149 U.S. 698, 724 (1893); *see also* Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886) ("The fourteenth amendment to the constitution is not confined to the protection of citizens.").

ii. Traditional Perspective Jurisprudence Comes to the Fore

After *In re Ross*, cases exalting the Traditional Perspective abounded.[47] For instance, *United States v. Curtiss-Wright Export Corp.*[48] held that "[n]either the Constitution nor the laws passed in pursuance of it have any force in foreign territory unless in respect of our own citizens."[49] And in the *Insular Cases*,[50] the Court developed a doctrine of extraterritoriality that rendered constitutional protections contingent upon territorial incorporation.[51] It extended protections to territories designated to become states and withheld protections from territories that were not.[52]

Additionally, *United States ex rel. Turner v. Williams*[53] made clear that a noncitizen does not become one of "the people" to whom the Constitution applies simply by attempting to enter the country.[54] The Court emphasized that "[t]o appeal to the Constitution is to concede that this is a land governed by that supreme law, and . . . those who are excluded cannot assert the rights . . . obtaining in a land to which they do not belong as citizens or otherwise."[55] While

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47 *See, e.g.*, United States v. Verdugo-Urquidez, 494 U.S. 259, 271 (1990) (holding that noncitizens receive constitutional protections only after entering the U.S. and developing substantial connections thereto); Johnson v. Eisentrager, 339 U.S. 763, 784 (1950) (holding that the Fifth Amendment has no extraterritorial application to noncitizens); United States v.Curtiss-Wright Exp. Corp., 299 U.S. 304 (1936) (holding that the Constitution has no force or effect in foreign territories except with respect to U.S. citizens).

48 299 U.S. 304 (1936).

49 *Id.* at 318.

50 Balzac v. Porto Rico, 258 U.S. 298 (1922); Porto Rico v. Tapia, 245 U.S. 639 (1918); Ocampo v. United States, 234 U.S. 91 (1914); Porto Rico v. Rosaly, 227 U.S. 270 (1913); Dowdell v. United States, 221 U.S. 325 (1911); Kepner v. United States, 195 U.S. 100 (1904); Dorr v. United States, 195 U.S. 138 (1904); Hawaii v. Mankichi, 190 U.S. 197 (1903); Fourteen Diamond Rings v. United States, 183 U.S. 176 (1901); Downes v. Bidwell, 182 U.S. 244 (1901); Armstrong v. United States, 182 U.S. 243 (1901); Dooley v. United States, 182 U.S. 222 (1901); De Lima v. Bidwell, 182 U.S. 1 (1901).

51 "A vital distinction was made between 'incorporated' and 'unincorporated' territories." Granville-Smith v. Granville-Smith, 349 U.S. 1, 5 (1955). In the former, the Constitution fully applied. *Id.* In the latter, certain provisions applied if they were deemed essential. *Id.* "By 1922[,] it was regarded as clearly settled that the jury provisions of Article III and the Sixth and Seventh Amendments 'do not apply to territory . . . which has not been incorporated into the Union.'" Kinsella v. Krueger, 351 U.S. 470, 475 (1956). *See, e.g.*, *Balzac*, 258 U.S. at 304 (holding that the Sixth Amendment does not apply in Puerto Rico); *Ocampo*, 234 U.S. at 98 (holding that grand-jury indictments are not necessary in the Philippines); *Dorr*, 195 U.S. at 148–50 (holding that jury trials are not required in the Philippines).

52 Kent, *supra* note 39, at 540 (citing *Balzac*, 258 U.S. at 304–06).

53 194 U.S. 279 (1904).

54 *Id.* at 292.

55 *Id.*

Ross's sway eventually faltered,[56] the Traditional Perspective's ascent had only begun.[57]

2. The Traditional Perspective's Apogee

In *Johnson v. Eisentrager*,[58] the Supreme Court emphatically rejected the notion that "the Fifth Amendment confers rights upon all persons, whatever their nationality, wherever they are located and whatever their offenses."[59] Instead, the Court held that noncitizens outside the geographic boundaries of the United States were not entitled to Fifth Amendment protections.[60]

To preface its holding, the Court explained that the Constitution is not a safeguard for noncitizens residing abroad: "[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."[61] And *Eisentrager* concluded with a succinct yet pronounced statement of skepticism:

> Such extraterritorial application of organic law would have been so significant an innovation in the practice of governments that, if intended or apprehended, it could scarcely have failed to excite contemporary comment. Not one word can be cited. No decision of this Court supports such a view. None of the learned commentators on our Constitution has even hinted at it. The practice of every modern government is opposed to it.[62]

From this precedential wellspring, *United States v. Verdugo-Urquidez*[63] emerged. There, the Court held that "aliens receive constitutional protections when they have come within the territory of the United States and developed substantial connections with this country."[64] The case not only uprooted the

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56 Reid v. Covert, 354 U.S. 1, 12 (1957) (holding that the Constitution protects United States citizens abroad) (stating that "the *Ross* case should be left as a relic from a different era" without overruling it).

57 *See, e.g.*, United States v. Belmont, 301 U.S. 324, 332 (1937) (recognizing that "our Constitution, laws, and policies have no extraterritorial operation, unless in respect of our own citizens").

58 339 U.S. 763 (1950).

59 *Id.* at 783.

60 *Id.* at 785 ("We hold that the Constitution does not confer a right of personal security or an immunity from military trial and punishment upon an alien enemy engaged in the hostile service of a government at war with the United States.").

61 *Id.* at 771.

62 *Id.* at 784–85 (citation omitted).

63 494 U.S. 259 (1990).

64 *Id.* at 271.

budding seeds of Contemporary jurisprudence but also constituted the Court's "most thorough exegesis on the extraterritorial application of constitutional provisions."[65] The case's background and the court's rationale follow.

In 1985, the United States Drug Enforcement Administration ("DEA") suspected Rene Martin Verdugo-Urquidez of leading a drug-trafficking cartel.[66] A year later, the Mexican Federal Judicial Police ("MFJP") arrested Verdugo-Urquidez and transported him across the border into United States custody.[67]

Meanwhile, the DEA sought authorization from the MFJP to search two of Verdugo-Urquidez's residences in Mexico.[68] The DEA believed that these searches would turn up evidence implicating Verdugo-Urquidez in a murder.[69] After receiving authorization, DEA agents—accompanied by MFJP officers—searched the properties and seized documents.[70] The search uncovered a tally sheet that cataloged Verdugo-Urquidez's illicit drug shipments.[71]

Before trial, Verdugo-Urquidez moved to suppress the evidence.[72] He contended that the search violated his Fourth Amendment rights because the DEA failed to obtain an American search warrant.[73] The district court agreed.[74] The Ninth Circuit affirmed.[75] And the Supreme Court granted certiorari.[76]

In its opinion, the Court begins by stating the issue: "whether the Fourth Amendment applies to the search and seizure . . . of property that is owned by a nonresident alien and located in a foreign country."[77] A brief answer follows: "[I]t does not."[78] But a threefold rationale makes clear what a three-word answer cannot.

First, the Court explains that "the people" is a constitutional term of art.[79] The precise phrase appears seven times in the Constitution.[80] Given this notable

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65 Lamont v. Woods, 948 F.2d 825, 834 (2d Cir. 1991).

66 United States v. Verdugo-Urquidez, 494 U.S. 259, 262 (1990).

67 *Id.* at 293 n.12 (Brennan, J., dissenting).

68 *Id.*

69 *Id.* at 262 (majority opinion).

70 *Id.*

71 *Id.* at 262–63.

72 *Id.* at 263.

73 *Id.*

74 *Id.*

75 *Id.*

76 *Id.* at 264.

77 *Id.* at 261.

78 *Id.*

79 *Id.* at 265.

80 *Id.* The Preamble was ordained and established by "the People of the United States." U.S. CONST. pmbl. Article I makes "the People of the several States" responsible for choosing members of the House of Representatives. *Id.* art. I, § 2, cl. 1. The First Amendment protects "the right of

infrequency—among other things—the Court concludes that "the people" only encompasses (1) citizens and (2) persons who develop a sufficient connection with the United States to be considered part of the national community.[81]

Second, the Court looks to the relevant history. The historical evidence demonstrates that the framers were concerned with searches and seizures arising in domestic matters.[82] The Fourth Amendment protects "the people of the United States against . . . action by their own Government; it was never . . . [understood] to restrain the actions of the Federal Government against aliens outside of the United States territory."[83]

Third, the Court turns to case law. Drawing from precedent, the Court devises a simple, elegant method for determining constitutional applicability: "[A]liens receive constitutional protections when they have come within the territory of the United States and developed substantial connections with this country."[84] Since Verdugo-Urquidez had no connection to the United States—other than illegal drug trafficking—he could not rely on the Fourth Amendment for protection.[85]

3. Recent Affirmations of the Traditional Perspective

Recent cases demonstrate that the Traditional Perspective still holds sway with the Supreme Court. For instance, *Zadvydas v. Davis*[86] reaffirmed the holdings of *Eisentrager* and *Verdugo-Urquidez*: "It is well established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside of our geographic borders."[87] As in prior cases, the Court's reasoning "rested upon a basic territorial distinction."[88]

In *Clapper v. Amnesty International USA*,[89] the Court explained that "[a]lthough the foreign client might not have a viable Fourth Amendment claim, it is possible that the monitoring of the target's conversations with his or her attorney would provide grounds for a claim of standing on the part of the

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the people peaceably to assemble." *Id.* amend. I. The Second Amendment protects "the right of the people to keep and bear Arms." *Id.* amend. II. The Ninth Amendment explains that the enumeration of certain rights shall not be construed to "deny or disparage others retained by the people." *Id.* amend. IX. And the Tenth Amendment reserves the powers not delegated to the United States for "the people." *Id.* amend. X.

81 *Verdugo-Urquidez*, 494 U.S. at 265.

82 *Id.* at 266.

83 *Id.*

84 *Id.* at 271.

85 *Id.* at 271–73.

86 533 U.S. 678 (2001).

87 *Id.* at 693.

88 *Id.* at 694 (citing Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 215 (1953)).

89 568 U.S. 398 (2013).

attorney."[90] Likewise, in *Kerry v. Din*,[91] a United States citizen brought suit on behalf of her noncitizen husband because "an unadmitted and nonresident alien . . . has no right of entry into the United States, and no cause of action to press in furtherance of [a constitutional claim]."[92]

Last term, in *Trump v. Hawaii*,[93] Justice Thomas echoed the Traditional Perspective's mantra in his concurrence.[94] He concluded that the plaintiffs did not present a viable First Amendment claim because "the alleged religious discrimination . . . was directed at aliens abroad."[95]

B. The Contemporary Departure from the Traditional Perspective

Dissatisfied with the outcomes that the Traditional Perspective yields, some advocate an approach to constitutional extraterritoriality that "seeks to weigh the nature of the constitutional power to be applied, the relationship between the United States and the person seeking protection, the risk of injustice, and the practical limitations."[96] Many commentators contend that the Supreme Court recently adopted such an approach.[97]

1. *Boumediene v. Bush*

In *Boumediene v. Bush*,[98] the Court held that the Suspension Clause[99] had full legal force and effect at Guantanamo Bay.[100] There, several noncitizen Guantanamo Bay detainees—who were classified as enemy combatants—were

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90 *Id.* at 421 (citing *Verdugo-Urquidez*, 494 U.S. at 261).

91 135 S. Ct. 2128 (2015).

92 *Id.* at 2131.

93 138 S. Ct. 2392 (2018).

94 *Id.* at 2424.

95 *Id.*

96 Richard Nicholson, Note, *Functionalism's Military Necessity Problem: Extraterritorial Habeas Corpus, Justice Kennedy,* Boumediene v. Bush, *and* Al Maqaleh v. Gates, 81 FORDHAM L. REV. 1393, 1405 (2012) (citing José A. Cabranes, *Our Imperial Criminal Procedure: Problems in the Extraterritorial Application of U.S. Constitutional Law*, 118 YALE L.J. 1660, 1698 (2009)).

97 *See, e.g.*, *id.* (finding that *Boumediene v. Bush*, 553 U.S. 723 (2008), adopts this approach); E. Carlisle Overbey, Note, *Bringing Comfort to the Enemy?: The Past, Present, and Future of Habeas Corpus Petitions in Light of the Formalistic Application of Boumediene*, 46 CORNELL INT'L L.J. 401, 425 (2013) (concluding that courts undermine *Boumediene* by applying it formalistically).

98 553 U.S. 723 (2008).

99 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.").

100 *Boumediene*, 553 U.S. at 771.

denied writs of habeas corpus under Section 7(a) of the Military Commissions Act ("MCA"), which stripped federal courts of jurisdiction over such cases.[101]

On appeal, the detainees challenged the MCA's constitutionality.[102] But the D.C. Circuit held that the provision in question was not an unconstitutional suspension of habeas corpus because noncitizens detained by the United States in foreign territories do not have a constitutional right of habeas corpus.[103] Citing *Johnson v. Eisentrager*[104] and relying upon historical evidence, the court concluded that habeas corpus is not "available . . . to aliens without presence or property within the United States."[105] The detainees appealed.[106]

The Supreme Court granted certiorari.[107] In an opinion authored by Justice Kennedy, the Court held that Section 7(a) unconstitutionally suspended the writ of habeas corpus.[108] Looking to *Eisentrager* for support, the Court identified three factors for determining Suspension Clause's reach: "(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."[109] In so holding, the Court openly acknowledged that its decision was an aberration: "It is true that before today the Court has never held that noncitizens detained . . . in territory over which another country maintains *de jure* sovereignty have any rights under our Constitution."[110]

i. Justice Souter Concurs

Justice Souter concurred.[111] He wrote separately to voice disagreement with the dissenters.[112] First, Justice Souter argued that the Majority's opinion was just a logical extension of *Rasul v. Bush*.[113] "[I]t is no bolt out of the blue," he

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101 *Id.* at 732.

102 *Id.* at 733.

103 Boumediene v. Bush, 476 F.3d 981, 987–91 (D.C. Cir. 2007).

104 339 U.S. 763 (1950) (holding that German prisoners of war detained in a United States run prison in Germany were not entitled to habeas corpus).

105 *Boumediene*, 476 F.3d at 990.

106 *Boumediene*, 553 U.S. at 733.

107 *Id.* at 734.

108 *Id.* at 795.

109 *Id.* at 766.

110 *Id.* at 770.

111 *Id.* at 798 (Souter, J., concurring).

112 *Id.*

113 *Id.* at 799 (citing Rasul v. Bush, 542 U.S. 466 (2004)).

wrote.[114] Second, he believed that the dissenters did not give sufficient weight to the length of time that the petitioners had been detained. Accordingly, he took issue with the suggestion "that the Court [was] . . . reviewing claims that the military . . . could handle within some reasonable period of time."[115]

ii. Chief Justice Roberts Dissents

Chief Justice Roberts dissented.[116] He suggested that the majority had supplanted federal law with "shapeless procedures to be defined by federal courts at some future date."[117] Procedural concerns aside, the Chief Justice next assessed the substantive result.[118]

"So who has won?"[119] he asked. *It was not the detainees*: They were left with "only the prospect of further litigation to determine the content of their new habeas right."[120] *It was not Congress*: "whose attempt to . . . balance the security of the American people with the detainees' liberty interests [is] brushed aside."[121] *It was not the writ of habeas corpus*: "whose majesty is hardly enhanced by its extension to a jurisdictionally quirky outpost, with no tangible benefit to anyone."[122] *It was not the rule of law*: "unless by that is meant the rule of lawyers, who will now arguably have a greater role . . . in shaping policy for alien enemy combatants."[123] *And it was not the American people*: "who today lose a bit more control over the conduct of this Nation's foreign policy to unelected, politically unaccountable judges."[124]

iii. Justice Scalia Dissents

Justice Scalia dissented.[125] He began by emphasizing the enormity of the Court's holding: "[F]or the first time in our Nation's history, the Court confers a constitutional right to habeas corpus on alien enemies detained abroad by our military forces in the course of an ongoing war."[126] He then addressed some

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114 *Id.*

115 *Id.* at 799–800.

116 *Id.* at 801 (Roberts, C.J., dissenting).

117 *Id.*

118 *Id.* at 826.

119 *Id.*

120 *Id.*

121 *Id.*

122 *Id.*

123 *Id.*

124 *Id.*

125 *Id.* (Scalia, J., dissenting).

126 *Id.* at 826–27.

potential consequences of the Court's decision.[127] Lastly, Justice Scalia suggested that the judiciary—"the branch that knows least about the national security concerns"—had wrongly usurped executive power.[128]

iv. Scholarly Interpretation

Although *Boumediene* did not purport to overrule any prior decisions, many view the decision as an overhaul of extraterritorial jurisprudence.[129] In light of *Boumediene*'s rationale, many commentators have asserted that the Court's "formalistic" approach to extraterritorial jurisprudence has been replaced by a "functional" one.[130] Only time will tell whether this is so.

2. *Boumediene*'s Implications for Constitutional Extraterritoriality

Despite the clamor surrounding *Boumediene*, many courts have entirely disregarded the decision in cases analyzing the Constitution's extraterritorial application.[131] For instance, in the recent case of *United States v. Loera*,[132] the Eastern District of New York relied entirely upon *Verdugo-Urquidez* (without a single reference to *Boumediene*) in holding that the Fourth Amendment did not extend its protections to a noncitizen who resided outside the United States.[133]

There, Joaquín Archivaldo Guzmán Loera ("El Chapo") challenged the FBI's search of servers that ran his encrypted communication network—which included phone calls, text messages, and other digital information.[134] Crucially, these servers were in the Netherlands.[135]

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127 *Id.* at 827 ("Contrary to my usual practice . . . I think it appropriate to begin with a description of the disastrous consequences of what the Court has done today.").

128 *Id.* at 831.

129 *See, e.g.*, Hernandez v. Mesa, 137 S. Ct. 2003, 2008–09 (2017) (Breyer, J., dissenting) ("[Q]uestions of extraterritoriality turn on objective factors and practical concerns, not formalism." (citing *Boumediene*, 553 U.S. at 764)); Nicholson, *supra* note 96.

130 *See, e.g.*, *Hernandez*, 137 S. Ct. at 2008–09 (Breyer, J., dissenting); Joseph C. Alfe, *Extraterritorial Constitutionalism: A Rule Proposed*, 50 J. MARSHALL L. REV. 787, 796 (2017).

131 *See, e.g.*, Castro v. Cabrera, 742 F.3d 595, 599–602 (5th Cir. 2014) (holding that "[b]ecause the Fourth Amendment does not apply to those detainees that are aliens, and [the defendant] is entitled to qualified immunity in relation to those detainees that are U.S. citizens, the judgment of dismissal is AFFIRMED") (recognizing that the Fourth Amendment "does not apply to the search and seizure of nonresident aliens on foreign soil").

132 333 F. Supp. 3d 172 (E.D.N.Y. 2018).

133 *Id.* at 181–82.

134 *Id.* at 180.

135 *Id.*

The FBI obtained evidence from El Chapo's servers in three ways.[136] First, the FBI made several requests for Dutch authorities to surveil certain IP addresses connected to El Chapo's communication network, while the Dutch authorities intercepted and recorded phone calls and provided that surveillance to the FBI on an ongoing basis.[137] Second, the Dutch authorities executed search warrants on the servers and provided their contents to the FBI.[138] Third, the Dutch authorities used additional servers to track conversations and created a backup server that automatically received and stored the data for the FBI.[139]

El Chapo maintained that this conduct violated his Fourth Amendment privacy interest in the servers' contents.[140] To support this contention, El Chapo argued that he developed sufficient ties with the United States to acquire Fourth Amendment protection because—if the government's allegations were true—he directed a large-scale narcotic trafficking operation within the United States.[141]

Relying on *Verdugo-Urquidez*, the Eastern District held that "the Fourth Amendment does not apply 'to the search and seizure by United States agents of property that is owned by a nonresident alien and located in a foreign country.'"[142] And the court noted the Second Circuit's strict adherence to the holding of *Verdugo-Urquidez*.[143] As the court put it, "this Circuit consider[s] the *Verdugo-Urquidez* holding 'dispositive case law.'"[144]

Accordingly, El Chapo could only invoke the Fourth Amendment by establishing substantial and voluntary connections to the United States.[145] Here, the searches occurred in the Netherlands. And El Chapo was a citizen of Mexico who resided abroad. Therefore, El Chapo's connections proved inadequate.[146]

The court added that criminal conduct—however substantial it may be—cannot yield the type of connection *Verdugo-Urquidez* envisioned.[147] As such, El Chapo's purely criminal connections to the United States did not entitle him

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136 *Id.*

137 *Id.*

138 *Id.*

139 *Id.*

140 *Id.* at 182.

141 *Id.*

142 *Id.* at 181.

143 *Id.* (citing *In re* Terrorist Bombings of U.S. Embassies in E. Afr., 552 F.3d 157, 174 (2d Cir. 2008); United States v. Gasperini, No. 16-CR-441, 2017 WL 3038227, at *3 (E.D.N.Y. July 17, 2017), *aff'd*, 894 F.3d 482 (2d Cir. 2018); United States v. Hasbajrami, No. 11-CR-623, 2016 WL 1029500, at *7 (E.D.N.Y. Mar. 8, 2016); United States v. Defreitas, 701 F. Supp. 2d 297, 304 (E.D.N.Y. 2010)).

144 *Id.* (quoting *Defreitas*, 701 F. Supp. 2d at 304).

145 *Id.* at 182.

146 *Id.*

147 *Id.*

to Fourth Amendment rights.[148] In succinctly summarizing its opinion, the court stated the following:

> Because [the] defendant was, at the relevant time, a citizen and resident of Mexico and has not shown substantial voluntary connections to the United States, [the] defendant cannot invoke the Fourth Amendment for searches that occurred in the Netherlands. However, assuming defendant could invoke the Fourth Amendment, [the court] would still deny his motion to suppress the Dutch servers evidence.[149]

Loera is by no means an aberration. Many other courts have noted that "the *Boumediene* court was concerned only with the Suspension Clause and not with . . . any other constitutional text."[150] For example, in *Ali v. Rumsfeld*,[151] the D.C. Circuit recognized that "*Boumediene* 'explicitly confined its constitutional holding "only" to the extraterritorial reach of the Suspension Clause' and 'disclaimed any intention to disturb existing law governing the extraterritorial reach of any constitutional provisions, other than the Suspension Clause.'"[152] And long "[a]fter *Boumediene*, the D.C. Circuit maintained that habeas only protected the fact, place, or duration of detention, and it expressly refused to apply due process to extraterritorial habeas challenges."[153]

In sum, decisions disregarding and distinguishing *Boumediene* suggest that its impact is not nearly as profound as some might believe. It would seem that "[t]he post-*Boumediene* momentum for the extraterritorial application of constitutional rights in favor of noncitizens has largely dissipated."[154]

C. Reconciling the Traditional and the Contemporary

Due to the confusion surrounding constitutional extraterritoriality, some courts have attempted to synthesize the Traditional and Contemporary into one

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148 *Id.* (citing United States v. Gorshkov, No. CR00-550C, 2001 WL 1024026, at *3 (W.D. Wash. May 23, 2001)).

149 *Id.*

150 Igartúa v. United States, 626 F.3d 592, 600 (1st Cir. 2010) (citation omitted).

151 649 F.3d 762 (D.C. Cir. 2011).

152 *Id.* at 771.

153 Mary Van Houten, *The Post*-Boumediene *Paradox: Habeas Corpus or Due Process?*, 67 STAN. L. REV. ONLINE 9 (2014) (footnote omitted); *see also* Al-Hela v. Trump, No. 05-cv-01048, 2019 U.S. Dist. LEXIS 42717, at *27 (D.D.C. Mar. 15, 2019) ("[T]he D.C. Circuit has confirmed that . . . detainees at Guantanamo do not possess constitutional due process rights.").

154 Lee Kovarsky, *Citizenship, National Security Detention, and the Habeas Remedy*, 107 CALIF. L. REV. 867, 868 (2019). It should be noted that "Justice Anthony Kennedy, who penned *Boumediene*, was replaced by Justice Brett Kavanaugh, whose decision making on the D.C. Circuit rejected, virtually without exception, the rights-bearing status of noncitizens abroad." *Id.*

coherent framework.[155] For illustrative purposes, consider a recent case out of the Third Circuit: *Osorio-Martinez v. Attorney General United States*.[156] There, the court invalidated an Immigration and Nationality Act ("INA") jurisdiction-stripping provision[157] under *Verdugo-Urquidez* and *Boumediene*.[158]

To understand *Osorio-Martinez*'s holding, the reader must first become acquainted with "entry fiction."[159] Under this doctrine, "excludable aliens . . . denied entry into the United States, even when technically within U.S. territory, may be 'treated, for constitutional purposes, as if stopped at the border.'"[160] Without further ado, here is the full story behind *Osorio-Martinez*.

In 2015, United States authorities "encountered and apprehended each petitioner within close proximity to the border and shortly after their illegal crossing."[161] At the time, the petitioners neither presented immigration papers nor claimed to have been lawfully admitted to the United States.[162] Therefore, the authorities detained the petitioners and initiated removal proceedings.[163]

While awaiting removal in detention, the *Osorio-Martinez* petitioners attained Special Immigrant Juvenile ("SIJ") status.[164] And given their changed statuses, the petitioners sought to secure their releases under the Suspension Clause. [165]

The petitioner's action raised a novel question of first impression: "Does the [INA's] jurisdiction-stripping provision . . . unconstitutional[ly] suspen[d] . . . the writ of habeas corpus as applied to SIJ designees seeking judicial review of orders of expedited removal?"[166] Using *Boumediene* and *Verdugo-Urquidez*, the Third Circuit answered that question affirmatively.[167]

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155 *See, e.g.*, Thuraissigiam v. U.S. Dep't of Homeland Sec., 917 F.3d 1097, 1106–07 (9th Cir. 2019); Ibrahim v. Dep't of Homeland Sec., 669 F.3d 983, 997 (9th Cir. 2012) (allowing a Malaysian student who was studying in the United States to bring suit for alleged First and Fifth Amendment violations that took place while she was traveling to Malaysia) ("Under *Boumediene* and *Verdugo-Urquidez*, we hold that Ibrahim has 'significant voluntary connection' with the United States.").

156 893 F.3d 153 (3d Cir. 2018).

157 8 U.S.C.A § 1252(a)(2)(B)(ii) (West 2019).

158 *Osorio-Martinez*, 893 F.3d at 178.

159 Entry-fiction doctrine plays an important role in analyzing the kind of Suspension Clause challenge at issue in this case. Castro v. U.S. Dep't of Homeland Sec., 835 F.3d 422, 443 n.22 (3d Cir. 2016).

160 Castro v. Cabrera, 742 F.3d 595, 599–600 (5th Cir. 2014) (quoting Zadvydas v. Davis, 533 U.S. 678, 693 (2001)).

161 *Castro*, 835 F.3d at 427 (describing the apprehension of the petitioners in *Osorio-Martinez*).

162 *Id.* at 427–28.

163 *Osorio-Martinez*, 893 F.3d at 159.

164 *Id.* at 160.

165 *Id.*

166 *Id.* at 158.

167 *Id.* at 168.

First, the court endeavored to determine whether the petitioners were prohibited from invoking the Suspension Clause.[168] Despite being noncitizens, the petitioners were not prohibited from doing so.[169] In the Third Circuit's view, the petitioners "developed the [requisite] 'substantial connections with this country.'"[170] The court provided four reasons in support of this contention:

> (1) [the petitioners] . . . satisfied rigorous eligibility criteria for SIJ status, [which made] them . . . wards of the state with obvious implications for their relationship to the United States; (2) Congress accorded [SIJ designees] a range of statutory and procedural protections that establish a substantial legal relationship with the United States; (3) . . . [the petitioners had] "beg[un] to develop the ties that go with permanent residence"; and (4) . . . [the] recognition of SIJ designees' connection to the United States is consistent with the exercise of Congress's plenary power.[171]

Second, the court "turn[ed] to the question whether the substitute for habeas [was] adequate and effective to test the legality of the petitioner's detention (or removal)."[172] The court concluded that the INA "does not provide 'an "adequate [or] effective" alternative to habeas review.'"[173] Accordingly, the court found that the petitioners' SIJ status conferred a special right to invoke the Suspension Clause.[174]

Although *Osorio-Martinez* ostensibly draws from *Verdugo-Urquidez* and *Boumediene*, the latter case's function is superfluous. Instead of attempting to reconcile competing law, the Third Circuit could have reached the same result under *Verdugo-Urquidez* alone.[175] While the Third Circuit admirably synthesized inconsistent doctrine, this framework's adoption would inevitably foster greater confusion.[176]

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168 *Id.* at 166.

169 *Id.* at 167–68.

170 *Id.* at 168 (quoting United States v. Verdugo-Urquidez, 494 U.S. 259, 271 (1990)).

171 *Id.* (quoting Castro v. U.S. Dep't of Homeland Sec., 835 F.3d 422, 448 (3d Cir. 2016)).

172 *Id.* at 166.

173 *Id.* at 177 (quoting Khouzam v. Attorney Gen. of the U.S., 549 F.3d 235, 246 (3d Cir. 2008)).

174 *Id.* at 178.

175 *See infra* Section IV.B.

176 *Id.*

III. THE PRESENT DILEMMA

As discussed above, courts are conflicted about the Constitution's application to noncitizens in extraterritorial disputes. Below, this Part addresses the conflict's newest developments.

In *Hernandez*,[177] the Fifth Circuit held that a noncitizen who lacked substantial ties to the United States could not use *Bivens* to vindicate purported Fourth Amendment protections.[178] Soon after, the Ninth Circuit reached the opposite conclusion in *Rodriguez*.[179] From these cases, a legal paradox arises: "[A]n alien injured on Mexican soil by a Border Patrol agent shooting from Texas lacks recourse . . . [whereas] an alien injured on Mexican soil by an agent shooting from California or Arizona may sue for damages."[180]

This Part examines the *Hernandez–Rodriguez* paradox. Section III.A discusses the development of *Bivens* actions. Second, Section III.B explains how *Bivens* actions led to a circuit split over constitutional extraterritoriality. Section III.C relays the factual background, procedural history, and legal reasoning of *Hernandez v. Mesa*. And Section III.D provides the factual background, procedural history, and legal reasoning of the decision that caused the present dilemma: *Rodriguez v. Swartz*.

A. On Bivens *Actions*

In *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*,[181] the Supreme Court held that federal agents who violate the Fourth Amendment can be held liable for money damages by way of implied cause of action.[182] After *Bivens*, a number of subsequent decisions modified its breadth.

In *Davis v. Passman*,[183] the Court extended *Bivens* to allow for causes of action under the Fifth Amendment's Due Process Clause.[184] Next, *Carlson v. Green*[185] further extended *Bivens* to encompass Eighth Amendment disputes.[186] But this trend of expansion was short-lived.

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177 885 F.3d 811 (5th Cir. 2018).

178 *Id.* at 814.

179 Rodriguez v. Swartz, 899 F.3d 719 (9th Cir. 2018).

180 *Id.* at 758 (Smith, J., dissenting).

181 403 U.S. 388 (1971).

182 *Id.* at 397.

183 442 U.S. 228 (1979).

184 *Id.* at 248–49.

185 446 U.S. 14 (1980).

186 *Id.* at 23.

After *Davis* and *Carlson*, the Supreme Court decided eight consecutive cases holding *Bivens* actions untenable.[187] This trend of rejecting *Bivens* claims ultimately culminated in *Ziglar v. Abbasi*,[188] where the Court "made clear that expanding the *Bivens* remedy is now a 'disfavored' judicial activity."[189]

In *Abbasi*, several noncitizens who had been detained following the September 11 terrorist attacks—because they lacked legal authorization to be in the country—brought a putative class action suit alleging due process and equal protection violations under *Bivens*.[190] In an opinion by Justice Kennedy,[191] the Court presented the analytical framework for assessing the viability of a *Bivens* action before dismissing virtually all of the respondents' claims.[192] *Abbasi* set forth the following two-pronged analysis for determining whether an ostensible *Bivens* action may proceed.

First, courts must ask whether the case presents a "new context."[193] A case presents a new context if it differs from *Bivens*, *Davis*, or *Carlson* in a "meaningful way."[194] A case differs meaningfully if (1) it implicates a different constitutional right than previous *Bivens* cases; (2) it involves circumstances where precedent provides no substantial guide for official conduct; or (3) it introduces "special factors" unconsidered by previous *Bivens* cases.[195] If a case

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[187] *See* Minneci v. Pollard, 565 U.S. 118 (2012) (finding that a prisoner could not assert an Eighth Amendment *Bivens* action for damages against private-prison employees); Wilkie v. Robbins, 551 U.S. 537 (2007) (declining to devise a *Bivens* remedy that would separate constitutional violations from improper government actions); Corr. Servs. Corp. v. Malesko, 534 U.S. 61 (2001) (declining to entertain a *Bivens* action against private entities that engaged in alleged constitutional malfeasance while acting under color of federal law); FDIC v. Meyer, 510 U.S. 471 (1994) (declining to permit a *Bivens* claim against a federal agency that was otherwise amenable to suit); Schweiker v. Chilicky, 487 U.S. 412 (1988) (declining to permit a *Bivens* action against individual government employees who allegedly violated due-process rights by mishandling Social Security applications); United States v. Stanley, 483 U.S. 669 (1987) (declining to permit a *Bivens* action for injuries arising out of military service); Bush v. Lucas, 462 U.S. 367 (1983) (declining to permit a *Bivens* action against individual government officials for First Amendment violations that arose in federal-employment context); Chappell v. Wallace, 462 U.S. 296 (1983) (declining to provide a *Bivens* remedy for enlisted military personnel against their superior officers).

[188] 137 S. Ct. 1843 (2017).

[189] *Id.* at 1857 (citing Ashcroft v. Iqbal, 556 U.S. 662, 675 (2009)).

[190] *See id.* at 1851–54, 1858–59.

[191] Justices Sotomayor, Kagan, and Gorsuch took no part in this decision.

[192] *Abbasi*, 137 S. Ct. at 1861–69. The Court remanded the "prisoner abuse claim . . . to allow the Court of Appeals to consider the claim in light of the [proper] *Bivens* analysis." *Id.* at 1869.

[193] *Id.* at 1864.

[194] *Id.* at 1859.

[195] *Id.* at 1864. Elsewhere, the Court provides a longer (albeit non-exhaustive) list of factors:

> the rank of the officers involved; the constitutional right at issue; the generality or specificity of the official action; the extent of judicial guidance as to how an officer should respond to the problem or emergency to be confronted; the

does not differ from prior decisions in a "meaningful way"—based upon these factors—it presents a cognizable *Bivens* claim.

Second, when cases present new contexts, courts determine whether special factors caution against extending *Bivens*.[196] While "special factors" is not a well-defined term,[197] the Court has stated unambiguously that special-factors analyses answer this question: "'[W]ho should decide' whether to provide for a damages remedy, Congress or the courts?"[198]

To a large extent, this question is farcical: Its answer is a forgone conclusion. The Court has stated unequivocally that "the Legislature is in the better position to consider if 'the public interest would be served' by imposing a 'new substantive legal liability.'"[199] Still, courts inquire whether the judiciary is well suited—absent congressional action or instruction—to consider and weigh the costs and benefits of allowing a *Bivens* action to proceed.[200] If a court believes that Congress might doubt the efficacy or necessity of a *Bivens* claim, it should dismiss the case out of respect for the legislature.[201] But if a court concludes that special factors do not caution against extending *Bivens*, the case may proceed.[202]

*B. Post-*Abbasi Bivens *Actions Beget Extraterritorial Uncertainty*

Two recent decisions are illustrative of *Bivens* jurisprudence in the post-*Abbasi* landscape.[203] Both of the cases are factually indistinguishable: They involved tragic cross-border incidents in which Border Patrol agents (within the United States) shot and killed Mexican nationals (standing on Mexican soil).[204] Both posed the same question: Under *Bivens*,[205] may noncitizens who lack any

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> statutory or other legal mandate under which the officer was operating; the risk of disruptive intrusion by the Judiciary into the functioning of other branches; or the presence of potential special factors that previous *Bivens* cases did not consider.

Id. at 1860.

196 *Id.* at 1857.

197 *Id.*

198 *Id.* (quoting Bush v. Lucas, 462 U.S. 367, 380 (1983)).

199 *Id.* (quoting Schweiker v. Chilicky, 487 U.S. 412, 426–27 (1988)).

200 *Id.* at 1857–58.

201 *Id.* at 1858.

202 *Id.*

203 *Compare* Hernandez v. Mesa, 885 F.3d 811 (5th Cir. 2018), *with* Rodriguez v. Swartz, 899 F.3d 719 (9th Cir. 2018).

204 *Herndandez*, 885 F.3d at 814; *Rodriguez*, 899 F.3d at 727.

205 403 U.S. 388 (1971).

substantial ties to the United States recover for extraterritorial harms?[206] And both reached opposite conclusions.[207]

Indeed, *Hernandez* concluded with a resounding and emphatic no.[208] Relying on *Abbasi*, the Fifth Circuit held that expanding the *Bivens* action is judicially disfavored; therefore, it refused to provide a remedy where Congress had not.[209] In so holding, the Fifth Circuit ruminated on the lack of "direct judicial guidance concerning the extraterritorial scope of the Constitution and its potential application to foreign citizens on foreign soil."[210]

But *Rodriguez* answered that same question affirmatively.[211] There, the Ninth Circuit explicitly held that a noncitizen was entitled to extraterritorial Fourth Amendment protection.[212] Consequently, *Bivens* provides an avenue for noncitizens—who lack any substantial ties to the United States—to recover for alleged extraterritorial Fourth Amendment violations.[213]

Below, this Part explores these respective cases in greater detail.[214]

C. Hernandez v. Mesa

On the evening of June 7, 2010, Sergio Hernández—a 15-year-old Mexican citizen with no ties to the United States—was playing with his friends on the Mexican side of a culvert that marks the boundary between Ciudad Juarez, Mexico, and El Paso, Texas.[215] Meanwhile, Border Patrol Agent Jesus Mesa, Jr., was engaged in his assigned law enforcement duties at the border.[216] During this time, a group of young men began throwing rocks at Agent Mesa from the Mexican side of the border.[217] While standing on United States soil, Agent Mesa

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206 *See Hernandez*, 885 F.3d at 822; *Rodriguez*, 899 F.3d at 747.

207 *Compare Hernandez*, 885 F.3d at 823, *with Rodriguez*, 899 F.3d at 730.

208 *Hernandez*, 885 F.3d at 823.

209 *Id.* at 811.

210 *Id.* at 817.

211 *Rodriguez*, 899 F.3d at 730.

212 *Id.*

213 *Id.* at 726.

214 *See infra* Section III.C (discussing *Hernandez*, 885 F.3d 811); Section III.D (discussing *Rodriguez*, 899 F.3d 719).

215 *Hernandez*, 885 F.3d at 814; Hernandez v. United States, 802 F. Supp. 2d 834, 837 (W.D. Tex. 2011), *aff'd*, 757 F.3d 249 (5th Cir. 2014), *aff'd on reh'g en banc*, 785 F.3d 117 (5th Cir. 2015), *vacated and remanded sub nom.* Hernandez v. Mesa, 137 S. Ct. 2003 (2017).

216 *Hernandez*, 885 F.3d at 814.

217 *Id.*

fired several shots toward his perceived assailants.[218] As a result, Sergio Hernández was fatally wounded.[219]

Afterwards, an investigation revealed that the shooting "occurred while smugglers attempting an illegal border crossing hurled rocks from close range at a Customs and Border Patrol agent who was attempting to detain a suspect."[220]

Based on these findings, investigators concluded that "the agent did not act inconsistently with Customs and Border Patrol policy or training regarding use of force."[221] Thus, the evidence did not show that Agent Mesa "acted willfully . . . to do something the law forbids."[222] Still, expressing remorse over the loss of life, officials pledged to work alongside the Mexican government in hopes of preventing future incidents.[223]

1. The Hernándezes' *Bivens* Action

Hernández's parents sued in the Western District of Texas.[224] They alleged that Agent Mesa violated their son's Fourth and Fifth Amendment rights and sought damages under *Bivens*.[225]

Agent Mesa invoked qualified immunity and moved to dismiss.[226] He maintained that Hernández lacked Fourth and Fifth Amendment protections because he was a noncitizen who lacked substantial ties to the United States.[227] The district court agreed and dismissed the case.[228] The Hernándezes appealed.

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218 *Id.*

219 *Id.*

220 Hernandez v. Mesa, 137 S. Ct. 2003, 2005 (2017) (alterations omitted) (quoting Press Release, Dep't of Justice, Federal Officials Close Investigation into the Death of Sergio Hernandez-Guereca (Apr. 27, 2012), https://www.justice.gov/opa/pr/federal-officials-close-investigation-death-sergio-hernandez-guereca).

221 *Id.* (alteration in original) (quoting Press Release, Dep't of Justice, Federal Officials Close Investigation into the Death of Sergio Hernandez-Guereca (Apr. 27, 2012), https://www.justice.gov/opa/pr/federal-officials-close-investigation-death-sergio-hernandez-guereca).

222 *Id.* (quoting Press Release, Dep't of Justice, Federal Officials Close Investigation into the Death of Sergio Hernandez-Guereca (Apr. 27, 2012), https://www.justice.gov/opa/pr/federal-officials-close-investigation-death-sergio-hernandez-guereca).

223 *Id.*

224 Hernandez v. United States, 757 F.3d 249, 254 (5th Cir. 2014), *aff'd on reh'g en banc*, 785 F.3d 117 (5th Cir. 2015), *vacated and remanded sub nom.* Hernandez v. Mesa, 137 S. Ct. 2003 (2017).

225 *Id.* at 255.

226 *Id.* at 256.

227 *Id.*

228 *Id.*

The Fifth Circuit granted the appeal. Initially, the Fifth Circuit affirmed the judgment concerning the Fourth Amendment[229] but found the Hernándezes' Fifth Amendment claim viable.[230]

Notwithstanding this decision, the Fifth Circuit reheard the case while sitting en banc and unanimously reached a twofold conclusion: (1) the Fourth Amendment claim failed on the merits; and (2) qualified immunity shielded Agent Mesa from Fifth Amendment claims.[231] The Hernándezes petitioned for certiorari.

2. The Supreme Court Grants Certiorari

The Supreme Court granted certiorari and heard *Hernandez* alongside *Abbasi*.[232] The Court began by addressing the *Bivens* question.[233] In its view, the appropriate course of action was to allow the Fifth Circuit to undertake a new *Bivens* analysis on remand in light of its decision in *Abbasi*.[234] (There, the Court had clarified the analysis that courts should undertake when addressing *Bivens* claims.[235]) The Court believed that "[i]t would be imprudent . . . to resolve [the Fourth Amendment] issue when, in light of the intervening guidance provided in *Abbasi*, doing so may be unnecessary to resolve this particular case."[236] With that, the Supreme Court vacated the Fifth Circuit's decision and remanded the case for further consideration under *Abbasi*.[237]

i. Justice Thomas Dissents

In a dissenting opinion, Justice Thomas pointed out that the Court had "directed the parties to address . . . '[w]hether the claim in this case may be asserted under *Bivens.*'"[238] Justice Thomas believed that the Court should have answered the question rather than remanding for the Fifth Circuit to do so.[239]

Justice Thomas further noted that "'*Bivens* and its progeny' should be limited 'to the precise circumstances that they involved.'"[240] He saw the facts of

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229 *Id.* at 267.

230 *Id.* at 272.

231 Hernandez v. Mesa, 885 F.3d 811, 814 (5th Cir. 2018).

232 *Id.* at 814–15.

233 Hernandez v. Mesa, 137 S. Ct. 2003, 2006 (2017).

234 *Id.* at 2006–07.

235 *See supra* Section III.A.

236 *Hernandez*, 137 S. Ct. at 2007.

237 *Id.* at 2008.

238 *Id.* (Thomas, J., dissenting) (quoting Hernandez v. Mesa, 137 S. Ct. 291, 291 (2016)).

239 *Id.*

240 *Id.* (citing Ziglar v. Abbasi, 137 S. Ct. 1843, 1870 (2017) (Thomas, J., concurring)).

this case as meaningfully different than those of *Bivens* and its progeny.[241] Simply put, this case involved cross-border conduct—and the others did not.[242] Therefore, Justice Thomas would have affirmed the Fifth Circuit's decision.[243]

ii. Justice Breyer Dissents

In another dissenting opinion,[244] Justice Breyer—who was joined by Justice Ginsburg—stated that the Court should have reversed "the Court of Appeals' Fourth Amendment holding."[245] Although Hernández was on the Mexican side of the culvert when he was shot, Justice Breyer believed that "questions of extraterritoriality turn on objective factors and practical concerns, not formalism."[246]

Justice Breyer felt that Hernández was entitled to Fourth Amendment protection. He provided six factors to support his contention: (1) the agent could not have known whether Sergio Hernández was a United States citizen; (2) the culvert—where the shooting occurred—does not contain any physical features of a border (e.g., fences); (3) the culvert constitutes a "limitrophe" area under international law; (4) the culvert was overseen by an international boundary commission; (5) the oversight of "limitrophe" areas imposes duties and obligations under international law; and (6) the Court's failure to apply the Fourth Amendment to the culvert would produce serious anomalies.[247]

These six considerations, according to Justice Breyer, provided ample reason "for treating the entire culvert as having sufficient involvement with, and connection to, the United States to subject [it] to Fourth Amendment protections."[248] After answering the Fourth Amendment question, Justice Breyer would have remanded for consideration of the *Bivens* and qualified immunity questions.[249]

3. The Fifth Circuit's Final Ruling on the Remanded *Bivens* Claim

On remand, the Fifth Circuit—sitting en banc—reaffirmed dismissal.[250] The court held that Hernández's *Bivens* claim presented a "new context" under

241 *Id.*

242 *Id.*

243 *Id.*

244 *Id.* (Breyer, J., dissenting).

245 *Id.*

246 *Id.* at 2008–09 (citing Boumediene v. Bush, 553 U.S. 723, 764 (2008)).

247 *Id.* at 2009–11.

248 *Id.* at 2011.

249 *Id.*

250 Hernandez v. Mesa, 885 F.3d 811, 823 (5th Cir. 2018).

Abbasi (i.e., the cross-border shooting was factually distinguishable from the circumstances underlying prior *Bivens* actions).[251] In so holding, the court noted that binding precedent "strongly suggests that the Fourth Amendment does not apply to American officers' actions outside [the] country's borders."[252] Thus, the Fifth Circuit "conclude[d] that this [was] not a close case."[253]

D. Rodriguez v. Swartz

Oftentimes, a *Bivens* cure worsens what it seeks to remedy.[254] *Rodriguez* demonstrates as much: (1) It ignores binding precedent; (2) it distinguishes the indistinguishable; and (3) it undoes the first semblance of consistency that constitutional extraterritoriality had known since *Verdugo-Urquidez*.[255]

In *Rodriguez*, the Ninth Circuit held that a noncitizen residing abroad had Fourth Amendment protection.[256] While the court acknowledged *Hernandez*, it sidestepped the case by claiming that the border patrol agent's subjective knowledge about the decedent outweighed the objective facts.[257] The full story follows.[258]

1. *Rodriguez*'s Factual Background

On October 10, 2012—just before midnight—Officer John Zuñiga of the Nogales Police Department received a call reporting suspicious activity on International Street, which runs along the Mexican border.[259] Soon after, Officer Quinardo Garcia arrived on the scene and saw two men with large bundles on their backs climbing over the border fence into the United States.[260] Officer Garcia immediately called for backup and began chasing the two men.[261]

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251 *Id.* at 816–17.

252 *Id.* at 817 (citing United States v. Verdugo-Urquidez, 494 U.S. 259, 274–75 (1990)).

253 *Id.* at 823.

254 Wilkie v. Robbins, 551 U.S. 537, 561 (2007).

255 *See* Rodriguez v. Swartz, 899 F.3d 719 (9th Cir. 2018).

256 *Id.* at 730.

257 *Id.* at 733.

258 Although the Ninth Circuit—as a procedural matter—relied solely on the allegations in the complaint, this Note provides additional information for the reader's benefit.

259 Mark Binelli, *10 Shots Across the Border*, N.Y. TIMES (Mar. 3, 2016), https://www.nytimes.com/2016/03/06/magazine/10-shots-across-the-border.html?searchResultPosition=1. Although border security is the responsibility of the United States Border Patrol, Nogales police may intervene "when illegal activity is happening stateside—if, for instance, drug smugglers have slipped over the fence and are making their way into Arizona." *Id.*

260 *Id.*

261 *Id.*

As he pursued the men, they disappeared into a residential yard.[262] Concerned of a potential ambush, Officer Garcia decided to wait for backup.[263] Moments later, Officer Zuñiga arrived on the scene alongside several Border Patrol agents[264]—one of whom was Agent Lonnie Swartz.[265]

Upon arrival, Zuñiga spotted the two men scaling the fence back into Mexico.[266] He ordered them to climb down from the fence.[267] Suddenly, Officer Zuñiga saw rocks flying towards him.[268] He also heard gunfire.[269]

Agent Swartz had fired his weapon.[270] Ten bullets hit José Antonio Elena Rodriguez ("J.A.").[271] J.A. was a Mexican citizen who had never set foot in the United States.[272] But Agent Swartz did not know that when he fired his weapon.[273]

2. Araceli Rodriguez Files Suit Under *Bivens*

J.A.'s mother, Araceli Rodriguez, brought a *Bivens* action against Agent Swartz in Arizona's district court.[274] She asserted that Agent Swartz intentionally killed J.A. and thereby violated his Fourth and Fifth Amendment rights.[275]

Agent Swartz moved to dismiss.[276] The motion set forth two separate arguments for dismissal: (1) J.A. was not entitled to constitutional protections because he was a noncitizen who lacked substantial ties to the United States; and (2) Agent Swartz was entitled to qualified immunity.[277]

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262 *Id.*

263 *Id.*

264 *Id.*

265 Rodriguez v. Swartz, 899 F.3d 719, 727 (9th Cir. 2018).

266 Binelli, s*upra* note 259.

267 *Id.*

268 *Id.*

269 *Id.*

270 *Rodriguez*, 899 F.3d at 727.

271 Binelli, *supra* note 259.

272 Jacob Gershman, *Border Patrol Shooting of Mexican Teen Civil Lawsuit Goes to Court*, WALL ST. J. (Oct. 20, 2016, 5:52 PM), https://www.wsj.com/articles/border-patrol-shooting-of-mexican-teen-civil-lawsuit-goes-to-court-1476989995?ns=prod/accounts-wsj.

273 Binelli, *supra* note 259.

274 Rodriguez v. Swartz, 111 F. Supp. 3d 1025, 1030 (D. Ariz. 2015), *aff'd*, 899 F.3d 719 (9th Cir. 2018).

275 *See id.*

276 *Id.*

277 *Id.* at 1030–31.

The district court denied Agent Swartz's motion.[278] The court took this as an opportunity to highlight its disagreement with *Hernandez*.[279] It found that Agent Swartz violated J.A.'s clearly-established Fourth Amendment rights.[280] Consequently, Agent Swartz could not rely on qualified immunity.[281] In turn, Agent Swartz filed an interlocutory appeal.

3. The Ninth Circuit Finds in Araceli Rodriguez's Favor

On appeal, the Ninth Circuit upheld the district court's decision.[282] The court found that J.A. "had a Fourth Amendment right to be free from the . . . unreasonable use of deadly force."[283] Much like the district court below, the Ninth Circuit "recognize[d] that on similar facts, the Fifth Circuit reached a contrary conclusion."[284] Nevertheless, the court distinguished *Rodriguez* from *Hernandez*.[285] And the court held that—assuming the allegations were true—Swartz was not entitled to qualified immunity.[286]

"[T]his case is not about searches and seizures broadly speaking," wrote the Ninth Circuit: "It is about the unreasonable use of deadly force by a federal agent on American soil."[287] Therefore, the court concluded that the use of "deadly force by an American agent acting on American soil,"[288] regardless of the decedent's location, was subject to the Fourth Amendment.[289]

Although the court expressed some reluctance in extending *Bivens*,[290] it chose to do so for three reasons: (1) Rodriguez lacked alternative remedies;[291] (2) Congress did not withhold remedies deliberately;[292] and (3) special factors

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278 *Id.* at 1028.

279 *Id.* at 1041. ("This holding again contravenes that of the Fifth Circuit Court of Appeals in *Hernandez v. United States*, 785 F.3d 117 (2015). This Court respectfully disagrees with the en banc panel's decision that 'any properly asserted right was not clearly established to the extent the law requires.'" (quoting *Hernandez*, 785 F.3d 117)).

280 *Id.* at 1039.

281 *Id.*

282 Rodriguez v. Swartz, 899 F.3d 719, 748 (9th Cir. 2018).

283 *Id.* at 731.

284 *Id.*

285 *Id.*

286 *Id.* at 748.

287 *Id.* at 731.

288 *Id.*

289 *Id.*

290 *See id.* at 744.

291 *Id.* at 739.

292 *Id.*

did not counsel hesitation.[293] In so holding, the court noted that the allegations may turn out to be unsupported and the shooting may have been justified.[294]

"[M]indful of the tragedy underlying this case,"[295] Circuit Judge Milan D. Smith, Jr., issued a blistering dissent.[296] In his view, *Hernandez* should have determined the outcome of this case.[297] "By creating an extraterritorial *Bivens* remedy," Judge Smith contended, "the majority veers into uncharted territory, ignores Supreme Court law, and upsets the separation of powers between the judiciary and the political branches of government."[298] Worse still, the majority did not properly apply the principles set forth in *Abbasi*.[299] And this led to the unfounded conclusion "that there [were] no special factors weighing against this unprecedented expansion of *Bivens*."[300]

Finally, Judge Smith expressed concern about the implications and externalities of the court's decision.[301] He framed the untenable result this way: "[A]n alien injured on Mexican soil by a Border Patrol agent shooting from Texas lacks recourse under *Bivens*, [while] an alien injured on Mexican soil by an agent shooting from California or Arizona may sue for damages."[302]

IV. HARD CASES MAKE BAD LAW

Below, this Part aims to resolve the *Hernandez–Rodriguez* circuit split. Section IV.A contends that the *Hernandez–Rodriguez* split's constitutional implications make it unsustainable.[303] Section IV.B explains why the Supreme Court must resolve the split by demarcating the Constitution's extraterritorial limitations.[304] And Section IV.C posits that the legislature—not the judiciary—is best suited to establish remedies for cross-border shootings.[305]

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293 *Id.* at 746–47.

294 *Id.* at 748.

295 *Id.* at 757 (Smith, J., dissenting).

296 *Id.* at 748.

297 *Id.* at 750.

298 *Id.* at 758.

299 *Id.*

300 *Id.*

301 *Id.*

302 *Id.*

303 *See infra* Section IV.A.

304 *See infra* Section IV.B.

305 *See infra* Section IV.C.

A. The Hernandez–Rodriguez *Circuit Split Is Unsustainable*

Cliché or not, hard cases make bad law.[306] *Rodriguez* is undoubtedly a hard case. So it is unsurprising that reason finds no refuge in its jurisprudence of confusion.[307] From *Rodriguez*, a legal paradox arose: "[A]n alien injured on Mexican soil by a Border Patrol agent shooting from Texas lacks recourse under *Bivens*, [whereas] an alien injured on Mexican soil by an agent shooting from California or Arizona may sue for damages."[308]

To be sure, all circuit splits make outcomes contingent upon forum.[309] But the *Hernandez–Rodriguez* split presents a far more egregious problem: Constitutional protections apply differently to identically situated persons. This is because *Rodriguez* shook the very foundations of American jurisprudence by expanding the Constitution's reach beyond its grasp. It is one thing for circuits to split on matters of statutory interpretation: "Congress can clarify, amend, or repeal a federal statute variously interpreted by circuits . . . ."[310] It is another for circuits to split on constitutional matters because only the Supreme Court can resolve the conflict definitively.[311]

Before *Rodriguez*, no court had extended *Bivens* to cases involving the extraterritorial application of constitutional protections.[312] And the "[Supreme] Court has rejected every *Bivens* claim it has evaluated . . . that touch[es] on national security, even while recognizing the lack of alternate remedies."[313] This practice stems from the Court's desire to provide federal officers with wide latitude to perform their duties.[314] The Court also justifies its practice on separation of powers grounds.[315] Since the Constitution bestows the executive and legislative branches with plenary power over foreign relations and national

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306 N. Sec. Co. v. United States, 193 U.S. 197, 400 (1904) (Holmes, J., dissenting).

307 Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 993 (1992) (Scalia, J., dissenting).

308 Rodriguez v. Swartz, 899 F.3d 719, 758 (2018) (M. Smith, J., dissenting).

309 For this reason, circuit splits provoke federal forum shopping. *See* Wayne A. Logan, *Constitutional Cacophony: Federal Circuit Splits and the Fourth Amendment*, 65 VAND. L. REV. 1137, 1142 (2012).

310 *Id.*

311 *Id.*

312 Meshal v. Higgenbotham, 804 F.3d 417, 424–25 (D.C. Cir. 2015), *cert. denied*, 137 S. Ct. 2325 (2017).

313 Recent Case, Rodriguez v. Swartz, *899 F.3d 719 (9th Cir. 2018)*, 132 HARV. L. REV. 1096, 1101 (2019).

314 *Id.*

315 *Id.*

security, the Court avoids treading on that terrain.[316] Despite these concerns, *Rodriguez* consciously departed from the Traditional view.[317]

Rodriguez not only departs from the typical *Bivens* analysis but also disregards binding precedent on extraterritoriality. After all, the Court holds that the Fourth Amendment protects only "the people" of the United States;[318] it does not "restrain the actions of the Federal Government against aliens outside of the United States territory."[319] Therefore, as explained below, "it is possible that *Rodriguez* will not withstand higher review."[320]

1. On *Rodriguez*'s Externalities

At first, a malady is difficult to detect but easy to cure.[321] In time, the malady becomes easy to detect but difficult to cure.[322] Bad law is the same way. While *Rodriguez*'s implications are difficult to detect, they will be debilitating if left uncured.[323]

Until *Rodriguez*, "the starting points and first principles in this debate [were] not seriously in dispute."[324] Even after *Boumediene*, "[t]he two available toeholds to persons who assert constitutional rights from outside the sovereign territory of the United States [were] American citizenship and some element of de facto or de jure American sovereignty over the territory of the events in question."[325] In situations involving neither de facto nor de jure sovereignty, noncitizens outside the geographic boundaries of the United States "receive[d] constitutional protections only 'when they [had] come within the territory of the United States and developed substantial connections with this country.'"[326]

Despite recent aberrations, "[t]he Supreme Court has long taken the view that the Constitution is subject to territorial limitations."[327] Over the years, federal law developed atop this stable foundation. For instance, this view is the

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316 *Id.*

317 *Id.*

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

319 *Id.*

320 Recent Case, *supra* note 313, at 1101.

321 NICCOLÒ MACHIAVELLI, THE PRINCE 11 (W.K. Marriott trans., Everyman's Library 1908) (1532).

322 *Id.*

323 Petition for Writ of Certiorari, Swartz v. Rodriguez (No. 18-309).

324 Veiga v. World Meteorological Org., 568 F. Supp. 2d 367, 374 (S.D.N.Y. 2008).

325 *Id.* (citing Boumediene v. Bush, 553 U.S. 723, 758 (2008); United States v. Verdugo-Urquidez, 494 U.S. 259, 274–75 (1990); Reid v. Covert, 354 U.S. 1, 5–6 (1957)).

326 *Id.* (quoting *Verdugo-Urquidez*, 494 U.S. at 271).

327 Atamirzayeva v. United States, 524 F.3d 1320, 1322 (Fed. Cir. 2008).

groundwork upon which our system of immigration law rests.[328] This view also underlies all manner of national security endeavors.[329] To disregard this view—as *Rodriguez* does—is to shatter the bedrock of much federal law. Consider two examples.

i. Immigration Law

"[J]udicial meddling in immigration matters is particularly violative of separation-of-powers principles because the Constitution gives the political branches 'broad, undoubted power over the subject of immigration.'"[330] In the same vein, immigration litigation—which places "actual and often sympathetic human being[s] front and center"[331]—finds courts in a position where they tend to overvalue individual interests and overlook policy considerations.[332] Often, the ramifications of interventionist decisions do not become apparent until long after the gavel comes down.[333] For these reasons, the judiciary resists taking an active role in immigration.[334] But extending constitutional rights to noncitizens abroad would require the judiciary to adopt a preeminent role.

Immigration law distinguishes between noncitizens who are physically present in the United States and noncitizens who are not.[335] Noncitizens in the United States possess certain rights and privileges that those abroad lack.[336] And those seeking initial admission have no constitutional rights at the port of

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328 Zadvydas v. Davis, 533 U.S. 678, 693 (2001) ("The distinction between an alien who has effected an entry into the United States and one who has never entered runs throughout immigration law.").

329 *See* Rodriguez v. Swartz, 899 F.3d 719, 758 (9th Cir. 2018) (Smith, J., dissenting).

330 Maria S. *ex rel.* E.H.F. v. Garza, 912 F.3d 778, 784–85 (5th Cir. 2019) (quoting Arizona v. United States, 567 U.S. 387, 394 (2012)), *cert. denied sub nom.*, Maria S. v. Garza, No. 18-1350, 2019 WL 4921302 (U.S. Oct. 7, 2019).

331 David A. Martin, *Why Immigration's Plenary Power Doctrine Endures*, 68 OKLA. L. REV. 29, 48 (2015).

332 *Id.*

333 *Id.*

334 *Id.*

335 *Zadvydas*, 533 U.S. at 693.

336 *Id.*; *see, e.g.*, Kleindienst v. Mandel, 408 U.S. 753, 762–63 (1972) (analyzing the right to receive information domestically because an unadmitted noncitizen could not invoke any speech protections while abroad).

entry.[337] Clearly, then, extending constitutional rights to noncitizens abroad would compel a complete overhaul of immigration law.[338]

Under such a regime, immigration law's foundational principles would become untenable because they presuppose that noncitizens who reside abroad lack constitutional protections.[339] Indeed, "Congress regularly makes rules that would be unacceptable if applied to citizens."[340] Thus, if constitutional rights extended to all persons and places—which dissolves any meaningful distinction between citizen and noncitizen—these rules would be unsustainable.

ii. Intelligence Gathering

If constitutional protections were extended to noncitizens abroad, law-enforcement organizations would need to revamp international intelligence-gathering policies to account for the Fourth Amendment protections of all persons in all places. Indeed, many of the current "United States' . . . security operations could violate the Constitution if the affected noncitizens outside the United States had . . . constitutional rights."[341] A universal Fourth Amendment would not only hamper law enforcement's ability to obtain national-security intel but also provide arrestees with a mechanism for appearing before a United States tribunal.[342] No doubt, "accepting [this view] would have significant and deleterious consequences for the United States in conducting activities beyond its boundaries."[343]

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337 Landon v. Plasencia, 459 U.S. 21, 32 (1982) ("This Court has long held that an alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application, for the power to admit or exclude aliens is a sovereign prerogative."); Leng May Ma v. Barber, 357 U.S. 185, 187 (1958) ("[I]mmigration laws have long made a distinction between those aliens who have come to our shores seeking admission . . . and those who are within the United States after an entry, irrespective of its legality. In the latter instance[,] the Court has recognized additional rights and privileges not extended to those in the former category who are merely 'on the threshold of initial entry.'"); Kwong Hai Chew v. Colding, 344 U.S. 590, 598 n.5 (1953) ("The Bill of Rights is a futile authority for the alien seeking admission for the first time to these shores.").

338 *See* NEUMAN, *supra* note 33, at 118.

339 This is why "[s]cholars challenging the plenary power doctrine seek to constitutionalize immigration law." Travis Silva, *Toward a Constitutionalized Theory of Immigration Detention*, 31 YALE L. & POL'Y REV. 227, 243 (2012).

340 Mathews v. Diaz, 426 U.S. 67, 80 (1976).

341 Kent, *supra* note 39, at 464.

342 United States v. Verdugo-Urquidez, 494 U.S. 259, 273–74 (1990) (finding that the international "[a]pplication of the Fourth Amendment . . . could significantly disrupt the ability of the political branches to respond to foreign situations involving our national interest . . . . [And] aliens with no attachment to this country might well bring actions for damages to remedy claimed violations of the Fourth Amendment in foreign countries or in international waters").

343 *Id.* at 273.

B. The Court Must Clarify the Constitution's Extraterritorial Scope

When the Supreme Court addresses the *Hernandez–Rodriguez* split, it must begin by clarifying the Constitution's extraterritorial scope.[344] This way, the Court effectively resolves the split without rehashing *Bivens* issues directly. The rationale is simple enough: Either Fourth Amendment protections extend to noncitizens abroad or they do not. And if they do not—as precedent holds—*Rodriguez* becomes unsustainable because *Bivens* only provides remedies for constitutional violations.[345]

By focusing on constitutional extraterritoriality—and setting out a clear principle of decision—the Court removes a stain of uncertainty from the law. This approach not only resolves the present split but also prevents any future splits from arising. Prudential considerations aside, the prevailing uncertainty is incompatible with the rule of law.[346] The longer that this uncertainty lingers, the more harm that befalls the rule of law.[347]

Below, this Part moves from generalities to specifics in arguing that the Constitution has no extraterritorial application whatsoever to noncitizens who reside abroad.

1. Whose Constitution Is It Anyway?

As Professor Andrew Kent has discussed at length, many aspects of the Constitution suggest that it is not a universal document.[348] While this Note does not presume to rewrite Professor Kent's work, some of his observations appear below. Before that, however, the most glaring feature of the Constitution merits discussion: It is a *constitution*.

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[344] Petition for Writ of Certiorari at i, Swartz v. Rodriguez, No. 18-309, 2018 WL 4348517 (U.S. Sept. 7, 2018) (asking whether "the panel's decision to create [a *Bivens*] remedy . . . in the new context of a cross-border shooting, misapplies Supreme Court precedent and violates separation-of-powers principles, where foreign relations, border security, and the extraterritorial application of the Fourth Amendment are some of the special factors that counsel hesitation against such an extension"); Petition for Writ of Certiorari at i, Hernandez v. Mesa, No. 17-1678, 2018 WL 3155839 (U.S. June 15, 2018) (asking whether the "plaintiffs plausibly allege that a rogue federal law enforcement officer violated clearly established Fourth and Fifth Amendment rights for which there is no alternative legal remedy").

[345] *Bivens* established an "implied private action for damages against federal officers alleged to have violated a citizen's constitutional rights." Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 66 (2001).

[346] Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1179 (1989).

[347] *See id.*

[348] Kent, *supra* note 39, at 485 ("Viewed as a whole, the Constitution is not a globalist document.").

i. Never Forget that We Are Expounding a Constitution

Famously, in *McCulloch v. Maryland*,[349] Chief Justice John Marshall wrote that "we must never forget that it is a *constitution* we are expounding."[350] (The expounders forgot.) Merriam-Webster defines the term *constitution* as "the basic principles and laws of a nation, state, or social group that determine the powers and duties of the government and guarantee certain rights to the people in it."[351] By definition, then, a *constitution* governs a particular group and confers rights only to those within the group. And for most of United States history, courts took this for granted.

For instance, the reader will remember *Chisholm v. Georgia*.[352] There, Chief Justice John Jay remarked that "the Constitution of the United States is . . . a compact made by the people of the United States *to govern themselves* . . . in a certain manner."[353] He analogized to then-existing state constitutions.[354] These founding-era state constitutions shared an important feature: They focused on the rights of their respective political communities.[355] Consider a primary objective of the Massachusetts Constitution: "to secure the existence of the body-politic, to protect it, and to furnish the individuals who compose it with the power of enjoying, in safety and tranquility, their natural rights and blessings of life."[356] Thus, the Massachusetts Constitution did not establish a government for all; it created one for "ourselves and posterity."[357] Likewise, as Chief Justice John Jay observed, the United States Constitution established a government for the people and their posterity.

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349 17 U.S. (4 Wheat.) 316 (1819).

350 *Id.* at 407.

351 *Constitution*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/constitution (last visited Oct. 9, 2019). Similarly, Black's Law Dictionary defines the term *constitution* as "[t]he fundamental and organic law of a country or state that establishes the institutions and apparatus of government, defines the scope of governmental sovereign powers, and guarantees individual civil rights and civil liberties; a set of basic laws and principles that a country, state, or organization is governed by." *Constitution*, BLACK'S LAW DICTIONARY (10th ed. 2014).

352 2 U.S. 419 (1793).

353 *Id.* at 471 (emphasis added).

354 *Id.* ("Every State Constitution is a compact made by and between the citizens of a State *to govern themselves* in a certain manner . . . ." (emphasis added)).

355 Kent, *supra* note 39, at 489.

356 MASS. CONST. of 1780, pmbl.

357 *Id.*

ii. The Law of the Land

As another matter, consider the Supremacy Clause.[358] It provides that the "Constitution . . . shall be the supreme Law of the Land,"[359] not the law of any other place.[360] And in 18th century usage, the "law of the land" referred to domestic law—often common law—which stood in stark contrast with the law of nations.[361]

iii. For Ourselves and Our Posterity

The Constitution's Preamble also betrays its territorial orientation.[362] Examples abound. First, the Preamble explains that the Constitution is intended to "insure *domestic* Tranquility."[363] No doubt, this clause's domestic orientation speaks for itself. Second, the Preamble secures "Liberty" to "ourselves and our Posterity"—but not to anyone else.[364] And, third, the Preamble states that the Constitution exists to "provide for the common defence."[365] Taken in context, "common defence" refers to the defense of "the People of the United States" and the "Union"—not the defense of foreign people or foreign places.[366] All throughout, the Preamble makes clear that the Constitution is "ordain[ed] and establish[ed] for the United States of America."[367]

2. Reconciling *Boumediene* and *Verdugo-Urquidez*

Boumediene's legacy proves as controversial as the decision itself.[368] For years, critics felt that it went too far by extending habeas to noncitizen terrorism

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358 U.S. CONST. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.").

359 *Id.*

360 Kent, *supra* note 39, at 509.

361 *Id.* at 510.

362 *Id.*

363 U.S. CONST. pmbl. (emphasis added).

364 Kent, *supra* note 39, at 509.

365 *Id.*

366 *Id.*

367 *Id.*

368 Stephen I. Vladeck, Opinion, *Will the Rule of Law Apply Along the Border?*, N.Y. TIMES (June 12, 2018), https://www.nytimes.com/2018/06/12/opinion/boumediene-rule-of-law-border.html.

suspects outside the United States.[369] Meanwhile, proponents argued that the decision did not go far enough because it extended habeas only to Guantanamo detainees and provided no guidance on procedural, evidentiary, or substantive rules.[370] As such, it is obvious that neither camp is satisfied. One D.C. Circuit judge "went so far as to compare the justices in the majority to the characters in 'The Great Gatsby'—'careless people' who 'smashed things up' and 'let other people clean up the mess they had made.'"[371]

For now, one thing seems clear: *Boumediene* means different things to different people.[372] To some, "*Boumediene*'s right to habeas corpus would be meaningless if there were no substantive rights [for it] to protect."[373] To others, *Boumediene* is meaningful only insofar as factually analogous cases arise—i.e., cases involving prisoners seeking habeas corpus from a detention camp.[374] Unsurprisingly, the author adopts the latter perspective.

Recall that *Boumediene* involved a fundamentally different issue than *Verdugo-Urquidez*.[375] In *Boumediene*, the issue was whether the Suspension Clause's reach extended to areas where the federal government had *de facto* control.[376] *Verdugo-Urquidez*, on the other hand, raised the issue of whether constitutional protections extended to a noncitizen abroad.[377]

Out of context, *Boumediene*'s functional analysis might seem to leave open the possibility that substantive rights extend to noncitizens abroad.[378] But

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369 *Id.*

370 *Id.*

371 *Id.*

372 *Compare* Hernandez v. Mesa, 137 S. Ct. 2003, 2007 (2017) (Breyer, J., dissenting) (claiming that *Boumediene* renders the extraterritorial scope of the Constitution dependent upon a functional test), *with* Hernandez v. Mesa, 885 F.3d 811, 817 (5th Cir. 2018) (en banc) ("[N]o federal circuit court has extended the holding of *Boumediene* either substantively to other constitutional provisions or geographically to locales where the United States has neither *de facto* nor *de jure* control. Indeed, the courts have unanimously rejected such extensions.").

373 Van Houten, *supra* note 153, at 11 (quoting former Solicitor General Neal Katyal).

374 *See, e.g.*, *Hernandez*, 885 F.3d at 817 ("[N]o federal circuit court has extended the holding of *Boumediene* either substantively to other constitutional provisions or geographically to locales where the United States has neither *de facto* nor *de jure* control. Indeed, the courts have unanimously rejected such extensions."); Ali v. Rumsfeld, 649 F.3d 762, 771 (D.C. Cir. 2011) (en banc) ("*Boumediene* 'explicitly confined its constitutional holding "only" to the extraterritorial reach of the Suspension Clause' and 'disclaimed any intention to disturb existing law governing the extraterritorial reach of any constitutional provisions, other than the Suspension Clause.'"); Igartúa v. United States, 626 F.3d 592, 600 (1st Cir. 2010) ("The *Boumediene* court was concerned only with the Suspension Clause . . . not with . . . any other constitutional text.").

375 Maltz, *supra* note 21, at 404–06.

376 *Id.*

377 *Id.*

378 *Id.*

the *Boumediene* Court did not purport to overrule *Verdugo-Urquidez*.[379] And *Verdugo-Urquidez* spoke in no uncertain terms about the test for determining if noncitizen litigants possess constitutional protections: "[A]liens receive such protections when they have come within the territory of, and have developed substantial connections with, [the United States]."[380]

C. Clear Constitutional Boundaries Beget Sound Legislative Actions

During oral arguments in *Hernandez v. Mesa*,[381] Justice Kennedy asked whether Congress had considered passing any laws that would compensate victims' families in instances of cross-border shootings.[382] In response, Deputy Solicitor General Kneedler stated that he did not know of any such bills, "but that would be the solution."[383]

Two facets of this exchange are noteworthy. First, Justice Kennedy's question betrays his awareness that *no laws* addressed the issue at hand. And second, Deputy Solicitor General Kneedler's response tacitly demonstrates his understanding that his adversary's lack of legal authority was not dispositive of the matter. Both aspects of the exchange are deeply troubling in a system of *enumerated powers*[384] that expressly limits the judiciary's jurisdiction to cases arising under federal law.[385]

1. On the Roles of Judges and Legislators

These days, courts are either innovative or restrained. Innovative courts make mistakes; restrained courts prevent those mistakes from being corrected: "This is . . . the balance, or mutual check, in our Constitution."[386] Of course, that was a joke—albeit a bad one—but it rings true because innovation without correction caused the present dilemma. While the courts busy themselves by ceaselessly "caution[ing] against 'broad pronouncements' with respect to 'the

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379 *Id.*

380 United States v. Verdugo-Urquidez, 494 U.S. 259, 260 (1990).

381 137 S. Ct. 2003 (2017).

382 Transcript of Oral Argument at 51, *Hernandez*, 137 S. Ct. 2003 (No. 15-118).

383 *Id.*

384 United States v. Lopez, 514 U.S. 549, 552 (1995) ("The Constitution creates a Federal Government of enumerated powers.").

385 U.S. CONST. art. III ("The judicial Power shall extend to all Cases . . . arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority.").

386 G.K. Chesterton, *The Blunders of Our Parties*, ILLUSTRATED LONDON NEWS, Apr. 19, 1924, *reprinted in* 33 THE COLLECTED WORKS OF G.K. CHESTERTON 312, 313 (Lawrence J. Clipper ed., 1990).

Constitution's extraterritorial application,'"[387] they simultaneously ignore more than a century of precedent addressing the issue. And when precedent abounds, judicial reluctance is mistaken.

Having discussed innovations in constitutional extraterritoriality,[388] this Note would be remiss not to briefly remark on the underlying motivation. Likely, a desire for *justice* has motivated courts to depart from historical norms. When a court references the lack of alternative remedies in a *Bivens* action, it is expressing concern that a wrong cannot be righted without judicial innovation.

In the United States, however, courts are not arbiters of justice.[389] An oft-mentioned anecdote illustrates the point. One day, Justice Oliver Wendell Holmes and Judge Learned Hand lunched together. After finishing their meals, Holmes entered his carriage to return home.[390] As the carriage gained speed, Judge Hand shouted his goodbye: "Do justice, sir, do justice." Holmes halted the carriage in its tracks. "That is not my job," Holmes replied: "It is my job to *apply* the law."[391]

Whether apocryphal or not, this story illustrates an essential truth of American jurisprudence. When Holmes remarked that justice would not be appropriate judicial consideration, he was not saying that justice has no place in law.[392] Rather, he was saying that it is not a judge's function to put it there.[393] Although justice undoubtedly plays an important role in the legislative process, it has little or no role in the judicial interpretation of legislation.[394]

It might seem that if justice is desirable in law, the question of who puts it there is secondary (or even entirely trivial).[395] Nothing could be further from true: Justice contrived at whim from personal predilection is not justice at all. The recognition of this fact underlies the American legal system—which respects not the rule of king but the rule of law.[396] It follows that the separation of powers

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387 United States v. Kashamu, 15 F. Supp. 3d 854, 859 (N.D. Ill. 2014) (citing United States v. Wanigasinghe, 545 F.3d 595, 597 (7th Cir. 2008)).

388 *See supra* Part II.

389 THOMAS SOWELL, THE QUEST FOR COSMIC JUSTICE 168–69 (1999).

390 *Id.*

391 *Id.* (emphasis added). *See also* STEPHEN BUDIANSKY, OLIVER WENDELL HOLMES: A LIFE IN WAR, LAW, AND IDEAS 415 (2019) ("Learned Hand often told the story of how one time, visiting Holmes in Washington, he had jokingly called back to him as they parted after sharing a ride to the Capital, 'Well, Sir, goodbye, do justice!' Holmes spun sharply around. 'Come here, young feller, come here.' . . . 'That is not my job. My job is to play the game according to the rules.'").

392 SOWELL, *supra* note 389, at 168–69.

393 *Id.*

394 *Id.*

395 *Id.*

396 THOMAS PAINE, COMMON SENSE (1776), *reprinted in* COMMON SENSE AND RELATED WRITINGS 72, 98 (Thomas P. Slaughter ed., 2001) ("[I]n America THE LAW IS KING.").

in creating and interpreting law preserves the rule of law itself.[397] Without this separation, arbitrariness governs. (Judicial preference enshrines itself as law.) To guard against this, judges and legislators should embrace their respective roles. Prudential considerations should be left to legislators.[398] And judges should "see that the game is played according to the rules[—]whether [they] like them or not."[399]

2. Judicial Activism Disincentivizes Legislative Action

Bivens and its progeny are relics "of the heady days in which this Court assumed common-law powers to create causes of action—decreeing them to be 'implied' by the mere existence of a statutory or constitutional prohibition."[400] Nowadays, courts seem to know better.[401] But old habits die hard.[402]

When courts allow for *Bivens*-style remedies—as the Ninth Circuit did in *Rodriguez*—they disincentivize Congress from acting. After all, why should Congress address a problem that the judiciary has already addressed? The logic is simple: When the judiciary usurps legislative power by inventing post-hoc remedies, it preempts congressional action and allows legislators to abdicate their roles with impunity. Consequently, Congress may freely ignore problems that it would otherwise have to address.

This Note does not advocate against extending constitutional rights to noncitizens abroad out of some perverse desire to deprive them of legal remedies for real-world harms; it makes the case for strict territoriality because it is an essential piece of the constitutional puzzle. When that piece is in place, it ensures that the system *can* function as intended. (Here, this means Congress would face political pressure to address the issue of cross-border shootings.) But when that piece is out of place—when the judiciary extends the Constitution's reach beyond its grasp—Congress lacks any incentive to act. Thus, inadequate remedies, jurisprudential inconsistencies, and tragic externalities proliferate.

Finally, just because "constitutional rights should not be interpreted as restricting all government action against all persons in all places . . . does not mean that . . . uses of force . . . are immune from demands for justification."[403] Instead, "it simply means that the standards . . . are not to be sought in the United

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397 SOWELL, *supra* note 389, at 169.

398 Ziglar v. Abbasi, 137 S. Ct. 1843, 1857 (2017) ("When an issue 'involves a host of considerations that must be weighed and appraised,' it should be committed to 'those who write the laws' rather than 'those who interpret them.'").

399 SOWELL, *supra* note 389, at 169–70.

400 Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 75 (2001) (Scalia, J., concurring).

401 *See, e.g.*, *Abbasi*, 137 S. Ct. at 1857.

402 *See, e.g.*, Rodriguez v. Swartz, 899 F.3d 719, 727 (9th Cir. 2018).

403 NEUMAN, *supra* note 33, at 111.

States Constitution."[404] It is the legislature's responsibility to address cross-border shootings. And only the legislature can do so adequately.

V. CONCLUSION

The Constitution's framers were like pioneering ship builders.[405] They did not merely seek to assemble a structure that would stay afloat in rough seas; they meant to grant *passengers* greater comfort and safety than any preceding ship provided.[406] To this end, the framers included rights akin to lifeboats.[407] *Passengers* use them if the ship fails.[408]

Today, however, the crew (the courts) and the passengers (the people) fixate on the lifeboats while the ship decays. This fixation portends disaster. While they lay plans to sail lifeboats around the world, the ship goes untended. Lest the ship sink, those aboard must remember what keeps them afloat.

Thus, this Note contends that legal lifeboats are not intended for those who never set foot on the constitutional ship. As the law stands, "it is [neither] anomalous [n]or unprincipled to read the Constitution as protecting *people within the United States* but not *aliens abroad*."[409] Indeed, the Supreme Court espoused this view since it first addressed the issue. Until the Court reaffirms its Traditional jurisprudence, paradoxical decisions will continue to multiply. Consensus dictates that such a result is untenable: "People, regardless of their citizenship status, should not be subjected to on-again, off-again protections."[410] Alas, the *Hernandez–Rodriguez* voyage leaves the ship aimlessly adrift in uncertain seas.

*Brendan O. Beutell**

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404 *Id*.

405 Randy E. BARNETT, OUR REPUBLICAN CONSTITUTION 167 (2016).

406 *Id*.

407 *See id*.

408 *Id*.

409 Kent, *supra* note 39, at 540 (emphasis added).

410 Blair E. Wessels, Note, *Won't You Be My Neighbor:* Meza-Rodriguez*, the Second Amendment, and the Constitutional Rights of Noncitizens*, 121 W. VA. L. REV. 667, 692 (2018).

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