# *Boumediene* at the Border? The Constitution and Foreign Nationals on the U.S.-Mexico Border

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## Introduction

On June 7, 2010, a fifteen-year-old Mexican boy named Sergio Hernández Güereca was standing with a few friends in Ciudad Juárez, Mexico, at the border with El Paso, Texas.[1] The boys were running up to the U.S.

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[1] Lourdes Cardenas, *Remembering Sergio: Juárez Boy's Death Involving U.S. Border Patrol Agent Still Controversial*, El Paso Times (June 8, 2012, 12:00 AM), http://www.

border fence and back to Mexican territory.[2] Jesus Mesa, a Customs and Border Protection ("CBP") agent standing on the U.S. side of the border, shot at the boys and killed Hernández.[3] Hernández's story is not unique: the last few years have seen a spate of cross-border killings by government officials along the U.S.-Mexico border. CBP agents have been responsible for the deaths and serious injuries of approximately twenty individuals on the Mexican side of the line since 2010.[4]

The families of those killed have sued in U.S. courts alleging violations of the Fourth Amendment's prohibition on excessive force.[5] The suits advance a new legal theory: after the Supreme Court's adoption of a functional approach to extraterritorial jurisdiction in *Boumediene v. Bush*,[6] the Constitution should provide a remedy for victims of unauthorized deadly force from U.S. federal government actors at the border.[7] In *Boumediene,* the Supreme Court held that noncitizens detained by the U.S. government at Guantánamo Bay, Cuba, were entitled to seek writs of habeas corpus under the protection of the Constitution's Suspension Clause.[8] In reaching its holding, the Court considered whether judicial enforcement of the Suspension Clause would be "impracticable and anomalous" given the petitioners' status as

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elpasotimes.com/news/ci_20810005/juarez-boys-death-involving-u-s-border-patrol-agent-still-controversial, *archived at* http://perma.cc/0rkCrGLYrwr.

[2] Oral Argument at 0:52, Hernández v. United States, No. 12-50217 (5th Cir. Apr. 2, 2013), *available at* http://www.ca5.uscourts.gov/OralArgumentRecordings.aspx?prid=229306, *archived at* http://perma.cc/0hJjRH5nS1M. Although the officers originally argued that they fired their weapons in response to the boys throwing rocks, a subsequent investigation by Customs and Border Protection oversight authorities revealed that the boys were not physically aggressive toward the officers. *Id.*

[3] *Id.*

[4] Andrew O'Reilly, *ACLU Testifies at UN on Border Patrol Killings and Human Rights Abuses*, FOX NEWS LATINO (Oct. 25, 2012), http://latino.foxnews.com/latino/news/2012/10/25/aclu-testifies-at-un-on-border-patrol-killings-and-human-rights-abuses, *archived at* http://perma.cc/09DT1YyvcxF.

[5] Brief for Appellants, *Hernández*, No. 12-50217 (5th Cir. June 25, 2012), 2012 WL 2513647, at *9. The ACLU's Immigrants' Rights Project in New York, where I worked in the summer of 2012, filed an amicus brief in this case. My interest in this topic stems in part from conversations with ACLU attorneys including Esha Bhandari and Lee Gelernt.

[6] 553 U.S. 723 (2008).

[7] *See* Brief of Amici Curiae American Civil Liberties Union Foundation, ACLU Foundation of Arizona, ACLU Foundation of New Mexico, American Civil Liberties Union Foundation of Texas, and ACLU Foundation of San Diego & Imperial Counties in Support of Plaintiffs-Appellants at 2–3, *Hernández*, No. 12-50217 (5th Cir. July 24, 2012), 2012 WL 3066824 [hereinafter ACLU *Hernández* Brief]. The ACLU's attorneys limited their proposed holding to: "[W]here a U.S. Border Patrol agent uses excessive, deadly force while on U.S. territory that directly harms a noncitizen individual on the other side of the border, that individual has a claim under the Fourth Amendment." *Id.* at 19. This Note adopts a slightly broader framing, suggesting that a U.S. government agent's use of force need not be projected from one side of the border to the other.

[8] *Boumediene*, 553 U.S. at 732. This Note uses the words "noncitizens" and "foreign nationals" interchangeably to mean people who are not citizens of the United States, while recognizing that most of the individuals referred to are indeed citizens of somewhere, and not stateless. Similarly, this Note uses the word "Americans" to refer to "United States of Americans," though fully aware of the limitations of applying a continental designation to a national category.

noncitizen, enemy combatants; the nature of Guantánamo as a physical site; and practical considerations weighing against enforcing the right.[9]

The idea that *Boumediene* may have implications for the rights of foreign nationals subjected to U.S. government action outside Guantánamo finds support in the academy, and scholars have considered the relationship between *Boumediene,* immigration, and international law.[10] But no scholarly examination has considered whether foreign nationals immediately outside the territorial United States may assert protections under the U.S. Constitution.

This Note argues that the U.S. Constitution protects noncitizens at the U.S.-Mexico border from excessive deadly force at the hands of American government actors.[11] It begins by describing the doctrine that governs the extraterritorial application of the U.S. Constitution. Part I traces the development of extraterritoriality doctrine, including the "functional approach," from the nineteenth century to the present day. It also briefly addresses whether claims like Hernández's are properly at home under the Fourth or Fifth Amendment. Part II situates U.S. extraterritoriality doctrine in scholarly context. It summarizes several normative frameworks scholars have used to think through the question of whom a constitution should protect, and it revisits *Boumediene* in light of these theories.

Part III applies the theory and doctrine of extraterritoriality to the U.S.-Mexico border. It argues that noncitizens in the border region outside of the territorial United States who are brought under the control of a U.S. government official have a constitutional right to be free from excessive force. Applying the *Boumediene* factors in turn, section III.A addresses the nature

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[9] *Id.* at 770.

[10] *See, e.g.*, Sarah H. Cleveland, *Embedded International Law and the Constitution Abroad*, 110 COLUM. L. REV. 225, 226 (2010) (noting that the Court's approach in *Boumediene* "opened a space for aligning U.S. domestic obligations more closely to contemporary international legal approaches, the expectations and obligations of our allies, and the modern realities of the exercise of state power"); Gerald L. Neuman, *The Extraterritorial Constitution After Boumediene v. Bush*, 82 S. CAL. L. REV. 259, 286 (2009) (noting the uncertainties that remain after *Boumediene* and discussing the relationship between the category of foreign nationals eligible for constitutional protection under *Boumediene*, the status of the territory where the violations took place, and the nature of the right asserted); D. Carolina Núñez, *Inside the Border, Outside the Law: Undocumented Immigrants and the Fourth Amendment*, 85 S. CAL. L. REV. 85, 134 (2011) ("*Verdugo[-Urquidez]* and *Boumediene*, read together, indicate that physical borders neither guarantee nor exclude individuals from constitutional rights."); *see also* KAL RAUSTIALA, DOES THE CONSTITUTION FOLLOW THE FLAG?: THE EVOLUTION OF TERRITORIALITY IN AMERICAN LAW (2009); Christina Duffy Burnett, *A Convenient Constitution? Extraterritoriality After* Boumediene, 109 COLUM. L. REV. 973 (2009); Ernesto Hernández-López, Kiyemba, *Guantánamo and Immigration Law: An Extraterritorial Constitution in a Plenary Power World*, 2 UC IRVINE L. REV. 193 (2012); Chimène Keitner, *Rights Beyond Borders*, 36 YALE J. INT'L L. 55, 80–81 (2011); Philip Mayor, *Borderline Constitutionalism: Reconstructing and Deconstructing Judicial Justifications for Constitutional Distortion in the Border Region*, 46 HARV. C.R.-C.L. L. REV. 647 (2011).

[11] The Note focuses on federal government actors, because 48 U.S.C. § 1983, the analogue for state conduct, is explicitly limited to "any citizen of the United States or other person within the jurisdiction thereof."

of the site where the action took place in historical perspective and argues that the unique status of the border in American law and history weighs in favor of recognizing constitutional constraints on U.S. government actions just beyond the line.

Section III.B analyzes the effect of citizenship, status, and contacts with the United States to extraterritorial law. Drawing both on precedent and on normative frameworks scholars have used to determine who may claim constitutional protection, this section argues that noncitizens harmed by U.S. government officials at the border are entitled to assert claims in U.S. courts, regardless of their degree of prior connection to the United States. Section III.C addresses practical considerations concerning whether the right should apply. It argues that courts can and should extend constitutional protection to foreign nationals at the U.S.-Mexico border whom U.S. officials harm.

## I. The Extraterritorial Constitution: Doctrine

As the United States has expanded its footprint in the international order, the question of whether the Constitution should follow the flag has taken on increased importance. The Supreme Court prominently engaged with the question in the late nineteenth century when the United States acquired an empire overseas.[12] The country's changing role abroad during World War II and the Cold War brought renewed vigor to the issue.[13] In the 1990s, international conflict knocked at the United States' southern door in the form of powerful drug cartels, highlighting the potential consequences of American action south of the border.[14] Most recently, the "War on Terror" has forced lawmakers to reconsider the legal limits on U.S. conduct abroad.[15] This Part reviews the Court's central opinions on extraterritoriality as it moved away from strict territoriality and toward the "functional approach."[16]

### *A. The Development of the Extraterritoriality Doctrine Before* Boumediene

Over time, the Supreme Court has simplified and made consistent what is in fact a murky and contradictory doctrinal history regarding extraterritori-

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[12] For historical accounts of American imperial expansion at the end of the nineteenth century, see, for example, Julian Go, Patterns of Empire: The British and American Empires, 1688 to the Present (2011); and Walter LaFeber, *The American Search for Opportunity, 1865–1913*, *in* The Cambridge History of American Foreign Relations (Warren Cohen ed., 1993).

[13] *See* Johnson v. Eisentrager, 339 U.S. 763 (1950).

[14] *See* United States v. Verdugo-Urquidez, 494 U.S. 259 (1990).

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

[16] This Note frames the history as the Supreme Court has done in its recent recounting of the precedent, focusing on major landmarks in the evolution of the doctrine.

ality.[17] The Court has oscillated between rights-granting and rights-restricting views of the Constitution abroad.[18] This section will largely follow *Boumediene*'s narrative of the extraterritorial constitution, focusing on a handful of cases that appear and reappear in the precedent.

In the late nineteenth century, the Supreme Court adopted a strict territoriality paradigm for rights allocation: the Constitution would have no force outside the United States.[19] In *In re Ross*,[20] a U.S. citizen for jurisdictional purposes sought a writ of habeas corpus to challenge his conviction under the authority of the U.S. consul for crimes committed aboard a ship in Japan.[21] The Court rejected the challenge, stating that the Constitution's rights and guaranties "apply only to citizens and others within the United States . . . and not to residents or temporary sojourners abroad."[22] The Court also noted that it would be "impracticable" to obtain competent juries in such cases, which would leave felons unprosecuted.[23] Tying rights to territory, the Court held that "the Constitution can have no operation in another country."[24]

As the United States acquired an overseas empire at the close of the nineteenth century, the Court departed from *Ross*'s strict territoriality paradigm. In a series of decisions known as the *Insular Cases*, the Court confronted the question of whether the Insular Areas — Puerto Rico, Guam, Hawaii, American Samoa, and the Philippines — were inside or outside of the territorial United States for constitutional purposes, and whether an act of Congress was required to grant rights abroad.[25] Though the Supreme Court never provided a clear answer, the *Insular Cases* are commonly understood to have held that the Constitution extended in its entirety to incorporated territories, while only "fundamental" constitutional rights applied of

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[17] *See generally* Burnett, *supra* note 10.

[18] Several scholars have aptly addressed these tensions elsewhere. *See id.*; Gerald L. Neuman, *Whose Constitution?* 100 YALE L.J. 909, 915–16 (1991); *see also* Christina Duffy Burnett, *United States: American Expansion and Territorial Deannexation*, 72 U. CHI. L. REV. 797 (2005).

[19] *In re* Ross, 140 U.S. 453, 464–65 (1891).

[20] 140 U.S. 453.

[21] *Id.* at 454.

[22] *Id.* at 464 (citing Cook v. United States, 138 U.S. 157, 181 (1891)).

[23] *Id.*

[24] *Id.*

[25] *See, e.g.*, Balzac v. Porto Rico, 258 U.S. 298 (1922) (finding no Sixth Amendment right to jury trial in Puerto Rico); Ocampo v. United States, 234 U.S. 91 (1914) (holding inapplicable the Fifth Amendment grand jury provision in the Philippines); Dorr v. United States, 195 U.S. 138 (1904) (holding Seventh Amendment jury trial provision inapplicable in the Philippines); Hawaii v. Mankichi, 190 U.S. 197 (1903) (holding grand jury indictment requirement inapplicable in Hawaii); Downes v. Bidwell, 182 U.S. 244 (1901) (holding the Revenue Clauses of the Constitution inapplicable to Puerto Rico). These cases cumulatively adopted a novel distinction between incorporated and unincorporated territories. Burnett, *supra* note 10, at 982–83.

their own right in the unincorporated territories.[26] Most relevantly for the present inquiry, the *Boumediene* Court focused on the *Insular Cases*' conclusion that *some* rights applied of their own force even in unincorporated territories, without explicit legislative authorization.[27]

In the mid-twentieth century, the Court combined strict territoriality with multi-factor pragmatism to deny constitutional protection to enemy aliens abroad.[28] In *Johnson v. Eisentrager*,[29] German war prisoners argued that their trial, conviction, and imprisonment by an American-led military commission in China violated Articles I and III of the Constitution, as well as the Fifth Amendment.[30] Justice Jackson, writing for the Court, disagreed. First, he stressed the "distinctions recognized throughout the civilized world between citizens and aliens" and between "aliens of friendly and enemy allegiance."[31] Second, he noted that the prisoners were never in sovereign U.S. territory and that "the scenes of their offense, their capture, their trial and their punishment were all beyond the territorial jurisdiction of any court of the United States."[32] In addition, the Court stressed the practical obstacles to granting the prisoners constitutional rights, including the costs of transporting prisoners and witnesses, disruptions to theaters of war, and lack of international reciprocity.[33]

Less than a decade later, the Court departed from precedent and, for the first time in the modern era, extended constitutional protections to American citizens *outside* the territorial United States. In *Reid v. Covert*,[34] civilian spouses of military servicemen were tried before military courts for crimes committed abroad.[35] The women argued that they were constitutionally entitled to a trial before a civilian jury.[36] The Court agreed: "We reject the idea that when the United States acts against citizens abroad it can do so free of the Bill of Rights," Justice Black wrote.[37] Justice Black distinguished the *Insular Cases* and implicitly overruled *Ross* as "a relic from a different era."[38] Looking to the future, the Court observed:

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[26] Burnett, *supra* note 10, at 983. Cases adjudicating rights in the territories left open the question of whether the rights applied on their own or because of congressional authorization. *Id.* at 986–88.

[27] *Id.* at 984.

[28] *See* Johnson v. Eisentrager, 339 U.S. 763 (1950).

[29] 339 U.S. 763.

[30] *Id.* at 767.

[31] *Id.* at 770. Justice Jackson further noted that a government's obligation toward a noncitizen increases, providing "a generous and ascending scale of rights," as the noncitizen increases his or her ties to the United States. *Id.*

[32] *Id.* at 778.

[33] *Id.* at 779.

[34] 354 U.S. 1 (1957).

[35] *Id.* at 3–4.

[36] *Id.* at 3.

[37] *Id.* at 5.

[38] *Id.* at 12–14.

> If our foreign commitments become of such nature that the Government can no longer satisfactorily operate within the bounds laid down by the Constitution, that instrument can be amended by the method which it prescribes. But we have no authority, or inclination, to read exceptions into it which are not there.[39]

In a concurrence that laid the foundation for the functional approach, the second Justice Harlan stated: "The proposition is, of course, not that the Constitution 'does not apply' overseas, but that there are provisions in the Constitution which do not *necessarily* apply in all circumstances in every foreign place."[40] Relying on the *Insular Cases* and *Ross*, Justice Harlan advocated a pragmatic approach to determining the Constitution's application abroad: the Constitution does not require the U.S. government to strictly adhere to its text when doing so would be "altogether impracticable and anomalous."[41] Factors include: "the particular local setting, the practical necessities, and the possible alternatives which Congress had before it."[42] Justice Harlan argued that the present case — a capital offense — justified application of the Constitution; a lesser sentence might not.[43]

Whereas *Reid* dealt with the rights of U.S. citizens abroad, *Verdugo-Urquidez*[44] involved a Mexican citizen's right against unreasonable searches and seizures by U.S. federal agents in Mexico (but not specifically at the border).[45] Justice Rehnquist held that Verdugo-Urquidez — a foreign national lacking "substantial voluntary connections" to the United States — was not entitled to Fourth Amendment protection against a warrantless search.[46] Justice Kennedy, who provided the decisive fifth vote, nominally concurred. However, instead of following the majority's reliance on the Fourth Amendment's use of "the people" to exclude Verdugo-Urquidez from constitutional protection, Justice Kennedy used the functional approach. He argued that extending search-and-seizure protections in the case would be

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[39] *Id.* at 14.
[40] *Id.* at 74 (Harlan, J., concurring).
[41] *Id*.
[42] *Id.* at 75.
[43] *Id.* at 75–76.
[44] 494 U.S. 259 (1990).
[45] *Id.*
[46] *Id.* at 271. The Court first noted that the constitutional violation occurred solely in Mexico, stressing that the Fourth Amendment's prohibition against unreasonable search and seizure kicks in at the time of the unreasonable governmental intrusion, regardless of whether the seized evidence ever sees the light of day. *Id*. at 264. Lawful but involuntary presence in the United States, such as in American detention after capture abroad, does not suffice for constitutional protection to adhere. *Id*. at 272. The Court relied on *Eisentrager* to argue that if the Fifth Amendment (which refers to a "person") does not extend to noncitizens abroad, surely the Fourth Amendment (with its narrower subject, "the people") cannot apply either. *Id.* at 269. Finally, Chief Justice Rehnquist also noted the difficulties of effecting a constitutionally compliant search or seizure abroad. He worried that a magistrate's order would be "a dead letter" outside the United States. *Id.* at 274.

"impracticable and anomalous" and traced his inquiry to Justice Harlan's *Reid* concurrence.[47]

*Reid* and *Verdugo-Urquidez* drew a clear fault line between citizens, whose participation in the polity entitled them to a degree of constitutional protection abroad, and noncitizens, who were not granted such protection. Justice Black's formalist, citizenship-dependent approach to assigning constitutional rights abroad governed, though Justices Harlan and Kennedy sought to infuse the doctrine with a measure of pragmatism. Whether they took functional considerations into account explicitly or not, the Justices were consistently cognizant of the effect of the United States' expansive and expanding role abroad on the question of when the Constitution follows the flag.

### *B.* Boumediene *and the Codification of the Functional Approach*

The Court's most recent comment on extraterritoriality came in the context of the "War on Terror." In *Boumediene v. Bush*, noncitizens detained as enemy combatants at Guantánamo Bay, Cuba, petitioned for a writ of habeas corpus.[48] The Court granted the writ, holding that Guantánamo detainees "do have the habeas corpus privilege," and that the Military Commissions Act of 2006, stripping federal courts of jurisdiction to hear petitioners' habeas applications, was an unconstitutional suspension of the writ.[49] Justice Kennedy, writing for the Court, divided the question into two parts: whether petitioners were barred from invoking the writ "either because of their status, *i.e.,* petitioners' designation by the executive branch as enemy combatants, or their physical location, *i.e.,* their presence at Guantánamo Bay."[50] Though the petitioners' citizenship is implied from the question, Justice Kennedy did *not* frame the inquiry in terms of nationality; harkening back to *Eisentrager*'s typology, the question was whether the petitioners were "aliens . . . of enemy allegiance" residing abroad rather than merely "aliens."[51]

Justice Kennedy began his analysis historically by discussing the "prudential barriers" that influenced the writ's application in English courts.[52] Next, Justice Kennedy turned to the nature of the United States' relationship with Guantánamo Bay. Cuba retains "ultimate sovereignty," but the United States exercises "complete jurisdiction and control" over the territory.[53]

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[47] *Id.* at 277–78 (Kennedy, J., concurring).

[48] Boumediene v. Bush, 553 U.S. 723, 772 (2008).

[49] *Id.* at 732–33. The Court also held that the Detainee Treatment Act of 2005, which provided a mechanism for detainee status review, was an inadequate substitute for habeas. *Id.* at 792.

[50] *Id.* at 739.

[51] *See* Johnson v. Eisentrager, 339 U.S. 763, 769 (1950).

[52] *Boumediene*, 553 U.S. at 751–52.

[53] *Id.* at 753 (quoting Lease of Lands for Coaling and Naval Stations, Feb. 23, 1903, U.S.-Cuba, Art. III, T.S. No. 418).

Given the writ's history and the complexity of the U.S.-Guantánamo relationship, Justice Kennedy strikingly concluded that de jure sovereignty is not the "touchstone of habeas corpus jurisdiction."[54]

Justice Kennedy next reviewed roots of the functional approach in the *Reid* and the *Insular Cases*, discussed in section A.[55] Taken together, "these decisions undermine the Government's argument that, at least as applied to noncitizens, the Constitution necessarily stops where *de jure* sovereignty ends."[56] Based on its review of the precedent, the *Boumediene* Court noted that "at least three" factors are relevant to the extraterritorial analysis:

> (1) [T]he 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.[57]

Justice Kennedy applied this framework: First, he noted that the petitioners were not American citizens — though unlike in *Eisentrager*, the *Boumediene* petitioners contested that they were enemy combatants.[58] The inadequacy of the Combatant Status Review Tribunals hearing procedures and the petitioners' uncertain status weighed in favor of finding a right to habeas.[59] Second, Justice Kennedy highlighted that the petitioners' apprehension and detention took place outside of the sovereign United States.[60] That fact militated against finding a right to the Suspension Clause. However, he also noted that U.S. control over Guantánamo was both different from and stronger than over the prison in *Eisentrager*.[61] "In every practical sense Guantánamo is not abroad; it is within the constant jurisdiction of the United States."[62] Third, Kennedy recognized the costs of holding that the Suspension Clause is applicable in military proceedings at Guantánamo — diversion of funds and personnel, for example — but found that those costs were not dispositive.[63] Furthermore, permitting habeas proceedings would not cause friction with the host government.[64]

Though Justice Kennedy did not specifically enumerate it in his list of three considerations, the "fundamental" nature of the right in question played a role in determining whether the right traveled abroad.[65] The

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[54] *Id.* at 755.
[55] *Id.* at 755–58.
[56] *Id.* at 755.
[57] *Id.* at 766.
[58] *Id.* at 766–67.
[59] *Id.*
[60] *Id.* at 768.
[61] *Id.* at 768–69.
[62] *Id.* at 769.
[63] *Id.* at 769–70.
[64] *Id.* at 770.
[65] *See* Neuman, *supra* note 10, at 273.

*Boumediene* Court highlighted the *Insular Cases*' focus on fundamental rights as it traced the lineage of the functional approach.[66] Justice Kennedy emphasized the "centrality" of habeas corpus, noting that "[t]he Framers viewed freedom from unlawful restraint as a fundamental precept of liberty" and habeas corpus as "a vital instrument to secure that freedom."[67] The Court concluded that it would not be impracticable and anomalous for the Suspension Clause to bind government, and thus that the Clause "has full effect at Guantánamo Bay."[68]

*Boumediene* was a groundbreaking opinion in several ways.[69] It was the first embrace of the functional approach by a clear judicial majority. It was the first time the Court held a statute unconstitutional under the Suspension Clause rather than reconciling it under the canon of constitutional avoidance. Most crucially, it was the first time the Court held that a noncitizen with no prior connections to the United States was entitled to protection under the Constitution for actions that took place wholly outside American sovereign territory.[70]

Lower courts have been unwilling to fully embrace *Boumediene*'s new approach to constitutional analysis.[71] Some courts — notably, the U.S. Court of Appeals for the D.C. Circuit — have limited *Boumediene*'s reach to the Suspension Clause[72] and to Guantánamo Bay.[73] Finally, courts have continued to apply *Verdugo-Urquidez*'s substantial connections test for noncitizens, sometimes in concert with *Boumediene*.[74] The lower courts' reticence to apply *Boumediene* broadly, or even accurately, may be an ill omen for Hernández, the young boy shot by CBP. But it highlights the importance of the Court's holding and raises the stakes for this analysis.

### *C. Excessive Deadly Force: A Fourth or Fifth Amendment Question?*

As noted, *Boumediene* is concerned not with the abstract issue of constitutional protection, but with the concrete question of how a particular right

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[66] *See Boumediene*, 554 U.S. at 759.

[67] *Id.* at 739.

[68] *Id.* at 771.

[69] *See generally* Neuman, *supra* note 10.

[70] *Id.*

[71] *See, e.g.*, Igartua v. United States, 626 F.3d 592, 600 (1st Cir. 2010); United States v. Hamdan, 801 F. Supp. 2d 1247 (C.M.C.R. 2011) (en banc) (per curiam), *rev'd*, 696 F.3d 1238 (D.C. Cir. 2012).

[72] *See* Rasul v. Myers, 563 F.3d 527, 529 (D.C. Cir. 2009).

[73] *See* Ali v. Rumsfeld, 649 F.3d 762, 772 (D.C. Cir. 2011); Al Maqaleh v. Gates, 605 F.3d 84, 93–97 (D.C. Cir. 2010); Doe v. United States, 95 Fed. Cl. 546, 570–71 (Fed. Cl. 2010).

[74] *See, e.g.*, Ibrahim v. Dep't of Homeland Sec., 669 F.3d 983, 995 (9th Cir. 2012). The case involved a Stanford Ph.D. student from Malaysia who was put on the no-fly list. *Id.* The Ninth Circuit noted that the border "is not a clear line that separates aliens who may bring constitutional challenges from those who may not." *Id.* Yet, the court went on to "hold only that Ibrahim has established 'significant voluntary connection'" sufficient to give rise to constitutional claims. *Id.* at 997.

applies in a given circumstance. Therefore, this Note's argument centers on the Constitution's protections against unauthorized deadly force at the hands of government officials.[75] This constitutional safeguard has two textual homes: the Fifth Amendment's guarantee against deprivation of life, liberty, or property without due process;[76] and the Fourth Amendment's restriction on unreasonable seizures.[77] Hernández's claim could be brought pursuant to Fifth Amendment due process doctrine.[78] Yet in *Graham v. Connor*,[79] the Court stated that, where possible, deadly force claims could — and perhaps must — be brought under the more specific Fourth Amendment prohibition against unreasonable seizures, rather than under Fifth Amendment substantive due process doctrine.[80] *Tennessee v. Garner*[81] stresses that "apprehension by the use of deadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment."[82] The Fifth Circuit is currently considering the question of whether *Graham v. Connor* requires that an unauthorized deadly force claim be brought under the Fourth Amendment, as parties submitted briefing on the matter in *Hernández v. Mesa*.[83]

If the court determines that *Graham v. Connor* applies to the present case, advocates will come up against *Verdugo-Uriquidez*'s holding that at least part of the Warrant Clause of the Fourth Amendment does not apply to noncitizens outside the territorial United States who lack voluntary substantial connections to the United States. Three arguments are available in response. First, *Verdugo-Urquidez*'s substantial connections test was overruled by *Boumediene* and, indeed, may not have been the law to begin with.[84] Second, *Verdugo-Urquidez* may be both legally and factually distin-

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[75] While there may be an argument that Hernández and others similarly situated were within U.S. jurisdiction, this Note does not develop the question.

[76] U.S. CONST. amend. V.

[77] U.S. CONST. amend. IV.

[78] *See* DEP'T OF JUSTICE, LAWFULNESS OF A LETHAL OPERATION DIRECTED AGAINST A U.S. CITIZEN WHO IS A SENIOR OPERATIONAL LEADER OF AL-QA'IDA OR AN ASSOCIATED FORCE (2012) (citing Mathews v. Eldridge, 424 U.S. 319 (1976), and Hamdi v. Rumsfeld, 542 U.S. 507 (2004)), *available at* http://msnbcmedia.msn.com/i/msnbc/sections/news/020413_DOJ_White_Paper.pdf, *archived at* http://perma.cc/0ZFxMan5iWZ.

[79] 490 U.S. 386 (1989).

[80] *Id.* at 395 ("[*A*]*ll* claims that law enforcement officers have used excessive force — deadly or not — in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard, rather than under a 'substantive due process' approach.").

[81] 471 U.S. 1 (1985).

[82] *Id.* at 7.

[83] ACLU *Hernández* Brief, *supra* note 7.

[84] Although Professor Neuman and most scholars believe that *Verdugo-Urquidez*'s "substantial connections" test is inapplicable after *Boumediene*, no opinion expressly addresses the question. *See* Neuman, *supra* note 10. The government could argue that if Justice Kennedy's concurrence is the law rather than Chief Justice Rehnquist's purported majority opinion, then the Court has held that it would be impracticable and anomalous to apply Fourth Amendment protections to noncitizens outside the country with no substantial connections to the United States. *See* United States v. Verdugo-Urquidez, 494 U.S. 259, 278 (1990).

guished.[85] And third, even if petitioners are excluded from the Fourth Amendment by *Verdugo-Urquidez*, a Fifth Amendment claim is proper because *Graham v. Connor* permits Fifth Amendment inquiry where the more specific, Fourth Amendment claim is unavailable.[86]

Ultimately, the question of whether the Fourth or Fifth Amendment applies may turn solely on the Court's willingness to consider the case in light of *Verdugo-Urquidez*. For the sake of consistency, this Note will refer primarily to a Fourth Amendment right, noting any important divergence between the Fourth and Fifth Amendments where appropriate.

## II. The Extraterritorial Constitution: Whom Should a Constitution Protect?

The Court's decision in *Boumediene* is long on historical context but short on normative justification. In fact, Justice Kennedy made no discernible effort to address the central theoretical question of extraterritoriality jurisprudence: what entitles someone to constitutional protection? The opinion leaves open the door for advocates to argue for inclusion in the constitutional order without being bound to a particular normative methodology. This Note will not attempt to develop an original theory about whom constitutions should protect. Rather, this Part discusses several approaches to marking the bounds of constitutional protection and notes how they might generate alternatives to the functional approach.

Drawing from history, political theory, and philosophy, legal scholars have produced a lively debate around the question of whom a constitution should protect. Professor Gerald L. Neuman's foundational article, *Whose Constitution?*, presented four approaches to answering the question — universalism, membership, municipal law/mutuality, which includes strict territoriality, and balancing or global due process.[87]

Universalism holds that "constitutional provisions that create rights with no express limitations as to the persons or places covered should be interpreted as applicable to every person and at every place."[88] Universalist

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[85] The Fourth Amendment houses both the unreasonable search and seizure claims at issue in *Verdugo-Urquidez* and excessive force claims like the one at issue in the present scenario; each has a different standard and therefore a different line of precedential cases. *Compare, e.g.*, Scott v. Harris, 550 U.S. 372, 383 (2007) (adopting a balancing test in the search and seizure context) *with Graham*, 490 U.S. at 397 (applying a reasonableness inquiry in excessive force cases).

[86] *See* United States v. Lanier, 520 U.S. 259, 272 n.7 (1997). "*Graham v. Connor* . . . does not hold that all constitutional claims relating to physically abusive government conduct must arise under either the Fourth or Eighth Amendments; rather, *Graham* simply requires that if a constitutional claim is covered by a specific constitutional provision, such as the Fourth or Eighth Amendment, the claim must be analyzed under the standard appropriate to that specific provision, not under the rubric of substantive due process." *Id.*

[87] Neuman, *supra* note 18, at 916–19. Professor Neuman later reiterated and expanded the typology in Gerald L. Neuman, Strangers to the Constitution (1996). It is in this later work that he uses the term "mutuality." *See id.* at v.

[88] Neuman, *supra* note 18, at 916.

theories may draw on natural law or its contemporary cousin, human rights law.[89] Some universalists adopt an "organic act" understanding of the relationship between the Constitution and the federal agents it governs: since the latter only exists through the former, "the federal government cannot exercise powers withheld by the Constitution anywhere, or with respect to any person."[90] Universalist theories give legal backing to the intuition that all are equal and thus entitled to equal justice regardless of the accident of citizenship or location. Such theories, however, are vulnerable to critiques of impracticability.[91]

The membership approach is a social contract theory where an actual or hypothetical agreement that embodies the consent of the governed benefits "members" to the contract.[92] Those outside of the agreement hold only "whatever rights they may have independent of the contract."[93] This approach echoes American constitutionalism's time-honored belief that governments "deriv[e] their just powers from the consent of the governed,"[94] yet it is not as well suited to an age when governments act across the globe on people far from the consenting polity. A membership theory of constitutionalism does not itself specify who may be party to the contract: citizens, nationals, residents, and/or noncitizens. Chief Justice Rehnquist's "substantial connections" test in *Verdugo-Urquidez* supplied one possible answer.[95]

In a municipal law/mutuality approach to defining constitutional relationships, governments owe obligations and individuals have rights if both are within "a sphere in which American law operates. . . . When the government acts outside the sphere of municipal law, it enters a field where its actions do not impose obligations."[96] Because a government cannot impose obligations on individuals when it acts outside the sphere of municipal law, individuals outside the sphere do not hold rights against that government.[97] A strict territoriality version of this approach holds that the boundaries of the sphere are coterminous with a country's territorial limits.[98] However, another version of the principle is possible, where the relevant sphere is not defined geographically, but rather transactionally, "extending constitutional rights to aliens abroad only in those situations in which the United States claims an individual's obedience to its commands on the basis of its legitimate authority."[99] Indeed, the sphere may expand over time, extending "to

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[89] *Id.*

[90] *Id.*

[91] *Id.* Parts of Justice Brennan's dissent in *Verdugo-Urquidez* reflect a universalist frame. *Id.*

[92] Neuman, *supra* note 18, at 917.

[93] *Id.*

[94] THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

[95] Neuman, *supra* note 18, at 917.

[96] *Id.* at 918.

[97] *Id.*

[98] *Id.* Professor Neuman notes that a strict territoriality version of the municipal law/mutuality approach was the law until *Reid*. *Id.*

[99] *Id.* at 982.

aliens outside United States territory *only* in those circumstances in which the United States seeks to impose obligations upon them under United States law."[100] What a transactionally based mutuality approach lacks in predictability over time, it gains in flexibility; it is perhaps the framework best suited to the contemporary realities of American power abroad. Justice Blackmun's dissent in *Verdugo-Urquidez* reflects this principle.[101]

Neuman's final theory is the global due process approach.[102] This theory reflects the instinct that it may be too generous to provide a full battery of constitutional rights and protections to an individual abroad who is only subjected to a handful of a country's laws:[103]

> If one views a constitution as a contract designed to create a balance of power between the governors and the governable, then the government's reduced right to obedience and reduced means of enforcement may call for a reciprocal reduction in individual rights. . . . This approach suggests that, ultimately, extraterritorial constitutional rights boil down to a single right: the right to "global due process."[104]

This is, in a sense, the functional approach — it "embodies judicial discretion to reject, after deferential inquiry, the applicability of constitutional rights to government actions abroad in situations where they would appear 'impracticable and anomalous.'"[105] As Neuman noted, the functional approach is vulnerable to critiques that it is unprincipled,[106] or that it is merely "a brand of harmless universalism: recognize constitutional rights as potentially applicable worldwide, and then balance them away."[107] The Court implicitly embraced this balancing in *Boumediene*.[108] But the functional approach requires each person's entitlement to individual rights to be balanced afresh against the government's "right to obedience and . . . means of enforcement."[109] Therefore, the opinion provides scant guidance even for future adherents to global due process.

In addition to the Court's adoption of the functional approach, scholars have highlighted two other important points about *Boumediene*'s potential criteria for inclusion in the constitutional realm. First, Professor Chimène Keitner identified separation-of-powers considerations in the Court's analy-

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[100] *Id.* at 919.
[101] *Id.*
[102] *Id.*
[103] *Id.*
[104] *Id.* at 919–20.
[105] *Id.* at 987.
[106] *Id.* at 989 ("[T]he Court should not be inquiring as to which constraints present problems of practicability, but rather as to which rights a government must respect in order to justify its claim to obedience.").
[107] *Id.* at 920.
[108] Neuman, *supra* note 10, at 286.
[109] Neuman, *supra* note 18, at 919.

sis. She argued that the Court is most likely to break away from a strict territorial paradigm, and toward one that more closely examines the relationship between the state and the governed, where it "perceive[s] that the political branches are acting largely unchecked."[110] Second, Professor Sarah H. Cleveland argued that *Boumediene*'s embrace of the functional approach brings it closer in line with evolving international norms.[111] Like international law, *Boumediene* requires the Court to assess the degree of American control in a particular context, with de jure and de facto sovereignty on one end of a spectrum.[112] In some international contexts, control over the person — and not over the territory — is the relevant metric.[113] As a guide for applying this messy doctrine, Cleveland proposes that adjudicators consider the "proportionality between the extent of control exercised and the scope of legal obligations incurred"; international law's tiered obligations to respect, protect, and ensure rights; and "fundamental rights" as a limiting principle.[114]

The *Boumediene* Court provided no clear category of people outside the United States who are presumptively entitled to constitutional protection.[115] Both *Boumediene* and *Verdugo-Urquidez* implicitly reject the proposition that "everyone" is the answer; and *Boumediene* repudiates *Verdugo-Urquidez*'s assertion that only those with "previous significant voluntary connection [to the United States]" is correct.[116] But since *Boumediene*'s facts provided a closed category, "individuals in U.S. custody," Kennedy had no need to specify a baseline.[117] Practitioners and scholars are left to puzzle through the decision's normative framework and its implication for future cases.

The normative arguments in Part III primarily appeal to the global due process framework, which *Boumediene* follows. However, this Part also highlights virtues of alternative conceptions of the constitutional sphere — recommending control, either as a standalone principle governing extraterritoriality or as a central factor in a global balancing approach.

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[110] Keitner, *supra* note 10, at 59 (referencing *Boumediene* and making particular note of Justice Kennedy's opinion in Rasul v. Bush, 542 U.S. 445 (2004)).

[111] Cleveland, *supra* note 10, at 282.

[112] *Id.* at 272. Under international law, relevant factors include whether the control is indefinite or absolute; whether the government intends to displace local authorities; whether American power is multilateral; whether a military mission is underway; how large the population under control is; and the potential for tension with the host government, culture, and legal system. *Id.*

[113] *Id.* at 250–51 (referencing Coard v. United States, Case 10.951, Inter-Am. Comm'n H.R., Report No. 109/99, OEA/Ser.L./V/II.106, doc. 3 rev. ¶ 37 (1999) (setting an "authority and control" standard); Alejandre v. Cuba, Case 11.589, Inter-Am. Ct. H.R., Report No. 86/99, OEA/Ser.L/V/II.106, doc. 3 rev. ¶¶ 23, 25 (1999) (focusing on Guantánamo detainees' status as persons under the authority and control of a state)); *see also infra* section III.B.

[114] Cleveland, *supra* note 10, at 281.

[115] *See* Neuman, *supra* note 10, at 286.

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

[117] Neuman, *supra* note 10, at 272.

## III. The Extraterritorial Constitution at the U.S.-Mexican Border

This Part argues that it would not be "impracticable and anomalous" to grant noncitizens immediately outside the United States at the U.S.-Mexican border a constitutional right to be free from arbitrary violence at the hands of American government officials.[118] The analysis follows *Boumediene*'s guide to how the Court might think through extending constitutional rights to noncitizens outside the country.[119] First, this Part examines the border as a physical space and its relationship to U.S. sovereignty and rule of law. Second, it analyzes the relevance of potential claimants' status as "friendly" noncitizens without ties to the United States. Third, it weighs the practical considerations inherent in extending the right, including the nature of the right and the circumstances of its application.

### *A. The Nature of the Site Where the Act Took Place: U.S. Power at the Border in Historical Perspective*

The U.S.-Mexico border was not always the fortified, if porous, dividing line that it is now.[120] Over the course of the nineteenth century, the border transitioned "from a peripheral, pastoral landscape to one of capitalism and state control."[121] Local governance, economic development, migration control, and especially law enforcement developed into binational projects. Alongside this transformation, American hard and soft powers deepened their reach into Mexican territory. While the precise form of American influence over the border region has changed over time, U.S. power has been a constant presence on both sides of the line.

This section contends that the United States' authority over a region need not be as strong as it was in *Boumediene* for rights to adhere, particularly where the degree of interdependence between two countries is so high. It advances two arguments. First, a doctrinal point: Since the functional approach allows for multi-factor flexibility, the fact that the United States has no de facto sovereignty over the relevant strip of land is not and should not be dispositive. Since the other two prongs of the functional analysis are stronger in the present case than in *Boumediene*,[122] courts applying

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[118] *See* Boumediene v. Bush, 553 U.S. 723, 770 (2008).

[119] *Id.*

[120] *See* Rachel St. John, Line in the Sand: A History of the Western U.S.-Mexico Border 5 (2011).

[121] Rachel St. John, *Divided Ranges: Trans-border Ranches and the Creation of National Space Along the Western Mexico-U.S. Border*, *in* Bridging National Borders in North America: Transnational and Comparative Histories 116, 117 (Benjamin H. Johnson & Andrew R. Graybill eds., 2010).

[122] *See infra* sections III.B–III.C (suggesting the status of the detainee and the practical obstacles to recognizing a right are more favorable to the noncitizens in the present case than they were in *Boumediene*).

*Boumediene*'s functional approach should be willing to extend right to life protections for noncitizens under U.S. control just beyond the border. Second, a historical argument: As the history of the U.S.-Mexico border shows, American presence in northern Mexico is qualitatively very different than in Guantánamo, in ways that are relevant to a pragmatic analysis. The United States has nothing approaching de facto sovereignty over the Mexican land just beyond the border, nor does the soft power America projects into northern Mexico approximate the United States' level of control over Guantánamo. Yet, the United States exerts and has exerted powerful influence over northern Mexico — militarily, economically, and politically. These displays of American might are all the more striking because they punctuate a story of deep interconnectedness between northern Mexico and the southern United States. In a jurisprudence that cares about "the particular local setting, the practical necessities, and the possible alternatives,"[123] courts should not be bound to a narrow reading of *Boumediene*'s three factors. History makes the region ripe for an extension of rights.

Since the mid-nineteenth century, the United States has wielded military, political, and economic authority over northern Mexico. The United States displayed military might on both sides of the border. It sent agents into Mexican territory during the Indian raids in the 1840s, the cross-border campaign against the French, the Mexican Revolution, and the drug enforcement operations of the mid-to-late twentieth century.[124] In the early 1990s, Operations Blockade and Gatekeeper, efforts to curb unauthorized immigration, positioned immigration "personnel and vehicles along the riverbank at close proximity to each other around the clock" and produced an "overwhelming show of force" from the United States.[125] Zero-tolerance U.S. drug policy has both contributed to the illicit trade in narcotics that grips the borderlands and led to American boots on the ground in northern Mexico.[126] The U.S. Drug Enforcement Agency ("DEA") has placed informants in border cartels,[127] agents on Mexican soil,[128] and surveillance drones in Mexican airspace.[129]

By the mid-twentieth century, Mexican and American officials "would often join forces to protect the unsanctioned crossings of Mexican nationals and to coordinate mass deportation campaigns not only out of the United

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[123] Reid v. Covert, 354 U.S. 1, 75 (1957) (Harlan, J., concurring).

[124] *See* MATT M. MATTHEWS, THE US ARMY ON THE MEXICAN BORDER: A HISTORICAL PERSPECTIVE 42, 51, 82 (2007).

[125] OSCAR J. MARTINEZ, TROUBLESOME BORDER 135 (2006). Notably, the militarization of the late 1990s was laid to rest when outcry erupted as a result of a U.S. army official shooting an unarmed Mexican-American teenager herding at the Rio Grande. *See* MIGUEL ANTONIO LEVARIO, MILITARIZING THE BORDER: WHEN MEXICANS BECAME THE ENEMY 121 (2011).

[126] LEVARIO, *supra* note 125, at 151.

[127] Ginger Thompson, *U.S. Agencies Infiltrating Drug Cartels Across Mexico*, N.Y. TIMES, Oct. 24, 2011, at A1.

[128] *Id.*

[129] Charlie Savage, *D.E.A. Extends Reach of Drug War*, N.Y. TIMES, Nov. 6, 2012, at A1.

States, but reaching deep into the interior of Mexico."[130] American efforts to control Mexican migration policy resulted in historical examples of the United States exporting potentially unlawful and even violent practices to its southern neighbor.[131] Similarly, current-day CBP and Department of Homeland Security policies aimed at funneling migrant routes away from metropolitan areas have made the region much more deadly.[132] The Mexican government has lashed out against the United States' interventionism in northern Mexico: Mexican officials have criticized the role the United States plays in fostering lawlessness, arming cartels, and feeding money to the drug trade.[133]

American displays of hard and soft power across the Rio Grande are more striking because they build on a history of transnational cooperation on the local, state, and federal levels. Before CBP, Texas Rangers patrolled the boundary, chasing runaway slaves into Mexico and clashing with civilian ranchers and bandit gangs.[134] Arizona Rangers and Mexican Rurales jointly patrolled the borderlands to secure them for investment.[135] Attempts to govern the region together occasionally required local actors to bend the laws of national sovereignty.[136]

Although the U.S. border has hardened and regionalism has declined, many of these patterns continue into the present day.[137] Local officials negotiate bilateral agreements on issues like "pollution, tourism, transportation, emergency response, public health, and industrialization,"[138] and border-

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[130] KELLY LYTLE HERNANDEZ, MIGRA!: A HISTORY OF THE U.S. BORDER PATROL 18, 127 (2010). When many of those deported were caught reentering, the two countries devised a scheme to transfer deportees deep into Mexico: Mexican authorities would receive them at the border and then "forcibly relocate" them to places far from the border with daily plane flights into the interior. *Id.* Through the 1950s and 1960s, between 600 and 1000 migrants were sent to Monterrey, Nuevo Leon, and Juarez weekly. *Id.*

[131] *Id.* at 141–42. For example, to address the problem of repeat unauthorized crossers, the Patrol Inspector in charge of the Mission, Texas station, Bob Salinger, decided to shave the heads of repeat offenders — often in humiliating patterns — so they could be recognized and deported into the interior. *Id.*

[132] *See, e.g.*, MARIA JIMENEZ, ACLU OF SAN DIEGO & IMPERIAL COUNTIES & MEXICO'S NAT'L COMM'N OF HUMAN RIGHTS, HUMANITARIAN CRISIS: MIGRANT DEATHS AT THE U.S.-MEXICO BORDER 8–9 (2009), *available at* https://www.aclu.org/files/pdfs/immigrants/humanitariancrisisreport.pdf, *archived at* http://perma.cc/09HH2GJKiE4; Wayne A. Cornelius, *Controlling "Unwanted" Immigration: Lessons from the United States, 1993–2004*, 31 J. OF ETHNIC AND MIGRATION STUD. 775, 782–84 (2005).

[133] HERNANDEZ, *supra* note 130, at 143.

[134] *See* LEVARIO, *supra* note 125, at 4, 14.

[135] *See* SAMUEL TRUETT, FUGITIVE LANDSCAPES: THE FORGOTTEN HISTORY OF THE U.S.-MEXICO BORDERLANDS 140–41 (2006).

[136] *Id.* at 141 (quoting BILL O'NEAL, THE ARIZONA RANGERS 64 (1987)). For example, Arizona Rangers Lieutenant John Foster worked with Emilio Kosterlitzky of the Rurales to permit Rangers hot on a criminal's trail to keep in pursuit into Mexican territory. The two negotiated an agreement: Rangers would request a leave of absence from the force just before crossing the border so they could enter as private citizens, satisfying "technicalities of Mexican law." *Id.*

[137] *See* PAUL GANSTER & DAVID E. LOREY, THE U.S.-MEXICAN BORDER INTO THE TWENTY-FIRST CENTURY 200–01 (2008).

[138] *Id.*

state governors and executives from both countries address problems of mutual concern.[139] These cross-border ventures demonstrate the reach of American soft power into Mexican territory, from the top of the federal bureaucracy to the local transportation board. Transnational influence is particularly crucial in the American Southwest, where the border region is peppered with twin cities, one on each side of the line, operating as one, from joint economies to common public transportation.[140] Since the 1900s, the United States and Mexico have been engaged in collaboration and contestation over the region's environmental resources, leading to bilateral treaties, local nongovernmental organizations, and cross-border civil society.[141] Most remarkable, perhaps, is the scale of the countries' economic interdependence in the border region.[142] The government and the governed alike contribute to a binational civil society.

The near constant power that the United States has exerted over the territory just beyond its southern border undermines the argument that extending the Constitution beyond that line would export foreign principles to an incompatible culture. The *Boumediene* Court was careful not to hold that the petitioners' right to the Suspension Clause hinged on the United States' de facto sovereignty at Guantánamo. Justice Kennedy relied on the nature of U.S. control on the island to argue that it would not be impracticable and anomalous to apply some legal boundaries to American state action. In a space where two countries' fates are so inextricably intertwined, and where cross-border cooperation is so crucial, perhaps a lower threshold than de facto sovereignty is and ought to be enough for certain constitutional rights to attach.

The strongest argument against applying the functional approach to the present case is that U.S. control on the Mexican side of the border is more analogous to the Landsberg Prison at issue in *Eisentrager*, and other places where constitutional rights were found unavailable, than to Guantánamo, where the Suspension Clause has effect. In *Boumediene,* Justice Kennedy stressed that power over Landsberg Prison during the American occupation

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[139] *Id.*

[140] Lawrence A. Herzog, *Border Commuter Workers and Transfrontier Metropolitan Structures Along the U.S.-Mexico Border*, *in* US-MEXICO BORDERLANDS: HISTORICAL AND CONTEMPORARY PERSPECTIVES 176, 186 (Oscar J. Martinez ed., 1996); MARTINEZ, *supra* note 125, at 129.

[141] MARTINEZ, *supra* note 125, at 122–24.

[142] GANSTER & LOREY, *supra* note 137, at 2. "The border region is characterized by a binational economy of astounding complexity. It has seen rapid transformation in a short span of time, changing from a cattle ranching and mining area that attracted U.S., Mexican and European capitalists in the late nineteenth century to the center of a lucrative vice- and pleasure-based tourist industry, to a region that, after World War II, attracted an extraordinary amount of international capital to its manufacturing and services sector. . . . On the Mexican side of the boundary, assembly plants . . . established beginning in the mid-1960s, accounted for as much as 55 percent of Mexico's manufactured exports and 45 percent of all exports by 2005." *Id.*

was shared among the Allied Powers.[143] He also noted that neither the United States nor its Allies intended to establish permanent governance over Germany.[144]

Yet the present case is distinguishable from *Eisentrager* in ways that might ease Justice Kennedy's objections to extraterritoriality. First, as the long history of U.S.-Mexican interaction at the border suggests, American power in the region is not transient. Kennedy stressed that the United States did not "intend to govern [the Insular Areas] indefinitely."[145] While the United States clearly does not seek to govern northern Mexico, American power over the region has a long history and a stable future, such that it may make sense to enforce governing norms. Second, while it is true that the U.S. and Mexican governments often operate together in the border region, this collaboration is different in kind and degree from the Allied occupation of Germany. In *Boumediene*, Justice Kennedy noted that the Allied Powers sought to govern while granting "the German people . . . self-government to the maximum possible degree consistent with such occupation."[146] The current case, by contrast, does not ask that the U.S. Constitution supplant Mexican law at the U.S.-Mexico border, nor even that the American government act in contravention of its Mexican counterpart's wishes. Rather, the Mexican government is eager for U.S. state actors to be accountable in American courts for actions on Mexican territory.[147]

In a functional framework that de-emphasizes sovereignty, the character of the space is but one part of the inquiry. While this first prong of the functional analysis weighs less strongly in favor of the noncitizen in the present case than in *Boumediene*, the status of the claimant and the practical obstacles to recognizing a right are more favorable.

### *B. The Citizenship and Status of the Person*

By repudiating *Verdugo-Urquidez*'s holding that noncitizens abroad without "substantial voluntary connections" were ineligible for constitutional protection, *Boumediene* both opened the door for a wider range of noncitizens to claim rights and shifted the normative paradigm for admittance to the constitutional realm.[148] This section argues that noncitizens immediately outside the United States but under its control should be entitled to constitutional rights post-*Boumediene*. First, the section briefly notes the

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[143] Boumediene v. Bush, 553 U.S. 723, 768 (2008).

[144] *Id.*

[145] *Id.*

[146] *Id.* (quoting Agreements Respecting Basic Principles for Merger of the Three Western German Zones of Occupation, and Other Matters, art. 1, U.S.-U.K.-Fr., Apr. 8, 1949, 63 Stat. 2819).

[147] Brief for the Government of the United Mexican States as Amicus Curiae in Support of Appellants at 2, Hernández v. United States, No. 12-50217 (5th Cir. July 2, 2012), 2012 WL 3066823.

[148] *See* Hernández-López, *supra* note 10, at 201.

decreased relevance of citizenship to the question of constitutional protection under the functional approach, stressing that courts should pay less heed to alienage where the petitioners are unlikely to be of enemy allegiance. In this respect, the second factor in the functional analysis weighs more heavily in favor of petitioners like Hernández than it did in *Boumediene*. Second, given the waning role of citizenship as a principle of distinction, this section examines two categories of individuals potentially eligible for constitutional rights: people in custody, and those under government control. It contends that control, rather than custody, ought to be the relevant metric in granting constitutional rights.

The impracticable and anomalous test "decreases the importance of alien status when deciding extraterritorial constitutional issues."[149] The *Boumediene* Court was primarily concerned with whether the petitioners were properly classified as enemy combatants, not with citizenship.[150] One commentator has argued that, rather than being central to the status question, "[c]itizenship and alien status are part of larger questions weighing additional concerns, such as the practical obstacles in determining the detainee's right to the writ."[151] The wartime context and the petitioners' enemy status were central to the Court's analyses in *Boumediene* and *Eisentrager*. Indeed, in *Boumediene*, uncertainty about the petitioners' enemy status weighed *in favor* of recognizing their entitlement to the writ.[152] If the Court was willing to grant constitutional protections to alleged enemies of the state, surely it would consider extending rights to noncitizens outside U.S. custody who are far from a battlefield and unlikely enemies. The Court's move away from the "substantial connections" test toward the flexible functional approach signals its willingness to expand the category of noncitizens entitled to protection.

*Boumediene* did not delineate a category of individuals who are presumptively eligible for constitutional rights. As Neuman noted, the Court may have chosen not to do this because the facts before it provided a context-specific baseline of "individuals in U.S. custody."[153] The most difficult part of asking the Court to recognize constitutional protections against excessive force for noncitizens outside the territorial United States will be convincing the Justices that custody should not be dispositive.

There are three lines of argument for granting constitutional protection to noncitizens outside the territorial United States and not in its custody but under American agents' control. First, permitting noncitizens to bring claims of excessive deadly force under the Fourth Amendment reduces the threat, to citizens and foreigners alike, that executive agents will "switch the Constitu-

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[149] *Id.* at 207.

[150] *Id.* at 207–08; *see also Boumediene*, 553 U.S. at 766–67.

[151] Hernández-López, *supra* note 10, at 207–08; *see also Boumediene*, 553 U.S. at 761–62.

[152] *Boumediene*, 553 U.S. at 766–67.

[153] Neuman, *supra* note 10, at 272.

tion on or off at will" by exporting violence — avoiding the very problem identified in *Boumediene* as it turned away from a territorial paradigm.[154] In response to the exploding drug trade along the U.S.-Mexico border and the parallel crackdown on unauthorized migration, courts have crafted a series of legal doctrines easing the strictures of the Constitution in the border zone.[155] This permits the executive to address perceived threats to sovereignty posed by unlawful immigration.[156] The physical and legal malleability of the border has led commentators to call it a "constitutional black hole": the closer one gets to it, the more norms are distorted.[157]

Despite this relaxation, the Court continues to indicate that the U.S. government may not simply execute noncitizens at its gates. Granting noncitizens in Hernández's position constitutional protection would give legal backing to this intuition. Immigration law distinguishes between noncitizens who have been inspected and admitted to the country and those who have not.[158] When someone in the latter category nevertheless enters the United States, she is still "inadmissible" rather than "deportable." This sleight of hand, termed the "entry fiction," locates the border wherever undocumented immigrants travel.[159] Such excludable aliens — outside the United States for legal purposes, but physically within it — have rights under the Fourth and Fifth Amendments,[160] "to be free of gross physical abuse at the hands of state or federal officials."[161] The Fifth Circuit has reaffirmed that "aliens in disputes with border agents [have] a right to be free from excessive force, and no reasonable officer would believe it proper to beat a defenseless alien without provocation . . . ."[162] As the ACLU has argued, under precedent:

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[154] *Boumediene*, 553 U.S. at 765.

[155] Mayor, *supra* note 10, at 650. Three doctrinal developments in particular have had the cumulative effect of bringing the border into the interior. First, CBP uses "roving patrols," in which agents may selectively stop cars and question those on board if the agent reasonably suspects that the passengers have no lawful status and the car is "within a reasonable distance" of the border. *Id.* at 650–51 (citing 8 U.S.C. § 1357(a) (2006); United States v. Martinez-Fuerte, 428 U.S. 543, 555 (1976); United States v. Brigoni-Ponce, 422 U.S. 873 (1975)). Second, CBP uses fixed immigration checkpoints, in some cases up to sixty-five miles away from the border. *Id.* at 652 (citing *Martinez-Fuerte*, 428 U.S. at 545, 549–50). Finally, CBP deploys extended border searches. *Id.* at 654–55. "[A]gents may conduct warrantless 'reasonable suspicion' searches of persons or vehicles already inside the borders of the United States if that reasonable suspicion is coupled with a 'reasonable certainty' that the individual has recently entered the United States and that she has not had a chance to obtain contraband since that entry." *Id.*

[156] *Id.* at 650–56.

[157] *Id.* at 647.

[158] *See* 8 U.S.C. § 1101(a) (2012).

[159] *See* Mayor, *supra* note 10, at 668.

[160] Lynch v. Cannatella, 810 F.2d 1363, 1373 (5th Cir. 1987); *see also* ACLU *Hernández* Brief, *supra* note 7.

[161] *Lynch*, 810 F.2d at 1374.

[162] Martinez-Aguero v. Gonzalez, 459 F.3d 618, 626–27 (5th Cir. 2006). In *Martinez-Aguero*, the Fifth Circuit permitted a Mexican citizen in the U.S. who was stopped at the port of entry and thus had not made a legal entry to bring a Fourth Amendment claim of excessive force against a CBP agent. *Id.*

> [T]he government cannot contend that its border agents could unjustifiably shoot noncitizens within U.S. territory without running afoul of the Constitution, even where the victim is in the territory illegally. Given that such conduct is subject to the restrictions of the Fourth Amendment, it would in fact be anomalous to hold that the Fourth Amendment does not govern *identical conduct* by a border agent, simply because the victim was a few feet over the territorial boundary . . . .[163]

Relaxed Fourth Amendment constraints on searches and seizures near the border and the entry fiction have two relevant consequences for the *Boumediene* inquiry. These legal developments have meaningfully decreased the border's significance as dividing line between those inside and outside the polity. A more relevant distinction might separate those under the practical control of the U.S. government — in its custody, subject to its territorial jurisdiction, or otherwise in the hands of its agents — and those outside its grasp. Moreover, doctrines have combined to curtail the judiciary's role in safeguarding individual rights against government encroachment, and executive and legislative power over the region has expanded in response. As scholars have recognized,[164] *Boumediene*'s move away from strict territoriality was designed to check Congress and the executive's ability to create lawless space by avoiding sovereign U.S. land.[165] The Court should further this policy by requiring U.S. agents to adhere to the same standard of conduct regarding noncitizens immediately outside the border as within it.

Second, most of the normative frameworks for inclusion in the constitutional realm described in Part II would grant noncitizens under the control of U.S. government agents the right to be free from excessive force. Of Neuman's categories, only membership in a social contract would likely fail to encompass the present case.[166] Universalist theories, while unlikely to feature in the Court's reasoning, apply without regard to citizenship or location.[167] A broad mutuality framework could define the legal sphere transactionally, as extending rights to noncitizens in all instances where the U.S. agent's conduct controls the individual's actions.[168] In this case, the agent imposes an obligation, backed by the threat of state coercion, to comply with his command when he places the petitioner in the sights of his weapon. Perhaps most importantly, a global due process approach would scale the individual's constitutional protections to match the extent of the United

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[163] ACLU *Hernández* Brief, *supra* note 7, at 21–22.
[164] Keitner, *supra* note 10, at 59.
[165] *See* Boumediene v. Bush, 553 U.S. 723, 765 (2008).
[166] Neuman, *supra* note 18, at 915–20.
[167] *Id.* at 916–17.
[168] *Id.* at 982.

States' legal regime, right to obedience, and means of enforcement abroad.[169] American power just across the Mexican border may be larger than it seems at first glance, as section III.A notes. Affording individual protections to petitioners like Hernández would match the legal authority of American officers commanding obedience from the barrel of government-issued weapons. Here, the individual, while not in custody, is under the agent's control — a crucial fact for the balancing approach's allocation of rights.

Third, international law provides support for the proposition that a state may owe rights to individuals within its control but outside its formal custody. Like the United States, the international legal order has also been moving away from strict territoriality and toward a paradigm that considers the state's power over the individual.[170] Under international law a state may have extraterritorial jurisdiction where its authorities carry out executive or judicial functions on the territory of another state, in what is known as the "state agent authority."[171] Recently, previously reluctant international bodies[172] have shown some willingness to consider a state's control over people, and not only over territory. One such case is *Al Skeini and Others v. The United Kingdom*,[173] in which the surviving family members of Iraqis killed by British soldiers in 2003 brought suit under the European Convention of Human Rights.[174] There, the European Court of Human Rights held that "the United Kingdom, through its soldiers engaged in security operations in Basrah during the period in question, exercised authority and control over individuals killed in the course of such security operations, so as to establish a jurisdictional link between the deceased and the United Kingdom . . . ."[175] In this jurisdictional framework, a person in Hernández's position inherently would have been under the government agent's control at the time of injury. As Judge Bonello noted in his *Al-Skeini* concurrence: "Jurisdiction flows not

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[169] *See id.* at 919.

[170] Cleveland, *supra* note 10, at 251 (referencing Coard v. United States, Case 10.951, Inter-Am. Comm'n. H.R., Report No. 109/99, OEA/Ser.L./V/II.106, doc. 3 rev. ¶ 37 (1999) (setting an "authority and control" standard and noting that jurisdiction may "under given circumstances, refer to conduct with an extraterritorial locus where the person concerned is present in the territory of one state, but subject to the control of another"); Alejandre v. Cuba, Case 11.589, Inter-Am. Comm'n H.R., Report No. 86/99, OEA/Ser.L./V/II.106, doc. 3 rev. ¶¶ 23, 25 (1999) (focusing on Guantánamo detainees' status as persons under the authority and control of a state)).

[171] Al Skeini v. United Kingdom, App. No. 55721/07, ¶ 135 (Eur. Ct. H.R. 2011).

[172] *Id.* ¶ 138. "In determining whether effective control exists, the Court will primarily have reference to the strength of the State's military presence in the area . . . . Other indicators may also be relevant, such as the extent to which its military, economic and political support for the local subordinate administration provides it with influence and control over the region . . . ." *Id.* ¶ 139. "While international law does not exclude a State's exercise of jurisdiction extra-territorially, the suggested bases of such jurisdiction (including nationality, flag, diplomatic and consular relations, effect, protection, passive personality and universality) are, as a general rule, defined and limited by the sovereign territorial rights of the other relevant States . . . ." Bankovic v. Belgium, 2001-XII Eur. Ct. H.R. 333, 351–52.

[173] App. No. 55721/07 (Eur. Ct. H.R. 2011).

[174] *Id.* ¶ 149.

[175] *Id.*

only from the exercise of democratic governance . . . . It also hangs from the mouth of a firearm. In non-combat situations, everyone in the line of fire of a gun is within the authority and control of whoever is wielding it."[176] The use of force itself carries jurisdictional implications.

U.S. courts are not moving toward this doctrine as quickly as international bodies.[177] However, at present, the Court could draw on this developing doctrine without committing itself to policing the executive branch all over the globe. The facts of *Hernández* are distinguishable from those of the "War on Terror" in several ways: the U.S.-Mexico border is a geographic, social space with a unique history of American power and influence; the victims are not enemy combatants in an active warzone; and the "War on Drugs," for all its rhetorical power, is not an armed conflict of the size and scale of the "War on Terror." The Court may therefore move incrementally toward this new jurisprudence.

In sum, *Boumediene*'s decreased emphasis on citizenship; its rejection of *Verdugo-Urquidez*'s substantial connections test; and its emphasis on government accountability and uniformity suggest that control may be a better metric for assessing entitlement to constitutional protection than territoriality or custody. The functional approach permits the Court to hold that noncitizens outside the United States at the border have constitutional rights.

### *C. Practical Considerations for Whether the Right Should Apply*

*Boumediene* is, at heart, a pragmatic opinion: the functional approach is interested in the practical effects of extending constitutional rights to noncitizens abroad. This section draws analogies to other opinions that have applied the "impracticable and anomalous" test to extraterritorial questions: Justice Harlan's concurrence in *Reid* and Justice Kennedy's concurrence in *Verdugo-Urquidez*. Considering the specific factors the Court applied in those cases, this section addresses the pragmatic considerations in the present case, examining three potential practical arguments against holding that the Constitution protects noncitizens at the border. Overall, it argues that the practical implications of recognizing a constitutional protection against unauthorized deadly force at the border would be less burdensome than those of granting Guantánamo detainees protection under the Suspension Clause.

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[176] *Id.* ¶ 28 (Bonello, J., concurring).

[177] Indeed, given the rising tide of targeted killings outside a declared warzone, it is unlikely that U.S. courts will police the political branches through an authority and control paradigm for jurisdiction any time soon. *See* DEP'T OF JUSTICE, *supra* note 78; Scott Shane & Charlie Savage, *Report on Targeted Killings Whets Appetite for Less Secrecy*, N.Y. TIMES (Feb. 5 2013), http://www.nytimes.com/2013/02/06/us/politics/obama-slow-to-reveal-secrets-on-targeted-killings.html, *archived at* http://perma.cc/0k5RqDj3Yr9.

The Court's inquiry into whether a particular extension of rights is impracticable and anomalous is likely to depend on the context of each case.[178] Nevertheless, a set of common concerns emerges from these opinions. The factors detailed here provide a point of departure for analyzing whether it would be impracticable and anomalous to grant rights abroad.

Justice Harlan framed the question of which specific constitutional safeguards are appropriately applied overseas as an analogue to due process.[179] As noted, determining what process is due requires considering "the particular local setting, the practical necessities, and the possible alternatives."[180] In *Reid*, Justice Harlan described three potential options: trying similarly situated petitioners in U.S. courts, holding American-run civilian trials abroad, and trying such petitioners in foreign courts.[181] The first choice faced "obvious and overwhelming" practical problems of transporting myriad petty offenders to the United States for trial, as well as the possibility of conflicting with foreign powers who might want to try criminals in their own courts. The second alternative faced the "considerable difficulties" of guaranteeing American procedure abroad and, again, risked foreign government objection to U.S. jurisdiction. The third proposal would require the United States to cede control over events that took place in its military facilities and perhaps open its bases to investigation.[182]

Most of the practical obstacles that troubled Justice Harlan are absent from the present case. Here, permitting litigants' access to U.S. courts is the most convenient option. As in *Reid,* it would be illogical to set up a U.S. court to try U.S. government agents on a foreign sovereign's land. Although adjudications could take place in Mexican tribunals without much trouble, the United States has been unwilling to extradite CBP agents to face the Mexican judiciary despite outstanding requests.[183] Permitting Hernández and others similarly situated to bring their claims in U.S. courts under U.S. law would be the least intrusive option from the points of view of U.S. and Mexican governments. Admitting these claimants would ease tensions between the two nations: the Mexican government decried the casualty rate of U.S. enforcement practices, and has submitted an amicus brief to support Hernández's case.[184] The present case also avoids some of Justice Harlan's smaller objections: there is no need to transport offenders back to the United

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[178] *Boumediene* and earlier functional concurrences stress the importance of considering a particular right's application given the concrete facts of a case. Boumediene v. Bush, 553 U.S. 723, 759–64 (2008).

[179] Reid v. Covert, 354 U.S. 1, 75 (1956) (Harlan, J., concurring).

[180] *Id.*

[181] *Id.* at 76 n.12.

[182] *Id.*

[183] Brief for the Government of the United Mexican States as Amicus Curiae in Support of Appellants, *supra* note 147, at 16.

[184] *Id.* ("In this case, the Mexican government sought the extradition of Agent Mesa to Mexico, but the U.S. government denied that request.").

States; nor to recruit jurors; nor to permit Mexican officials to examine U.S. government property.

Similarly, most of the factors that gave Justice Kennedy pause about extending search-and-seizure protections to noncitizens abroad in *Verdugo-Urquidez* weigh less heavily in *Hernández*-like cases. Justice Kennedy was particularly worried about the absence of local judges or magistrates available to issue and enforce warrants abroad.[185] Kennedy also stressed the inherent impracticality of cooperating with foreign officials to carry out justice.[186] Given the extent of cross-border law enforcement and the routine cooperation between Mexican and American police at the border (discussed in section II.A), risks of subpoena noncompliance are likely less acute in the present matter. While there would undoubtedly be greater inconvenience to law enforcement, the vast majority of the action in cases like *Hernández* takes place inside the territorial United States; only the ultimate harm happens abroad. In contrast to *Verdugo*, cooperation with Mexican law enforcement would be minimal, requiring only that any witnesses and evidence make their way across the border. The above noted practice of joint policing at the border shows that this type of coordination would not rise to the level of anomaly.[187]

Another concern that runs throughout this jurisprudence is the incompatibility of American law with foreign culture and institutions. Mexico is currently undergoing a law reform initiative that distinguishes the current judiciary from the one that Justice Kennedy considered in *Verdugo-Urquidez* over twenty years ago.[188] Although the Mexican judicial system is vulnerable to corruption and operates primarily on an inquisitorial rather than adversarial model, it nevertheless shares several fundamental qualities with American courts. Mexicans live under a written constitution with ample protections for civil rights and liberties,[189] trained advocates present arguments in court (often primarily through written briefings),[190] and a civil code sets clear standards for adjudication.[191]

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[185] United States v. Verdugo-Urquidez, 494 U.S. 259, 278 (1990) (Kennedy, J., concurring).

[186] *Id.* at 278.

[187] *See generally* GANSTER & LOREY, *supra* note 137 (describing cross-border policing).

[188] James McKinley Jr., *Mexico's Congress Passes Overhaul of Justice Laws*, N.Y. TIMES, Mar. 7, 2008, at A3.

[189] CONSTITUCIÓN POLÍTICA DE LOS ESTADOS UNIDOS MEXICANOS [C.P.], *as amended*, Diario Oficial de la Federación [DO], 5 de Febrero de 1917 (Mex.), *available at* http://www.diputados.gob.mx/LeyesBiblio/pdf/1.pdf, *archived at* http://perma.cc/0X2eQpuXoeJ.

[190] Karla Zabludovsky, *In Mexico, Rehearsing to Inject Drama into the Courtroom*, N.Y. TIMES, Aug. 28, 2012, at A7.

[191] Código Civil Federal [CC] [Federal Civil Code], *as amended*, Diario Oficial de la Federación [DO], 18 de Septiembre de 2013 (Mex.), *available at* http://info4.juridicas.unam.mx/ijure/fed/1/, *archived at* http://perma.cc/0pzCcwPeGn9.

Finally, the size of the deprivation matters to the functional analysis.[192] The petitioner in *Reid* faced trial for a capital offense; Justice Harlan noted that a lesser sentence might not warrant the impracticality of affording constitutional process.[193] In *Boumediene,* Justice Kennedy did not articulate an abstract standard for discerning when a constitutional provision is sufficiently important to warrant extraterritorial applicability.[194] However, *Boumediene*'s analysis stressed that the fundamental role of the Suspension Clause in guaranteeing personal freedom made it an excellent candidate for judicial safeguard, even outside the territorial United States.[195] Justice Kennedy supported this consideration with reference to the *Insular Cases*, where the key distinction between fundamental, personal rights and other constitutional protections allowed the Court "to use its power sparingly and where it would be most needed."[196] Justice Kennedy may not have intended to cabin *Boumediene* to fundamental rights only.[197] Yet however narrowly the category of rights eligible for extraterritorial consideration is drawn, it surely includes the fundamental right not to be unlawfully killed by a government hand.[198] Given the size of the deprivation and the relatively modest procedural imposition on the U.S. judiciary, granting Hernández and others access to court is consonant with Justice Harlan's vision of due process and Justice Kennedy's "fundamental precept[s] of liberty."[199]

Since the functional approach relies so heavily on the facts of each case, this section closes by addressing a handful of practical problems that might arise in a case like *Hernández v. Mesa.* The clearest practical objection to granting noncitizens at the border Fourth Amendment rights is rooted in the plenary power doctrine. Developed in the late nineteenth century, the plenary power doctrine curtails judicial review and grants significant deference to the political branches on matters relating to immigration.[200] It is premised on the sovereign's inherent right to exclude noncitizens from its territory.[201] Those objecting to extraterritoriality might argue that, given the extent of judicial deference to the political branches on immigration matters, it would be anomalous for the Court to grant noncitizens access to the judici-

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[192] *See* Reid v. Covert, 354 U.S. 1, 75–78 (1957) (Harlan, J., concurring) (noting the importance of procedure in a capital case).

[193] *Id.* at 75–76.

[194] *Boumediene* answers functionally the question of which rights ought to follow the flag: the ones that can. *See* Boumediene v. Bush, 553 U.S. 723, 739 (2008).

[195] *See id.*

[196] *Id.* at 758–59.

[197] *Id.*

[198] *See, e.g.*, Tracey Maclin, *The Central Meaning of the Fourth Amendment*, 35 WM. & MARY L. REV. 197, 230 (1993) ("Even the most ardent foe of a broad interpretation of civil liberties is hard pressed to deny that the Fourth Amendment ranks as a fundamental right deserving strict judicial protection.").

[199] *Boumediene*, 553 U.S. at 739.

[200] *See* T. ALEXANDER ALEINIKOFF, SEMBLANCES OF SOVEREIGNTY 159 (2002), *cited in* Mayor, *supra* note 10, at 648.

[201] *See, e.g.*, Fong Yue Ting v. United States, 149 U.S. 698 (1893); Chae Chan Ping v. United States, 130 U.S. 581 (1889).

ary in this instance.[202] However, this argument overstates the immigration implications of the question, as the case has no bearing on Congress's power to decide which noncitizens will be admitted to the United States. Furthermore, the Court would not place any new limitations on CBP's conduct: as noted, noncitizens inside the territorial United States, but legally not yet admitted, may already use the judicial system to discourage abuse at the hands of CBP officers. The present case would only apply the same standard of conduct to officers' interactions with noncitizens outside of the territorial United States. Finally, the fact that the noncitizens in question are not in U.S. custody strengthens the argument for recognition of Fourth Amendment rights. The judiciary has typically been hesitant to interfere with Congress's prerogative to detain unauthorized noncitizens pending a hearing or deportation.[203] The present case does not require the Court to address this issue.

A second potential argument against granting Fourth Amendment rights to noncitizens outside the United States stems from concerns over U.S. sovereignty. Current doctrine accepts the "core assumption that border crimes pose an exceptional challenge to the state and therefore justify exceptional powers."[204] However, both theory and logic suggest that government actions at the border can be separated into those that truly police threats to sovereignty (e.g., deterring smuggling and unauthorized migration) and those that do not (e.g., murder).[205] Cases in which an officer uses excessive force against a noncitizen could reasonably fall into either. Therefore, a presumption against extending constitutional protections is over-inclusive. Over-inclusion alone is not a fatal defect, but it is one that could be cured; the officer in question could raise sovereignty considerations on a case-by-case basis as a defense in litigation. The judiciary is well positioned to determine whether the facts in each case justified exceptional power.

A third potential objection to holding agents accountable in U.S. courts for cross-border violations rests on the fact that a U.S. officer has no authority to arrest a noncitizen causing trouble for — or even attacking — the American agent so long as the noncitizen is in Mexican territory. In this scenario, the officer would be able to defend herself only by projecting force across the border from the U.S. side into Mexico. However, as with alleged threats to sovereignty, this consideration would be more appropriately addressed on a case-by-case basis than as a threshold jurisdictional matter. Perhaps the standard could grant greater leeway to the government officer in light of the obstacles to making an arrest — but the specific facts would still need to be evaluated under some applicable standard.

In sum, the Court's discussion of the potential practical obstacles in *Boumediene* — location with respect to an active warzone, foreign policy

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[202] For an analysis of the plenary power in post-*Boumediene* immigration detention, see Hernández-López, *supra* note 10, at 193.

[203] *Cf.* Zadvydas v. Davis, 533 U.S. 678 (2001).

[204] Mayor, *supra* note 10, at 658.

[205] *Id.* at 659–60.

implications of granting the right, and administrative burdens — demonstrates that *Hernández* and cases like it warrant extending constitutional rights beyond what has been done in the past.[206] The U.S.-Mexico borderlands are not an active war zone; permitting noncitizens outside the United States to sue under the Fourth Amendment would ease tensions with Mexico;[207] and granting litigants access to court would place minimal administrative burdens on the U.S. courts and the executive, as CBP officers are barred from using excessive force domestically. Unlike in previous extraterritoriality cases, there is no need to set up extraterritorial tribunals, nor to seek enforcement of a magistrate's warrant abroad. The practical considerations weigh even more heavily in favor of granting petitioners access to constitutional protection than they did in *Boumediene*.

## Conclusion

The Court's opinion in *Boumediene* — long on history, short on doctrine, and broadly written — has clear implications for the rights of noncitizens subjected to U.S. government action abroad. This Note has argued that Sergio Hernández Güereca belongs to one such category of noncitizens that should come under *Boumediene*'s wing: those in the border region harmed at the hands of U.S. officers. This proposition finds support in the history of U.S. control on the Mexican side of the countries' shared boundary, in theoretical accounts of which rights ought to apply abroad and who may claim them, and in the practical considerations central to the functional approach. Though litigants seeking rights under *Boumediene* face an uphill battle, the Court's opinion has the potential to be expansive.

The history detailed in this Note highlights the possibility of a paradigm for the legal relationship between the United States and foreign nationals just beyond the Mexican border that is as equally compelling as, yet distinct from, the functional approach. The United States has had the good fortune to share peaceful borders with its northern and southern neighbors for over a century and a half. The economic, political, social, cultural, and historical ties detailed above have been tools for forging partnerships irrespective of differing citizenship and geographical location. Imagine, then, a legal regime that takes this shared history into account: one that sees Border Crossing Cards, environmental societies caring for a common desert, NAFTA, and binational Rotary clubs as tools of joint governance. Perhaps the border and its immediate surroundings could be reconceived as a social and political sphere that acts to *strengthen* rule of law in both countries — as a place where robust individual rights and government obligations exist, where con-

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[206] *See* Boumediene v. Bush, 553 U.S. 723, 770 (2008).

[207] *See* Fernanda Santos, *Shootings by Agents Increase Border Tensions*, N.Y. Times, June 11, 2013, at A1 (noting there have been at least fifteen fatal border shootings since 2010, of which ten involved Mexican victims, six of whom died in Mexico).

stitutions deserve judicial safeguard regardless of territory or nationality — rather than as the demarcation of the end of state sovereignty.[208] Under this paradigm, constitutional protection could extend to noncitizens in Mexico *despite Boumediene*'s focus on functionality, and not because of it.

[208] Such a vision might find a theoretical home in a "mutuality" theory of constitutional protection. *See* Neuman, *supra* note 18, at 919, 975. A social contract between government and the individual arises not out of membership in a particular class, but rather because of the mutual demands that one places on the other to ensure a working transnational community.