# HARD CASES MAKE BAD LAW: EXTRATERRITORIAL APPLICATION OF THE UNITED STATES CONSTITUTION

## 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.

## INTRODUCTION

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.

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I. INTRODUCTION

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

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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, it has not (recently) held that constitutional protections are wholly unavailable. This judicial indecisiveness—though seemingly innocuous—proved immensely consequential in two recent cases.

In Hernandez v. Mesa, the Fifth Circuit tacitly held that a noncitizen who resides abroad cannot claim Fourth Amendment protection. Soon after, the Ninth Circuit reached the opposite conclusion in Rodriguez v. Swartz. 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


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." 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.”

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. This Note contends that the Constitution has no extraterritorial application whatsoever to noncitizens residing abroad (save for rare and peculiar circumstances). This position finds its support in constitutional text, history, and law. Indeed, the position is implicit in the very word constitution.

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 that courts must apply the law (defects and all). 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. 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.

This Note proceeds in three parts. First, Part II provides an overview of the competing perspectives in constitutional extraterritoriality. 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.
18 Seeinfra 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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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)).
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

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, 555 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).


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.

border,’ even with respect to the acts of state officials that operate abroad.”  


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. For instance, United States v. Curtiss-Wright Export Corp. 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.” And in the Insular Cases, the Court developed a doctrine of extraterritoriality that rendered constitutional protections contingent upon territorial incorporation. It extended protections to territories designated to become states and withheld protections from territories that were not.

Additionally, United States ex rel. Turner v. Williams made clear that a noncitizen does not become one of “the people” to whom the Constitution applies simply by attempting to enter the country. 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.” 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 Export 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).
49 Id. at 318.
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. Knueger, 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, 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-Urquidez63 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”).
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).
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

65 Lamont v. Woods, 948 F.2d 825, 834 (2d Cir. 1991).
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. Davis86 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

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.
87 Id. at 693.
88 Id. at 694 (citing Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206, 215 (1953)).
attorney.” Likewise, in Kerry v. Din, 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]."

Last term, in Trump v. Hawaii, Justice Thomas echoed the Traditional Perspective’s mantra in his concurrence. He concluded that the plaintiffs did not present a viable First Amendment claim because “the alleged religious discrimination . . . was directed at aliens abroad.”

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.” Many commentators contend that the Supreme Court recently adopted such an approach.

1. Boumediene v. Bush

In Boumediene v. Bush, the Court held that the Suspension Clause had full legal force and effect at Guantanamo Bay. There, several noncitizen Guantanamo Bay detainees—who were classified as enemy combatants—were...
denied writs of habeas corpus under Section 7(a) of the Military Commissions Act ("MCA"), which stripped federal courts of jurisdiction over such cases. On appeal, the detainees challenged the MCA’s constitutionality. 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. Citing Johnson v. Eisentrager and relying upon historical evidence, the court concluded that habeas corpus is not “available . . . to aliens without presence or property within the United States.” The detainees appealed.

The Supreme Court granted certiorari. In an opinion authored by Justice Kennedy, the Court held that Section 7(a) unconstitutionally suspended the writ of habeas corpus. 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.” 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.”

i. **Justice Souter Conurs**

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

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101 *Id.* at 732.
102 *Id.* at 733.
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)).
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.”

### ii. Chief Justice Roberts Dissents

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

“So who has won?” 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.” *It was not Congress:* “whose attempt to . . . balance the security of the American people with the detainees’ liberty interests [is] brushed aside.” *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.” *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.” *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.”

### iii. Justice Scalia Dissents

Justice Scalia dissented. 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.” He then addressed some...
potential consequences of the Court’s decision.\footnote{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.”).} Lastly, Justice Scalia suggested that the judiciary—“the branch that knows least about the national security concerns”—had wrongly usurped executive power.\footnote{Id. at 831.}

iv. Scholarly Interpretation

Although Boumediene did not purport to overrule any prior decisions, many view the decision as an overhaul of extraterritorial jurisprudence.\footnote{See, e.g., Hernandez v. Mesa, 137 S. Ct. 2003, 2008–09 (2017) (Breyer, J., dissenting) (“[Qu]estions of extraterritoriality turn on objective factors and practical concerns, not formalism.” (citing Boumediene, 553 U.S. at 764)); Nicholson, supra note 96.} 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.\footnote{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).} 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.\footnote{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”).} For instance, in the recent case of United States v. Loera,\footnote{333 F. Supp. 3d 172 (E.D.N.Y. 2018).} 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.\footnote{Id. at 181–82.}

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.\footnote{Id. at 180.} Crucially, these servers were in the Netherlands.\footnote{Id.}
The FBI obtained evidence from El Chapo’s servers in three ways. 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. Second, the Dutch authorities executed search warrants on the servers and provided their contents to the FBI. 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.

El Chapo maintained that this conduct violated his Fourth Amendment privacy interest in the servers’ contents. 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.

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.’” And the court noted the Second Circuit’s strict adherence to the holding of Verdugo-Urquidez. As the court put it, “this Circuit consider[s] the Verdugo-Urquidez holding ‘dispositive case law.’”

Accordingly, El Chapo could only invoke the Fourth Amendment by establishing substantial and voluntary connections to the United States. 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.

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

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.” For example, in Ali v. Rumsfeld, 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.’” 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.”

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.”

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.
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.\textsuperscript{155} For illustrative purposes, consider a recent case out of the Third Circuit: Osorio-Martinez \textit{v. Attorney General United States}.\textsuperscript{156} There, the court invalidated an Immigration and Nationality Act (“INA”) jurisdiction-stripping provision\textsuperscript{157} under Verdugo-Urquidez and Boumediene.\textsuperscript{158}

To understand Osorio-Martinez’s holding, the reader must first become acquainted with “entry fiction.”\textsuperscript{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.’”\textsuperscript{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.”\textsuperscript{161} At the time, the petitioners neither presented immigration papers nor claimed to have been lawfully admitted to the United States.\textsuperscript{162} Therefore, the authorities detained the petitioners and initiated removal proceedings.\textsuperscript{163}

While awaiting removal in detention, the Osorio-Martinez petitioners attained Special Immigrant Juvenile (“SIJ”) status.\textsuperscript{164} And given their changed statuses, the petitioners sought to secure their releases under the Suspension Clause.\textsuperscript{165}

The petitioner’s action raised a novel question of first impression: “Does the [INA’s] jurisdiction-stripping provision . . . unconstitutionally suspend[d] the writ of habeas corpus as applied to SIJ designees seeking judicial review of orders of expedited removal?”\textsuperscript{166} Using Boumediene and Verdugo-Urquidez, the Third Circuit answered that question affirmatively.\textsuperscript{167}

\textsuperscript{155} See, e.g., Thuraissigiam \textit{v. U.S. Dep’t of Homeland Sec.}, 917 F.3d 1097, 1106-07 (9th Cir. 2019); Ibrahim \textit{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.”).

\textsuperscript{156} 893 F.3d 153 (3d Cir. 2018).


\textsuperscript{158} Osorio-Martinez, 893 F.3d at 178.

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

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

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

\textsuperscript{162} Id. at 427–28.

\textsuperscript{163} Osorio-Martinez, 893 F.3d at 159.

\textsuperscript{164} Id. at 160.

\textsuperscript{165} Id.

\textsuperscript{166} Id. at 158.

\textsuperscript{167} Id. at 168.
First, the court endeavored to determine whether the petitioners were prohibited from invoking the Suspension Clause.\textsuperscript{168} Despite being noncitizens, the petitioners were not prohibited from doing so.\textsuperscript{169} In the Third Circuit’s view, the petitioners “developed the [requisite] ‘substantial connections with this country.’”\textsuperscript{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.\textsuperscript{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).”\textsuperscript{172} The court concluded that the INA “does not provide ‘an “adequate [or] effective” alternative to habeas review.’”\textsuperscript{173} Accordingly, the court found that the petitioners’ SIJ status conferred a special right to invoke the Suspension Clause.\textsuperscript{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.\textsuperscript{175} While the Third Circuit admirably synthesized inconsistent doctrine, this framework’s adoption would inevitably foster greater confusion.\textsuperscript{176}

\textsuperscript{168} Id. at 166.
\textsuperscript{169} Id. at 167–68.
\textsuperscript{170} Id. at 168 (quoting United States v. Verdugo-Urquidez, 494 U.S. 259, 271 (1990)).
\textsuperscript{171} Id. (quoting Castro v. U.S. Dep’t of Homeland Sec., 835 F.3d 422, 448 (3d Cir. 2016)).
\textsuperscript{172} Id. at 166.
\textsuperscript{173} Id. at 177 (quoting Khouzam v. Attorney Gen. of the U.S., 549 F.3d 235, 246 (3d Cir. 2008)).
\textsuperscript{174} Id. at 178.
\textsuperscript{175} See infra Section IV.B.
\textsuperscript{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, 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. Soon after, the Ninth Circuit reached the opposite conclusion in Rodriguez. 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.”

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, 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. After Bivens, a number of subsequent decisions modified its breadth.

In Davis v. Passman, the Court extended Bivens to allow for causes of action under the Fifth Amendment’s Due Process Clause. Next, Carlson v. Green further extended Bivens to encompass Eighth Amendment disputes. But this trend of expansion was short-lived.
After Davis and Carlson, the Supreme Court decided eight consecutive cases holding Bivens actions untenable. This trend of rejecting Bivens claims ultimately culminated in Ziglar v. Abbasi, where the Court “made clear that expanding the Bivens remedy is now a ‘disfavored’ judicial activity.”

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. In an opinion by Justice Kennedy, the Court presented the analytical framework for assessing the viability of a Bivens action before dismissing virtually all of the respondents’ claims. 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.” A case presents a new context if it differs from Bivens, Davis, or Carlson in a “meaningful way.” 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. If a case

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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. While “special factors” is not a well-defined term, 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?

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.’” 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. 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. But if a court concludes that special factors do not caution against extending Bivens, the case may proceed.

B. Post-Abbasi Bivens Actions Beget Extraterritorial Uncertainty

Two recent decisions are illustrative of Bivens jurisprudence in the post-Abbasi landscape. 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). Both posed the same question: Under Bivens, may noncitizens who lack any 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 Hernandez, 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 concludes 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

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).
216 Hernandez, 885 F.3d at 814.
217 Id.
fired several shots toward his perceived assailants. As a result, Sergio Hernández was fatally wounded.

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.”

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.” Thus, the evidence did not show that Agent Mesa “acted willfully . . . to do something the law forbids.” Still, expressing remorse over the loss of life, officials pledged to work alongside the Mexican government in hopes of preventing future incidents.

1. The Hernándezes’ Bivens Action

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

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

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218 Id.
219 Id.
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 but found the Hernándezes’ Fifth Amendment claim viable. 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. The Hernándezes petitioned for certiorari.

2. The Supreme Court Grants Certiorari

The Supreme Court granted certiorari and heard Hernandez alongside Abbasi. The Court began by addressing the Bivens question. 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. (There, the Court had clarified the analysis that courts should undertake when addressing Bivens claims.) 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.” With that, the Supreme Court vacated the Fifth Circuit’s decision and remanded the case for further consideration under Abbasi.

i. Justice Thomas Dissents

In a dissenting opinion, Justice Thomas pointed out that the Court had “directed the parties to address . . . ‘whether the claim in this case may be asserted under Bivens.’” Justice Thomas believed that the Court should have answered the question rather than remanding for the Fifth Circuit to do so. Justice Thomas further noted that “‘Bivens and its progeny’ should be limited ‘to the precise circumstances that they involved.’” 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.
234 Id. at 2006–07.
235 See supra Section III.A.
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.\footnote{Id.} Simply put, this case involved cross-border conduct—and the others did not.\footnote{Id.} Therefore, Justice Thomas would have affirmed the Fifth Circuit’s decision.\footnote{Id.}

\textit{ii. Justice Breyer Dissents}

In another dissenting opinion,\footnote{Id. (Breyer, J., dissenting).} Justice Breyer—who was joined by Justice Ginsburg—stated that the Court should have reversed “the Court of Appeals’ Fourth Amendment holding.”\footnote{Id. at 2008–09 (citing Boumediene v. Bush, 553 U.S. 723, 764 (2008))).} 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.”\footnote{Id. at 2009–11.}

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.\footnote{Id. at 2011.}

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.”\footnote{Id.} After answering the Fourth Amendment question, Justice Breyer would have remanded for consideration of the Bivens and qualified immunity questions.\footnote{Id.}

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

On remand, the Fifth Circuit—sitting en banc—reaffirmed dismissal.\footnote{Hernandez v. Mesa, 885 F.3d 811, 823 (5th Cir. 2018).} The court held that Hernández’s Bivens claim presented a “new context” under
Abbasi (i.e., the cross-border shooting was factually distinguishable from the circumstances underlying prior Bivens actions).\footnote{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.”\footnote{252} Thus, the Fifth Circuit “conclude[d] that this [was] not a close case.”\footnote{253}

D. Rodriguez v. Swartz

Oftentimes, a Bivens cure worsens what it seeks to remedy.\footnote{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.\footnote{255}

In Rodriguez, the Ninth Circuit held that a noncitizen residing abroad had Fourth Amendment protection.\footnote{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.\footnote{257} The full story follows.\footnote{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.\footnote{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.\footnote{260} Officer Garcia immediately called for backup and began chasing the two men.\footnote{261}

\footnote{251} Id. at 816–17.
\footnote{252} Id. at 817 (citing United States v. Verdugo-Urquidez, 494 U.S. 259, 274–75 (1990)).
\footnote{253} Id. at 823.
\footnote{255} See Rodriguez v. Swartz, 899 F.3d 719 (9th Cir. 2018).
\footnote{256} Id. at 730.
\footnote{257} Id. at 733.
\footnote{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.
\footnote{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.
\footnote{260} Id.
\footnote{261} Id.
As he pursued the men, they disappeared into a residential yard. Concerned of a potential ambush, Officer Garcia decided to wait for backup. Moments later, Officer Zuñiga arrived on the scene alongside several Border Patrol agents—one of whom was Agent Lonnie Swartz. Upon arrival, Zuñiga spotted the two men scaling the fence back into Mexico. He ordered them to climb down from the fence. Suddenly, Officer Zuñiga saw rocks flying towards him. He also heard gunfire. Agent Swartz had fired his weapon. Ten bullets hit José Antonio Elena Rodríguez ("J.A."). J.A. was a Mexican citizen who had never set foot in the United States. But Agent Swartz did not know that when he fired his weapon.

2. Araceli Rodríguez Files Suit Under Bivens

J.A.’s mother, Araceli Rodríguez, brought a Bivens action against Agent Swartz in Arizona’s district court. She asserted that Agent Swartz intentionally killed J.A. and thereby violated his Fourth and Fifth Amendment rights. Agent Swartz moved to dismiss. 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.

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262 Id.
263 Id.
264 Id.
265 Rodriguez v. Swartz, 899 F.3d 719, 727 (9th Cir. 2018).
266 Binelli, supra note 259.
267 Id.
268 Id.
269 Id.
270 Rodriguez, 899 F.3d at 727.
271 Binelli, supra note 259.
273 Binelli, supra note 259.
275 See id.
276 Id.
277 Id. at 1030–31.
The district court denied Agent Swartz’s motion. The court took this as an opportunity to highlight its disagreement with *Hernandez*. It found that Agent Swartz violated J.A.’s clearly-established Fourth Amendment rights. Consequently, Agent Swartz could not rely on qualified immunity. 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. The court found that J.A. “had a Fourth Amendment right to be free from the . . . unreasonable use of deadly force.” Much like the district court below, the Ninth Circuit “recognize[d] that on similar facts, the Fifth Circuit reached a contrary conclusion.” Nevertheless, the court distinguished *Rodriguez* from *Hernandez*. And the court held that—assuming the allegations were true—Swartz was not entitled to qualified immunity.

“[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.” Therefore, the court concluded that the use of “deadly force by an American agent acting on American soil,” regardless of the decedent’s location, was subject to the Fourth Amendment.

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

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.*
In so holding, the court noted that the allegations may turn out to be unsupported and the shooting may have been justified.\textsuperscript{294} “[M]indful of the tragedy underlying this case,” Circuit Judge Milan D. Smith, Jr., issued a blistering dissent.\textsuperscript{296} In his view, Hernandez should have determined the outcome of this case.\textsuperscript{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.”\textsuperscript{298} Worse still, the majority did not properly apply the principles set forth in Abbasi.\textsuperscript{299} And this led to the unfounded conclusion “that there [were] no special factors weighing against this unprecedented expansion of Bivens.”\textsuperscript{300} Finally, Judge Smith expressed concern about the implications and externalities of the court’s decision.\textsuperscript{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.”\textsuperscript{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.\textsuperscript{303} Section IV.B explains why the Supreme Court must resolve the split by demarcating the Constitution’s extraterritorial limitations.\textsuperscript{304} And Section IV.C posits that the legislature—not the judiciary—is best suited to establish remedies for cross-border shootings.\textsuperscript{305}

\textsuperscript{293} Id. at 746–47.
\textsuperscript{294} Id. at 748.
\textsuperscript{295} Id. at 757 (Smith, J., dissenting).
\textsuperscript{296} Id. at 748.
\textsuperscript{297} Id. at 750.
\textsuperscript{298} Id. at 758.
\textsuperscript{299} Id.
\textsuperscript{300} Id.
\textsuperscript{301} Id.
\textsuperscript{302} Id.
\textsuperscript{303} See infra Section IV.A.
\textsuperscript{304} See infra Section IV.B.
\textsuperscript{305} See infra Section IV.C.
A. The Hernandez–Rodriguez Circuit Split Is Unsustainable

Cliché or not, hard cases make bad law. Rodriguez is undoubtedly a hard case. So it is unsurprising that reason finds no refuge in its jurisprudence of confusion. 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.”

To be sure, all circuit splits make outcomes contingent upon forum. 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 . . . .” It is another for circuits to split on constitutional matters because only the Supreme Court can resolve the conflict definitively.

Before Rodriguez, no court had extended Bivens to cases involving the extraterritorial application of constitutional protections. 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.” This practice stems from the Court’s desire to provide federal officers with wide latitude to perform their duties. The Court also justifies its practice on separation of powers grounds. Since the Constitution bestows the executive and legislative branches with plenary power over foreign relations and national

310 Id.
311 Id.
314 Id.
315 Id.
security, the Court avoids treading on that terrain.\textsuperscript{316} Despite these concerns, \textit{Rodriguez} consciously departed from the Traditional view.\textsuperscript{317}

\textit{Rodriguez} not only departs from the typical \textit{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,\textsuperscript{318} it does not “restrain the actions of the Federal Government against aliens outside of the United States territory.”\textsuperscript{319} Therefore, as explained below, “it is possible that \textit{Rodriguez} will not withstand higher review.”\textsuperscript{320}

1. On \textit{Rodriguez}’s Externalities

At first, a malady is difficult to detect but easy to cure.\textsuperscript{321} In time, the malady becomes easy to detect but difficult to cure.\textsuperscript{322} Bad law is the same way. While \textit{Rodriguez}’s implications are difficult to detect, they will be debilitating if left uncured.\textsuperscript{323}

Until \textit{Rodriguez}, “the starting points and first principles in this debate [were] not seriously in dispute.”\textsuperscript{324} Even after \textit{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.”\textsuperscript{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.’”\textsuperscript{326}

Despite recent aberrations, “[t]he Supreme Court has long taken the view that the Constitution is subject to territorial limitations.”\textsuperscript{327} Over the years, federal law developed atop this stable foundation. For instance, this view is the
groundwork upon which our system of immigration law rests. This view also underlies all manner of national security endeavors. 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.’” In the same vein, immigration litigation—which places “actual and often sympathetic human being[s] front and center”—finds courts in a position where they tend to overvalue individual interests and overlook policy considerations. Often, the ramifications of interventionist decisions do not become apparent until long after the gavel comes down. For these reasons, the judiciary resists taking an active role in immigration. 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. Noncitizens in the United States possess certain rights and privileges that those abroad lack. 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).
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).
Clearly, then, extending constitutional rights to noncitizens abroad would compel a complete overhaul of immigration law.

Under such a regime, immigration law’s foundational principles would become untenable because they presuppose that noncitizens who reside abroad lack constitutional protections. Indeed, “Congress regularly makes rules that would be unacceptable if applied to citizens.” 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.” 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. No doubt, “accepting [this view] would have significant and deleterious consequences for the United States in conducting activities beyond its boundaries.”

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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).


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. 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.

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. The longer that this uncertainty lingers, the more harm that befalls the rule of law.

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. 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”).


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*, Chief Justice John Marshall wrote that “we must never forget that it is a constitution we are expounding.” (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.” 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*. 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.” He analogized to then-existing state constitutions. These founding-era state constitutions shared an important feature: They focused on the rights of their respective political communities. 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.” Thus, the Massachusetts Constitution did not establish a government for all; it created one for “ourselves and posterity.” 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. It provides that the "Constitution . . . shall be the supreme Law of the Land," not the law of any other place. 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.

iii. For Ourselves and Our Posterity

The Constitution’s Preamble also betrays its territorial orientation. Examples abound. First, the Preamble explains that the Constitution is intended to “insure domestic Tranquility.” 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. And, third, the Preamble states that the Constitution exists to “provide for the common defence.” 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. All throughout, the Preamble makes clear that the Constitution is “ordain[ed] and establish[ed] for the United States of America.”

2. Reconciling Boumediene and Verdugo-Urquidez

Boumediene’s legacy proves as controversial as the decision itself. 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 Id. at 509.
361 Id. at 510.
362 Id.
363 U.S. CONST. pmbl. (emphasis added).
364 Id. at 509.
365 Id.
366 Id. at 510.
367 Id.
suspects outside the United States.\textsuperscript{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.\textsuperscript{370} As such, it is obvious that neither camp is satisfied.\textsuperscript{371} 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.’”\textsuperscript{371}

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

Recall that \textit{Boumediene} involved a fundamentally different issue than \textit{Verdugo-Urquidez}.

\textit{Boumediene}, the issue was whether the Suspension Clause’s reach extended to areas where the federal government had \textit{de facto} control.\textsuperscript{376} \textit{Verdugo-Urquidez}, on the other hand, raised the issue of whether constitutional protections extended to a noncitizen abroad.\textsuperscript{377}

Out of context, \textit{Boumediene}’s functional analysis might seem to leave open the possibility that substantive rights extend to noncitizens abroad.\textsuperscript{378} But

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\item\textsuperscript{369} \textit{Id.}
\item\textsuperscript{370} \textit{Id.}
\item\textsuperscript{371} \textit{Id.}
\item\textsuperscript{372} \textit{Compare} Hernandez v. Mesa, 137 S. Ct. 2003, 2007 (2017) (Breyer, J., dissenting) (claiming that \textit{Boumediene} renders the extraterritorial scope of the Constitution dependent upon a functional test), \textit{with} Hernandez v. Mesa, 885 F.3d 811, 817 (5th Cir. 2018) (en banc) (“[N]o federal circuit court has extended the holding of \textit{Boumediene} either substantively to other constitutional provisions or geographically to locales where the United States has neither \textit{de facto} nor \textit{de jure} control. Indeed, the courts have unanimously rejected such extensions.”).
\item\textsuperscript{373} Van Houten, \textit{supra} note 153, at 11 (quoting former Solicitor General Neal Katyal).
\item\textsuperscript{374} \textit{See, e.g.}, Hernandez, 885 F.3d at 817 (“[N]o federal circuit court has extended the holding of \textit{Boumediene} either substantively to other constitutional provisions or geographically to locales where the United States has neither \textit{de facto} nor \textit{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) (“\textit{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 \textit{Boumediene} court was concerned only with the Suspension Clause . . . not with . . . any other constitutional text.”).
\item\textsuperscript{375} Maltz, \textit{supra} note 21, at 404–06.
\item\textsuperscript{376} \textit{Id.}
\item\textsuperscript{377} \textit{Id.}
\item\textsuperscript{378} \textit{Id.}
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the Boumediene Court did not purport to overrule Verdugo-Urquidez.\footnote{Id.} 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].”\footnote{United States v. Verdugo-Urquidez, 494 U.S. 259, 260 (1990).}

C. Clear Constitutional Boundaries Beget Sound Legislative Actions

During oral arguments in Hernandez v. Mesa,\footnote{137 S. Ct. 2003 (2017).} Justice Kennedy asked whether Congress had considered passing any laws that would compensate victims’ families in instances of cross-border shootings.\footnote{Transcript of Oral Argument at 51, Hernandez, 137 S. Ct. 2003 (No. 15-118).} In response, Deputy Solicitor General Kneedler stated that he did not know of any such bills, “but that would be the solution.”\footnote{Id.}

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\footnote{United States v. Lopez, 514 U.S. 549, 552 (1995) (“The Constitution creates a Federal Government of enumerated powers.”).} that expressly limits the judiciary’s jurisdiction to cases arising under federal law.\footnote{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.”).}

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.”\footnote{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).} 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
Constitution’s extraterritorial application, 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, 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. 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. 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.”

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. Rather, he was saying that it is not a judge’s function to put it there. Although justice undoubtedly plays an important role in the legislative process, it has little or no role in the judicial interpretation of legislation.

It might seem that if justice is desirable in law, the question of who puts it there is secondary (or even entirely trivial). 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. It follows that the separation of powers

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.
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.
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. Prudent 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

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.
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.”

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. 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. To this end, the framers included rights akin to lifeboats. 

Passengers use them if the ship fails.

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.” 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.” 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).

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