

# FROM GUANTÁNAMO TO SYRIA: THE EXTRATERRITORIAL CONSTITUTION IN THE AGE OF “EXTREME VETTING”

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*This Article examines for the first time in scholarly literature whether and to what extent the Constitution applies extraterritorially to immigrants abroad. In particular, it explores whether non-detained immigrants and refugees outside the territorial boundaries of the United States can claim constitutional protection to challenge immigration policies and orders. The Supreme Court’s recent willingness to reconsider the limits of the political branches’ “plenary power” over immigration law and policy, coupled with the Court’s recent extension of the Constitution to certain classes of extraterritorial noncitizens, suggests that a future role may exist for extraterritorial jurisprudence to inform constitutional immigration law. Using the Trump Administration’s inchoate doctrine of “extreme vetting” as a case study, this Article explores how and in what circumstances the Court might make available avenues for constitutional challenge to immigrants residing abroad. It concludes by proposing a unified theory for extraterritorial constitutional immigration jurisprudence.*

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## INTRODUCTION

When then-candidate Donald Trump proposed a “total and complete shutdown’ of the entry of Muslims to the United States”<sup>1</sup> in

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<sup>1</sup> Jenna Johnson, *Trump Calls for “Total and Complete Shutdown of Muslims Entering the United States”*, WASH. POST (Dec. 7, 2015, 7:43 PM), <https://www.washingtonpost.com/news/post-politics/wp/2015/12/07/donald-trump-calls-for-total-and-complete-shutdown-of->

December 2015, a bipartisan group of lawmakers and scholars decried the proposal as immoral, impractical, and unconstitutional.<sup>2</sup> While the near-uniform backlash caused Trump to reframe his proposal as a policy of “extreme vetting” for immigrants and refugees, he maintained fealty through the rest of the campaign to his original plans.<sup>3</sup>

By the time President Trump issued Executive Order 13,769<sup>4</sup> on January 27, 2017, banning all migration from seven Muslim-majority nations, many of the same politicians who criticized the proposal a year earlier—including his Vice President—fell into line.<sup>5</sup> Who did not fall into line were the armies of protesters, civil rights activists, and immigration lawyers who immediately set out to challenge the law, descending on the nation’s busiest airports to meet with lawful immigrants in transit and detained upon arrival by immigration officials when the Order was entered.<sup>6</sup> Over a dozen legal challenges were filed

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muslims-entering-the-united-states/?utm\_term=.a8f48091a1ae.

<sup>2</sup> See, e.g., Mike DeBonis, *Ryan, McConnell Denounce Trump Plan to Bar Muslims from the U.S.*, WASH. POST (Dec. 8, 2015), [https://www.washingtonpost.com/news/powerpost/wp/2015/12/08/paul-ryan-joins-chorus-opposing-trumps-muslim-ban/?utm\\_term=.3c8bf57568f](https://www.washingtonpost.com/news/powerpost/wp/2015/12/08/paul-ryan-joins-chorus-opposing-trumps-muslim-ban/?utm_term=.3c8bf57568f) (noting the “tricky position in which Republican leaders find themselves when it comes to the unpredictable Trump . . . as his rhetoric has inched further toward the fringes”); Jerry Markon, *Experts: Trump’s Muslim Entry Ban Idea “Ridiculous,” “Unconstitutional,”* WASH. POST (Dec. 7, 2015), [https://www.washingtonpost.com/politics/experts-trumps-muslim-entry-ban-idea-ridiculous-unconstitutional/2015/12/07/d44a970a-9d47-11e5-bce4-708fe33e3288\\_story.html?utm\\_term=.0fac045d25ca](https://www.washingtonpost.com/politics/experts-trumps-muslim-entry-ban-idea-ridiculous-unconstitutional/2015/12/07/d44a970a-9d47-11e5-bce4-708fe33e3288_story.html?utm_term=.0fac045d25ca) (quoting legal scholars and experts who viewed the plan as “impossible,” “doomed by practical factors,” and a “blatantly unconstitutional” exclusion that “would make the United States a virtual pariah among nations”); cf. Peter J. Spiro, *Op-ed, Trump’s Anti-Muslim Plan Is Awful. And Constitutional.*, N.Y. TIMES (Dec. 8, 2015), <https://www.nytimes.com/2015/12/10/opinion/trumps-anti-muslim-plan-is-awful-and-constitutional.html> (calling the plan “reprehensible” but constitutionally defensible under the broad immigration powers granted to the political branches).

<sup>3</sup> Jeremy Diamond, *Trump on Latest Iteration of Muslim Ban: ‘You Could Say It’s an Expansion’*, CNN (July 24, 2016, 11:45 AM), <http://www.cnn.com/2016/07/24/politics/donald-trump-muslim-ban-election-2016/index.html> (recalling Trump’s response to a suggestion on Meet the Press that he was retreating from his “Muslim ban” proposal: “I actually don’t think it’s a rollback. In fact, you could say it’s an expansion . . . . People were so upset when I used the word Muslim. Oh, you can’t use the word Muslim. Remember this. And I’m OK with that, because I’m talking territory instead of Muslim”); Ali Vitali, *Donald Trump Shifts on Muslim Ban, Calls for ‘Extreme Vetting’*, NBC NEWS (July 18, 2016, 5:07 AM), <http://www.nbcnews.com/politics/2016-election/donald-trump-shifts-muslim-ban-calls-extreme-vetting-n611276> (“Trump is once again shifting the parameters of his proposed temporary ban on Muslims entering the country, calling Sunday for ‘extreme vetting’ of persons from ‘territories’ with a history of terror—though not explicitly abandoning his previous across-the-board ban.”).

<sup>4</sup> Exec. Order No. 13,769, 82 Fed. Reg. 8977 (Jan. 27, 2017) [hereinafter Executive Order].

<sup>5</sup> Avi Selk, *Pence Once Called Trump’s Muslim Ban ‘Unconstitutional.’ He Now Applauds the Ban on Refugees.*, WASH. POST (Jan. 28, 2017), <https://www.washingtonpost.com/news/the-fix/wp/2017/01/28/mike-pence-once-called-trumps-muslim-ban-unconstitutional-he-just-applauded-the-order> (quoting Vice President Mike Pence’s December 8, 2015 tweet that calls to ban Muslims from the United States are “offensive and unconstitutional” and Defense Secretary James Mattis’s July 2016 statement that the mere suggestion of a Muslim ban could cause “great damage” to world order).

<sup>6</sup> See Peter Baker, *Travelers Stranded and Protests Swell over Trump Order*, N.Y. TIMES

on behalf of immigrants and their families in the first week after the Executive Order.<sup>7</sup> Focusing on the nationality-based nature of the travel ban, the explicit preference in the Executive Order to prioritize refugee applications from “minority religions,” and the Administration’s thinly-veiled discriminatory motivations, these lawsuits challenged the Executive Order on a variety of constitutional and statutory grounds.<sup>8</sup>

Seven days after the Executive Order went into effect, U.S. District Judge James Robart issued a nationwide temporary restraining order halting enforcement of the Order.<sup>9</sup> A unanimous panel of the Ninth Circuit Court of Appeals affirmed the ruling.<sup>10</sup> By February 16, 2017, President Trump had publicly stepped away from the Order, promising to replace it with a “substantially revised” order to secure the country through extreme vetting,<sup>11</sup> though senior White House official Stephen Miller promised any new orders would remain fundamentally the same as the Executive Order.<sup>12</sup>

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(Jan. 29, 2017), <https://www.nytimes.com/2017/01/29/us/politics/white-house-official-in-reversal-says-green-card-holders-wont-be-barred.html> (describing mass protests at airports led by, *inter alia*, four democratic lawmakers at Dulles Airport who were barred from speaking with immigration officials about the status of detainees); Jack Jenkins, *Inside the Battle for Immigrant Rights at Dulles Airport*, THINK PROGRESS (Jan. 30, 2017, 6:32 PM), <https://thinkprogress.org/inside-the-battle-for-immigrant-rights-at-dulles-airport-d052b97ddf39#.cxds5ismx> (describing “makeshift” legal aid center assembled by the International Refugee Assistance Project, composed of “an ever-growing team of volunteer lawyers . . . crouched over laptops and surrounded by small mountains of donated food. Some wore suits, others hoodies, but all donned stickers with their names and legal expertise hastily scrawled across them (‘Immigration lawyer!’ read one, in smeared blue ink)”).

<sup>7</sup> Lauren Pearle & James Hill, *13 Legal Actions Challenging Trump’s Immigration Executive Order*, ABC NEWS (Feb. 1, 2017, 6:24 AM), <http://abcnews.go.com/Politics/legal-actions-challenging-trumps-immigration-executive-order/story?id=45175192>.

<sup>8</sup> See, e.g., Complaint, Hagig v. Trump, No. 1:17-CV-00289 (D. Colo. Jan. 31, 2017), ECF No. 1 (complaint filed by Libyan national challenging the Executive Order on Fifth and Fourteenth Amendment Equal Protection grounds; Fifth and Fourteenth Amendment Due Process grounds; First Amendment Establishment Clause grounds; and for violation of the Immigration and Nationality Act (INA)); Complaint, Sarsour v. Trump, 245 F. Supp. 3d 719 (E.D. Va. Jan. 30, 2017) (No. 1:17-CV-00120), ECF No. 1 (complaint filed by numerous Muslim plaintiffs challenging the Executive Order on the same grounds, as well as on First Amendment free exercise grounds); Plaintiff’s Motion for Temporary Restraining Order, Washington v. Trump, No. 2:17-CV-00141 (W.D. Wash. Jan. 30, 2017), ECF No. 3 [hereinafter Plaintiff’s Motion for TRO] (filed by Washington State, challenging the Executive Order on similar grounds).

<sup>9</sup> Plaintiff’s Motion for TRO, *supra* note 8, at 4 (finding that the states “are likely to succeed on the merits of the claims that would entitle them to relief”).

<sup>10</sup> Washington v. Trump, 847 F.3d 1151, 1164 (9th Cir. 2017) (per curiam) (“The Government has not shown that it is likely to succeed on appeal on its arguments about, at least, the States’ Due Process Clause claim, and we also note the serious nature of the allegations the States have raised with respect to their religious discrimination claims.”).

<sup>11</sup> Dan Levine, *Justice Department Says Trump Will Replace Travel Ban ‘in the near Future’*, HUFFINGTON POST (Feb. 16, 2017, 4:38 PM), [http://www.huffingtonpost.com/entry/justice-department-says-trump-will-replace-travel-ban-in-the-near-future\\_us\\_58a61a26e4b07602ad52ee76](http://www.huffingtonpost.com/entry/justice-department-says-trump-will-replace-travel-ban-in-the-near-future_us_58a61a26e4b07602ad52ee76).

<sup>12</sup> Taylor Link, *Stephen Miller Admits the New Executive Order on Immigration Ban Is Same as the Old*, SALON (Feb. 22, 2017, 2:30 PM), <https://www.salon.com/2017/02/22/stephen-miller-admits-the-new-executive-order-on-immigration-ban-is-same-as-the-old> (“One of the big

Since that chaotic first month of the Trump Era, the new Administration has enacted a second, “watered down” version of the first Executive Order<sup>13</sup>, has been dealt stinging defeats in lower courts across the country in what has become “sprawling” litigation,<sup>14</sup> and has been partially, if temporarily, vindicated by the Supreme Court’s decision to allow the second Executive Order to take effect while it awaited oral argument on the merits of the various challenges in October 2017.<sup>15</sup>

Regardless of the ultimate outcome of litigations surrounding the Executive Orders, Trump’s inchoate and discriminatory doctrine of extreme vetting raises two legally distinct yet interrelated issues. One, what, if any, limits does the Constitution place on the political branches’ broad “plenary power” to control immigration? Two, assuming that some constitutional limits exist to restrain immigration policy, which classes of immigrants may invoke constitutional protections to enforce these limits? In particular, to what extent can immigrants outside the territorial borders of the United States assert constitutional protections against invidious and otherwise impermissible immigration laws? This Article endeavors to answer both questions, and in so doing squarely addresses for the first time in scholarly literature how and to what extent extraterritorial constitutional jurisprudence applies to immigration law and policy.

This Article begins by exploring the extreme deference the judicial branch has traditionally afforded the political branches in the immigration context and the competing theories of this so-called plenary power.<sup>16</sup> The expansive, absolutist position of plenary power holds that the judicial branch cannot and will not review the constitutional sufficiency of executive immigration actions because the

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differences that you are going to see in the executive order is that it is going to be responsive to the judicial ruling which didn’t exist previously . . . . And so these are mostly minor, technical differences. Fundamentally, you are still going to have the same, basic policy outcome for the country.” (quoting Stephen Miller)).

<sup>13</sup> Exec. Order No. 13,780, 82 Fed. Reg. 13209 (Mar. 9, 2017) [hereinafter Second Executive Order]; Jacob Pramuk, *Trump May Have Just Dealt a Blow to His Own Executive Order*, CNBC (Mar. 16, 2017, 2:47 PM), <https://www.cnbc.com/2017/03/15/trump-may-have-just-dealt-a-blow-to-his-own-executive-order.html> (“This is [a] watered-down version of the first one. This is a watered-down version . . . . And let me tell you something, I think we ought to go back to the first one and go all the way (through the legal system), which is [what] I wanted to do in the first place.” (quoting President Trump on the Second Executive Order)).

<sup>14</sup> David S. Rubenstein & Pratheepan Gulasekaram, *Immigration Exceptionalism*, 111 Nw. U.L. REV. 583, 585 n.6 (2017) (listing the growing number of litigations and declaring that “[t]he litigation over President Trump’s executive order is sprawling”).

<sup>15</sup> See *Trump v. Int’l Refugee Assistance Project*, 137 S. Ct. 2080 (2017) (granting certiorari and staying the injunction entered by the Fourth Circuit Court of Appeals).

<sup>16</sup> See generally David A. Martin, *Why Immigration’s Plenary Power Doctrine Endures*, 68 OKLA. L. REV. 29 (2015) (outlining the origins of and defending separation of powers justifications for the plenary power doctrine).

political branches alone are “invested with power over all the foreign relations of the country,” including the power to exercise “[j]urisdiction over its own territory.”<sup>17</sup> The competing position holds that plenary power itself is a myth, “more of a rhetorical trope than a coherent judicial doctrine” that merely reflects the Court’s historical willingness to permit discrimination at home as well as abroad.<sup>18</sup>

With reference to recent precedent signaling an increased willingness to revisit immigration policies that fall out of step with contemporary norms, this Article posits that neither extreme view of plenary power is accurate. One need only cursorily review the case law to conclude that plenary power is real. Yet it is “subject to important constitutional limitations.”<sup>19</sup> While those limitations are difficult to precisely define, it appears from a close reading of history and precedent that, at a minimum, immigration rules that clearly fall outside “contemporary constitutional norms” might succumb to a constitutional challenge.<sup>20</sup>

Having addressed the threshold question of whether *anyone* can mount a successful constitutional challenge to an immigration policy, the Article turns to the question of *who* can mount such a challenge. In particular, the Article considers whether and to what extent the Constitution applies extraterritorially to protect non-detained immigrants and refugees beyond sovereign American soil.

Much of the Court’s history applying the Constitution beyond our borders has been defined by a normative tension between strict territorialists who hold the Constitution does not apply extraterritorially at all, and universalists who believe it applies always and everywhere. However, in 2008, a bare majority of the Supreme Court articulated a compromise approach in *Boumediene v. Bush*,<sup>21</sup> holding that alleged enemy combatants held at Guantánamo Bay Naval Base in Cuba had

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<sup>17</sup> *Chae Chan Ping v. United States*, 130 U.S. 581, 603, 605–06 (1889) (holding that immigration decisions by the legislative department are “conclusive upon the judiciary”).

<sup>18</sup> Adam Cox, *Why a Muslim Ban Is Likely to Be Held Unconstitutional: The Myth of Unconstrained Immigration Power*, JUST SECURITY (Jan. 30, 2017, 10:21 AM), <https://www.justsecurity.org/36988/muslim-ban-held-unconstitutional-myth-unconstrained-immigration-power> (rejecting the theory that Trump’s “immigration policies are somehow immune from constitutional scrutiny”).

<sup>19</sup> *Zadvydas v. Davis*, 533 U.S. 678, 695 (2001) (citing *INS v. Chadha*, 462 U.S. 919, 941–42 (1983)) (finding that the indefinite detention of a deportable alien would violate constitutional due process); see also *Chae Chan Ping*, 130 U.S. at 604 (congressional authority limited “by the Constitution itself and considerations of public policy and justice which control, more or less, the conduct of all civilized nations”).

<sup>20</sup> See Gabriel J. Chin, *Is There a Plenary Power Doctrine? A Tentative Apology and Prediction for Our Strange but Unexceptional Constitutional Immigration Law*, 14 GEO. IMMIGR. L.J. 257, 259 (2000) (“[I]f a case arises which challenges discrimination on a ground that violates contemporary constitutional norms, the Court will be faced with a new situation.”).

<sup>21</sup> 553 U.S. 723 (2008).

access to the constitutional right of habeas corpus to challenge their detention.<sup>22</sup> Eschewing bright line normative theories, Justice Kennedy instead adopted a practical, case-by-case approach to determining when and how constitutional rights apply abroad.<sup>23</sup> Kennedy's flexible, functional test recognized that it may be "impracticable and anomalous" to apply every provision of the Constitution "always and everywhere."<sup>24</sup>

Unfortunately, the language of Kennedy's *Boumediene* opinion is maddeningly imprecise, and his reliance on normative legal principles appears to stand in direct contradiction to his practical, easily malleable solution.<sup>25</sup> As one scholar observed, the breadth of lower court decisions criticizing, distinguishing, or outright ignoring *Boumediene* has had the effect of effectively "overrul[ing]" the decision, with the D.C. Circuit notably continuing to apply a strict territorial social compact view of extraterritoriality which *Boumediene* sought to discredit.<sup>26</sup>

In the face of an uncertain extraterritoriality jurisprudence, this Article attempts to apply the various surviving extraterritorial theories to the immigration context, again using extreme vetting generally and the Executive Orders specifically as a case study. One quickly realizes, unsurprisingly so, that the extent to which constitutional provisions apply extraterritorially to immigrants and refugees abroad varies substantially depending on the normative or consequentialist approach adopted. However, this exegesis helpfully illuminates certain fundamental commonalities across all extraterritorial theories from which a unified theory may be achieved. In short, any extraterritorial constitutional application should focus less on the controversial notion of extending individual rights abroad and more on the Constitution's traditional function as a limit on the federal government's powers, both at home and abroad.

The Article concludes by positing a unified theory of constitutional extraterritoriality generally and its application to immigration law and policy specifically. Recognizing the enduring legacy of plenary power and the politically sensitive nature of transnational migration policy in the field of foreign relations, the Article articulates a hybrid separation of powers/functionalist approach to extraterritorial constitutional

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<sup>22</sup> *Id.* at 732.

<sup>23</sup> See *id.* at 764, 766–71 (adopting a "functional approach" to extraterritoriality and finding that the U.S. government's total control of the naval base and lack of other complications did not make it "impracticable and anomalous" to grant habeas protections to noncitizen "enemy combatants" held outside U.S. sovereign soil).

<sup>24</sup> *Id.* at 759 (noting the "inherent practical difficulties of enforcing all constitutional provisions 'always and everywhere'" (quoting *Balzac v. Porto Rico*, 258 U.S. 298, 312 (1922))).

<sup>25</sup> See Jules Lobel, *Separation of Powers, Individual Rights, and the Constitution Abroad*, 98 IOWA L. REV. 1629, 1649–51 (2013) (criticizing "[t]he tension between *Boumediene's* broad separation-of-powers rationale and its confusing and troubling pragmatic, functional test").

<sup>26</sup> See Janet Cooper Alexander, *The Law-Free Zone and Back Again*, 2013 U. ILL. L. REV. 551, 555, 593–606 (2013).

immigration law that seeks to strike a coherent and justifiable balance between fundamental equality norms, internationally-recognized liberty interests, and political and diplomatic flexibility.

A few notes on what this Article will not do. First, it neither addresses the standing of individual states or other domestic actors to challenge the Executive Orders<sup>27</sup>, nor weighs in on the ultimate constitutionality of the Orders. For purposes of this Article, the Executive Order serves merely as a jumping off point for a much broader discussion. Second, the Article does not directly address the role of domestic immigration legislation or international treaty obligations as independent sources of extraterritorial immigrant rights. Though an important potential source for remedies, extraterritorial statutory application implicates different considerations from this Article's primary focus—extraterritorial constitutional application.<sup>28</sup> Finally, the Article references the potential immigration policy implications for extending the reach of the U.S. Constitution but neither passes judgment on nor recommends changes to existing immigration policies.

#### I. EXTREME VETTING AND IMMIGRATION LAW: HAVE WE REACHED THE LIMITS OF PLENARY POWER?

Before one can discuss whether extraterritorial immigrants possess constitutional rights to challenge a particular immigration policy, one must first consider whether *anyone* can successfully challenge such a policy. The Court's long history of deference in the immigration context suggests that the political branches remain immune from constitutional challenge to its immigration policies, even if such policies would clearly run afoul of the Constitution in the domestic context. This so-called plenary power enjoyed by the executive and Congress has led the Court to "uphold[] with depressing regularity statutes discriminating on the basis of race, sexual orientation, political activity, and sex and birth out-of-wedlock."<sup>29</sup> While the Court observed in 2001 that the political

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<sup>27</sup> See, e.g., Defendants' Opposition to Plaintiff State of Washington's Motion for Temporary Restraining Order at 9–14, *Washington v. Trump*, No. 2:17-CV-00141 (W.D. Wash. Feb. 2, 2017), ECF No. 50 [hereinafter Defendants' Opposition to TRO] (The Defendants' opposition to Washington and Minnesota State requests a nationwide injunction to halt the Executive Order, in part because these states "lack[] standing to invoke the court's jurisdiction").

<sup>28</sup> See Gerald L. Neuman, *Extraterritoriality and the Interest of the United States in Regulating Its Own*, 99 CORNELL L. REV. 1441, 1457 (2014) (noting that "[e]xtraterritorial application of constitutional rules involves a set of considerations that differ in part from those relevant to extraterritorial application of statutory rules," because "Congress can change [statutory] rule[s] prospectively if the court has chosen unwisely, whereas constitutional interpretations are extremely difficult to amend under Article V").

<sup>29</sup> Chin, *supra* note 20, at 257 ("These decisions, and the statutes they upheld, are inconsistent with fundamental values reflected in domestic constitutional law, yet they continue



branches' immigration power is "subject to important constitutional limitations,"<sup>30</sup> in reality the Court has never once invalidated a federal immigration policy on constitutional grounds.<sup>31</sup> Therefore, it is important to consider this threshold question of whether any of President Trump's extreme vetting immigration measures, no matter how noxious, can successfully be challenged at all, before exploring who can bring such challenges.

This Section briefly outlines the history and development of the plenary power doctrine, examines the competing scholarly position that plenary power is little more than a legal fiction, and analyzes recent Court precedent to posit a middle position: that plenary power is real but has substantive constitutional limits, and that Trump's expressly discriminatory policies may finally present the Court "with a strong case to test" these limits.<sup>32</sup>

#### A. *The "Unreviewable" Executive: The Doctrine of Plenary Power*

"The plenary power doctrine, traditionally traced to the Supreme Court's decision in *Chae Chan Ping*, has persisted despite a steady and vigorous stream of scholarly criticism."<sup>33</sup> In *Chae Chan Ping*, the Court considered whether an 1882 law barring all future immigration of Chinese laborers should work to exclude Chae Chan Ping, a Chinese immigrant lawfully residing in the United States, who left in 1887 for what he thought would be a brief visit to China.<sup>34</sup> Although the 1882 law contained a waiver provision designed to allow previously-admitted Chinese laborers to leave and return, that provision was discontinued by an act of Congress in 1888 while Chae Chan Ping was on his return voyage to the United States.<sup>35</sup> Upon arrival, he was denied entry.<sup>36</sup>

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to constitute the foundation of immigration law.").

<sup>30</sup> *Zadvydas v. Davis*, 533 U.S. 678, 695 (2001).

<sup>31</sup> Peter Spiro, *How the Courts Could See Their Way to Striking down the Trump Travel Ban*, LAWFARE (Feb. 2, 2017, 1:48 PM), <https://www.lawfareblog.com/how-courts-could-see-their-way-striking-down-trump-travel-ban> ("The courts have never imposed meaningful constraints on the executive branch in th[e] immigration] context.").

<sup>32</sup> Chin, *supra* note 20, at 257.

<sup>33</sup> Martin, *supra* note 16, at 29–30 ("*Chae Chan Ping v. United States*, also known as [t]he *Chinese Exclusion Case*, is traditionally taken as the fountainhead of the plenary power doctrine.").

<sup>34</sup> See *Chae Chan Ping v. United States*, 130 U.S. 581, 582 (1889).

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* David A. Martin eloquently explains why so many "twenty-first-century observers" are "deeply troubled" by this ruling:

The 1888 law it sustained stemmed from xenophobic and racist agitation in California, scapegoating the Chinese in the midst of a severe economic recession. And Chae Chan Ping himself is a highly sympathetic petitioner. He had lawfully resided in the United States for fifteen years, journeying back to visit family in China

In a unanimous decision, the Court upheld the exclusion against a constitutional equal protection challenge, finding that immigration decisions by the legislative department to exclude aliens are conclusive upon the judiciary.<sup>37</sup> The propriety of immigration decisions and their impact on foreign affairs with other countries “are not questions for judicial determination. If there be any just ground of complaint on the part of China, it must be made to the political department of our government, which is alone competent to act upon the subject.”<sup>38</sup>

Three years later, the Court largely rejected the claim that aliens possessed any constitutional due process protections to appeal immigration decisions.<sup>39</sup> In affirming the propriety of an immigration officer’s summary denial of entry to a Japanese immigrant seeking to reunite with her husband, the Court found that Congress may lawfully make immigration officers “the sole and exclusive judge . . . and no other tribunal, unless expressly authorized by law to do so, is at liberty to reexamine or controvert the sufficiency of the evidence on which he acted.”<sup>40</sup>

The following year, the Court extended the plenary power doctrine from exclusion of aliens not physically present on sovereign soil to deportation of aliens in the United States. In *Fong Yue Ting v. United States*, the Court upheld the deportation of a Chinese national purely on nationality grounds, finding that, “[t]he power of [C]ongress . . . to expel, like the power to exclude, aliens, or any specified class of aliens, from the country, may be exercised entirely through executive officers . . . .”<sup>41</sup>

“Unlike other bygone constitutional curiosities that offend our contemporary sensibilities, [*Chae Chan Ping*] has never been overturned.”<sup>42</sup> In fact, *Chae Chan Ping* and its progeny formed the

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only after carefully obtaining the official certificate provided by law as the means for his readmission. [And h]e was already at sea on his return voyage when Congress changed the law, with immediate effect, nullifying the use of those certificates to gain reentry.

Martin, *supra* note 16, at 30–31 (pushing back on criticism: “[T]he case receives more blame than it deserves. . . . The Court invoked sovereignty . . . not to deny rights but instead primarily to answer a federalism question.”).

<sup>37</sup> *Chae Chan Ping*, 130 U.S. at 606.

<sup>38</sup> *Id.* at 609.

<sup>39</sup> See *Ekiu v. United States*, 142 U.S. 651 (1892).

<sup>40</sup> *Id.* at 660 (citations omitted) (“It is not within the province of the judiciary to order that foreigners who have never been naturalized, nor acquired any domicile or residence within the United States, nor even been admitted into the country pursuant to law, shall be permitted to enter, in opposition to the constitutional and lawful measures of the legislative and executive branches of the national government. As to such persons, the decisions of executive or administrative officers, acting within powers expressly conferred by congress, are due process of law.” (emphasis added)).

<sup>41</sup> *Ting v. United States*, 149 U.S. 698, 713–14 (1893).

<sup>42</sup> Spiro, *supra* note 2 (summarizing over a century of precedent relying on *Chae Chan Ping*

bedrock for a significant broadening of plenary power during the 1950s. For example, in 1950, a German-born wife of a U.S. citizen challenged her summary exclusion from entry at Ellis Island by an immigration officer on national security grounds.<sup>43</sup> In affirming the executive branch's decision to exclude her without a hearing, the Court found that,

[t]he action of the executive officer under such authority is final and conclusive. Whatever the rule may be concerning deportation of persons who have gained entry into the United States, it is not within the province of any court, unless expressly authorized by law, to review the determination of the political branch of the Government to exclude a given alien.<sup>44</sup>

In 1952, three long-time residents of the United States were ordered deported because of their former membership in the Communist Party.<sup>45</sup> Though noting the severity of deporting aliens who had resided within the country for such a lengthy period of time, the Court affirmed the deportations by finding that,

any policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government. Such matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference.<sup>46</sup>

In 1953, the Court extended this reasoning in *Shaughnessy v. United States ex rel. Mezei*, when it found that a noncitizen facing exclusion was not entitled to any due process whatsoever, even if the result was indefinite detention.<sup>47</sup> After living in the United States for more than twenty-five years, Ignatz Mezei attempted to return to his native Romania to visit his dying mother but was denied entry into the country.<sup>48</sup> Upon his return to the United States, he was denied entry and

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to uphold noxious immigration laws, including a 2015 case denying due process protections to an excludable immigrant).

<sup>43</sup> See *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537 (1950).

<sup>44</sup> *Id.* at 543 (citations omitted). Two years after the ruling, Knauff found relief from the political branches when newspaper editorials decried her exclusion and the Attorney General granted her a hearing. Knauff lost before the Immigration Board of Special Inquiry but won a reversal at the Board of Immigration Appeals, after which she became a lawful permanent resident. See Charles D. Weisselberg, *The Exclusion and Detention of Aliens: Lessons from the Lives of Ellen Knauff and Ignatz Mezei*, 143 U. PA. L. REV. 933, 955–64 (1995) (providing an illuminating account of Knauff's journey before and after her Supreme Court case).

<sup>45</sup> See *Harisiades v. Shaughnessy*, 342 U.S. 580 (1952).

<sup>46</sup> *Id.* at 588–90 (“[N]othing in the structure of our Government or the text of our Constitution would warrant judicial review by standards which would require us to equate our political judgment with that of Congress.”).

<sup>47</sup> 345 U.S. 206 (1953).

<sup>48</sup> *Id.* at 208; see also Weisselberg, *supra* note 44, at 964–65.

held at Ellis Island for over two years on national security grounds while the government attempted and failed to find another country to host him.<sup>49</sup> The Court rejected his habeas claim that his indefinite detention violated due process: “Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned.”<sup>50</sup>

The Court reaffirmed the plenary power doctrine throughout the 1970s when it: upheld the exclusion of a self-described “revolutionary Marxist”<sup>51</sup>; upheld a statute requiring a five-year period of admission as a prerequisite for aliens wishing to receive medical care<sup>52</sup>; and upheld a facially discriminatory provision of the Immigration Act that recognized the relationship between children born out of wedlock with their mothers but not their fathers.<sup>53</sup> As recently as 2015, the Court upheld the exclusion of a permanent resident’s spouse on unspecified national security grounds based on secret evidence never made public.<sup>54</sup>

In short, the Supreme Court has never “struck down an immigration classification, even ones based on race.”<sup>55</sup> With such a consistent history of deference, it is easy for one to assume that “[t]he court has given the political branches the judicial equivalent of a blank check to regulate immigration as they see fit.”<sup>56</sup> While “[t]he courts have justified this constitutional exceptionalism on the grounds that

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<sup>49</sup> See *Mezei*, 345 U.S. at 208–10; see also Brian G. Slocum, *The War on Terrorism and the Extraterritorial Application of the Constitution in Immigration Law*, 84 DENV. U. L. REV. 1017, 1024 (2007) (“Because Mezei could not establish his nationality, other nations would not take him, and he remained confined by the government on Ellis Island.”).

<sup>50</sup> *Mezei*, 345 U.S. at 213. The Court reached this conclusion even though the “process” afforded Mezei was no process at all. See Slocum, *supra* note 49, at 1024 (“Mezei was excluded without a hearing based on confidential information. . . . Despite the indefinite, and potentially permanent, nature of his detention, the Court held that Mezei’s due process rights were not violated because Mezei was treated ‘as if stopped at the border’ and thus had *no* due process rights.” (emphasis in original)).

<sup>51</sup> *Kleindienst v. Mandel*, 408 U.S. 753, 766 (1972) (“The Court without exception has sustained Congress’ ‘plenary power to make rules for the admission of aliens and to exclude those who possess those characteristics which Congress has forbidden.’” (citation omitted)).

<sup>52</sup> See *Mathews v. Diaz*, 426 U.S. 67, 81 (1976) (“For reasons long recognized as valid, the responsibility for regulating the relationship between the United States and our alien visitors has been committed to the political branches of the Federal Government. Since decisions in these matters may implicate our relations with foreign powers . . . such decisions are frequently of a character more appropriate to either the Legislature or the Executive than to the Judiciary.”).

<sup>53</sup> See *Fiallo v. Bell*, 430 U.S. 787, 792 (1977); see also *Miller v. Albright*, 523 U.S. 420 (1998); cf. *Chin*, *supra* note 20, at 272 (critiquing the view that these cases turned on the plenary power doctrine, because “unmarried fathers are in a class by themselves; differential treatment of this group is probably the sex classification which the Court has been most willing to find reasonable domestically”).

<sup>54</sup> See *Kerry v. Din*, 135 S. Ct. 2128, 2131 (2015) (recasting petitioner’s claim as a “depriv[ation] of her constitutional right to live in the United States with her spouse,” for which “[t]here is no such constitutional right,” instead of focusing on her procedural constitutional right to due process of law).

<sup>55</sup> Spiro, *supra* note 2.

<sup>56</sup> *Id.*

immigration law implicates foreign relations and national security,” it nonetheless has upheld discriminatory decisions “even in the absence of a specific, plausible foreign policy rationale.”<sup>57</sup>

Given this uniform history of deference in the immigration context, it is little wonder many Court observers and commentators believe the plenary power to be absolute. Notably, the Trump Administration has advanced this absolutist position in its defense of the Executive Orders, asserting that courts cannot review the President’s Executive Orders precisely because there is “no basis for the Judiciary to second-guess the President’s determinations” in the immigration context.<sup>58</sup> While this position appears to rest on firm legal footing, both Judge Robart and a unified panel of the Ninth Circuit Court of Appeals rejected the notion of absolute judicial deference.<sup>59</sup> Thus, some outer limits to plenary power must exist. Sections I.B and I.C explore those possible limits in more detail.

### B. *The Myth of the Myth of Plenary Power*

Despite the long and seemingly conclusive historical record for a plenary power doctrine, some contend that no such doctrine exists at all and that the Court’s treatment of immigration policies is no more exceptional than its treatment of domestic laws.<sup>60</sup> For example, three days after entry of the first Executive Order, Professor Adam Cox challenged the so-called “myth of unconstrained immigration power” in declaring that the “Muslim [b]an is [l]ikely to be [h]eld [u]nconstitutional.”<sup>61</sup> Cox observed that “many have wondered whether

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<sup>57</sup> *Id.* (questioning what possible national security interests could be promoted by denying a father from reuniting with his out-of-wedlock son from the French West Indies).

<sup>58</sup> Defendants’ Opposition to TRO, *supra* note 27, at 22–24 (asserting that immigration decisions are areas “within the exclusive domain of the political branches of government. . . . It is thus well-established that courts cannot evaluate the President’s national security and foreign affairs judgments, especially in the immigration context. . . . It is simply not possible for the Court here to evaluate the President’s Executive Order without passing judgment on the President’s national security and foreign affairs determinations”).

<sup>59</sup> *See* Washington v. Trump, 847 F.3d 1151, 1161 (9th Cir. 2017) (per curiam) (“[T]he Government has taken the position that the President’s decisions about immigration policy . . . are unreviewable, even if those actions potentially contravene constitutional rights and protections. The Government indeed asserts that it violates separation of powers for the judiciary to entertain a constitutional challenge to executive actions such as this one. There is no precedent to support this claimed unreviewability, which runs contrary to the fundamental structure of our constitutional democracy.” (citing *Boumediene v. Bush*, 553 U.S. 723, 765 (2008))).

<sup>60</sup> *See, e.g.*, Chin, *supra* note 20, at 257; *cf.* Matthew J. Lindsay, *Disaggregating “Immigration Law”*, 68 FLA. L. REV. 179, 219 (2016) (recognizing the “constitutional exceptionalism of the federal immigration power” but advancing the claim that such exceptionalism is slowly eroding).

<sup>61</sup> Cox, *supra* note 18 (“The plenary power does not stand for the proposition that

the order, even if its [sic] amounts to such a discriminatory policy, is immune from attack because it is an immigration policy” and thus “constitutionally permissible” under “the doctrine of ‘immigration plenary power.’”<sup>62</sup> According to Cox, however, the assumption that “[t]he so-called plenary power . . . spell[s] death for any constitutional claim brought by immigrants seeking admission . . . is simply wrong. The plenary power doctrine is more of a rhetorical trope than a coherent judicial doctrine.”<sup>63</sup>

The claim that plenary power is more myth than reality asserts that each of the seminal constitutional immigration law cases “was decided during a constitutional era when such policies were often accepted as a matter of domestic law as well.”<sup>64</sup> Rather than representing a sovereign exception to the reach of the Constitution, these so-called plenary power cases were in fact consistent with the contemporary interpretation of the Constitution. This reinterpretation of the plenary power cases was first introduced by Jack Chin in 1999, when he observed that

the Court’s treatment of substantive immigration classifications . . . may not be that different from how it has treated those groups domestically . . . . At the time they were decided, many of the terrible immigration cases could have come out the same way even if they involved the rights of citizens under domestic constitutional law.<sup>65</sup>

This theory has intuitive historical appeal, and of course also provides a sliver of hope to the troves of progressive scholars decrying the plenary power doctrine.<sup>66</sup> It allows one to square the 1867 passage of the Fourteenth Amendment, guaranteeing equal protection under the laws, with the fact that, “[b]y statute, the right to immigrate was tied to race between 1882 and 1965.”<sup>67</sup> By placing these cases in historical context, so the theory goes, constitutional immigration law seems no

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blatant . . . discrimination on the basis of race, sex, religion, or ideology is constitutionally permissible in immigration policy.”).

<sup>62</sup> *Id.* (quoting Spiro, *supra* note 31).

<sup>63</sup> *Id.* (internal quotations omitted).

<sup>64</sup> *Id.*

<sup>65</sup> Chin, *supra* note 20, at 257–58 (asserting that “the Court has rarely, if ever, tested discrimination against a group in the immigration context at a moment when it had already recognized that the Constitution prohibited discrimination on that ground against citizens”).

<sup>66</sup> See Martin, *supra* note 16, at 30 (observing that “the doctrine ha[s] been widely and persistently condemned in the scholarly literature. It almost seems an obligatory rite of passage for scholars embarking on the study of immigration law to provide their own critique of plenary power or related doctrines of deference”).

<sup>67</sup> Chin, *supra* note 20, at 261; see also Lindsay, *supra* note 60, at 180–81, 180 n.1 (noting that “Congress abandoned the limitation of eligibility for naturalization to ‘free white persons’ . . . in the Immigration and Nationality Act of 1952 (INA) . . . . Yet it was not until the Immigration Act of 1965 that the civil rights revolution finally came to immigration law”); Spiro, *supra* note 2.

more exceptional than contemporary domestic constitutional law.<sup>68</sup>

While this theory of the myth of plenary power is appealing, it relies on a tortured reading of precedent. Had *Chae Chan Ping* and its progeny been decided on the basis that the challenged exclusionary classifications were substantively permissible, the decisions surely would have said so. But they did not. Instead, these cases universally reasoned that the challenged immigration policies were immune from constitutional challenge and judicial review, not that they withstood constitutional challenge *after* judicial review.<sup>69</sup> Indeed, this theory that constitutional immigration jurisprudence remains consistent with constitutional domestic jurisprudence is directly contradicted by the Court's clear pronouncement in *Fiallo v. Bell* that, "in the exercise of its broad power over immigration and naturalization, 'Congress regularly makes rules that would be unacceptable if applied to citizens.'"<sup>70</sup>

Chin acknowledges that "[t]he plenary power cases use strong language in support of the idea that Congress can do what it wants," but opines that "they may be largely dicta."<sup>71</sup> While Chin may be right that the most full-throated defenses of sovereign plenary power are not directly tied to the holdings in many of these cases, these consistent declarations, combined with the fact that "[t]he Supreme Court has never struck down a provision of the immigration law outright . . . stretching back more than a century, adds up to the plenary power doctrine."<sup>72</sup>

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<sup>68</sup> Cox, *supra* note 18 ("*Chae Chan Ping* was decided seven years before *Plessy v. Ferguson*, which upheld Jim Crow segregation and birthed the infamous jurisprudential principle of 'separate but equal.' *Haristades* was decided in 1952, a period when First Amendment protections were much more watered down—and when communist party members were not infrequently criminally prosecuted. And *Fiallo* was handed down in the mid-1970's, during the nascent phase of the Court's sex equality jurisprudence, when a number of domestic laws that discriminated on the basis of sex were upheld by the Supreme Court."); see also Chin, *supra* note 20, at 260 ("[A]fter enactment of the Fourteenth Amendment but before 1889, the year *Chae Chan Ping* was decided, state and federal courts upheld racial segregation in schools, miscegenation laws, exclusion of witnesses on the basis of race, and laws granting benefits to whites but not to blacks.").

<sup>69</sup> See generally *supra* Section I.A.

<sup>70</sup> *Fiallo v. Bell*, 430 U.S. 787, 792 (1977) (quoting *Mathews v. Diaz*, 426 U.S. 67, 80 (1976)); see also Spiro, *supra* note 31 ("The 1977 decision in *Fiallo v. Bell*—well into the modern-era rights revolution—is particularly instructive. The case involved a facially discriminatory provision of the Immigration Act that recognized the relationship between children born out of wedlock with their mothers but not their fathers. The regime implicated a double-barreled discrimination for equal protection purposes, implicating the suspect classes of gender and legitimacy. The Court upheld the provision on the basis of exactly the kids of stereotypes that trigger close judicial scrutiny in any other context.").

<sup>71</sup> Chin, *supra* note 20, at 259 ("Deference to discriminatory immigration classifications when domestic constitutional law would permit such discrimination against citizens does not imply deference when there is a domestic rule against discrimination on that basis.").

<sup>72</sup> Spiro, *supra* note 31.

C. “Contemporary Constitutional Norms”: The Limits of Plenary Power

While the Court has consistently reaffirmed the existence of plenary power, “recent developments in constitutional immigration law have begun to chart a course toward . . . the encroachment of mainstream constitutional norms” into the analysis.<sup>73</sup> Only two years after *Chin*’s reinterpretation of the plenary power cases, the Court provided a striking example of how “mainstream constitutional norms have infiltrated the Court’s immigration opinions.”<sup>74</sup>

In *Zadvydas v. Davis*, the Court held that the government lacked statutory authority to detain indefinitely Kestutis Zadvydas, a resident noncitizen subject to a final order of removal, and ordered Zadvydas released from federal custody and paroled into the United States.<sup>75</sup> The issue involved a statute providing that aliens set for deportation could not be held in detention for longer than ninety days unless the Attorney General determined the individuals “to be a risk to the community,” in which case the aliens “may be detained beyond the removal period.”<sup>76</sup> Immigration officials could not find a country willing to receive two deportable aliens within the ninety-day period but continued to hold the aliens in detention pursuant to the statutory exception.<sup>77</sup> Rather than directly confronting the constitutionality of the statute itself, the majority reviewed the legislative intent of the statute and held that it could not find “any clear indication of congressional intent to grant the Attorney General the power to hold indefinitely in confinement an alien ordered removed,” which would constitute a violation of due process.<sup>78</sup> The Court ultimately found that the dictates of constitutional due process required that, after a period of six months’ detention, the government provide evidence that further detention was necessary.<sup>79</sup>

Thus, while the Court rested its holding on statutory interpretation, it nonetheless injected constitutional due process considerations into the analysis to circumscribe an executive branch immigration action.<sup>80</sup> The Court observed the “‘cardinal principle’ of

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<sup>73</sup> Lindsay, *supra* note 60, at 224–25.

<sup>74</sup> *Id.* at 225–35 (analyzing *Zadvydas v. Davis*, 533 U.S. 678 (2001)).

<sup>75</sup> *Zadvydas*, 533 U.S. at 684–85, 702.

<sup>76</sup> *Id.* at 682.

<sup>77</sup> *Id.* at 684–87.

<sup>78</sup> *Id.* at 696–97; *see also* Lindsay, *supra* note 60, at 227–29 (“By the Court’s own admission . . . the plenary power doctrine prevented *Zadvydas* from challenging the statute directly on Fifth Amendment grounds . . . . [But a] five-Justice majority ‘construe[d] the statute to contain an implicit ‘reasonable time’ limitation, the application of which is subject to federal-court review.” (quoting *Zadvydas*, 533 U.S. at 682)).

<sup>79</sup> *Zadvydas*, 533 U.S. at 701.

<sup>80</sup> *See* Lindsay, *supra* note 60, at 228, 231 (“Given that *Zadvydas* was, at bottom, a case about statutory construction, one might have expected the Court’s analysis to center on the text



statutory interpretation, however, that when an Act of Congress raises ‘a serious doubt’ as to its constitutionality, ‘this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.’<sup>81</sup> Even as the majority acknowledged that *Zadvydas* lacked a legal right to live at large in the United States and affirmed Congress’s plenary power over the removal of noncitizens, it nevertheless insisted that such power was “subject to important constitutional limitations.”<sup>82</sup> In a dramatic change in tone from the complete deference of early immigration decisions, the Court noted merely the “greater immigration-related expertise of the Executive Branch” and that “principles of judicial review in this area recognize *primary* Executive Branch responsibility.”<sup>83</sup> Far from a complete abdication of its judicial review role, the Court claimed instead that it would “listen with care” to the concerns of the Executive when reviewing the constitutionality of immigration policies.<sup>84</sup>

But while the language and holding in *Zadvydas* illustrate that the plenary power of the political branches to enact immigration policy does have constitutional limits, it remains unclear what those limits are or whether the Executive Order or its subsequent extreme vetting iterations will breach those limits. After all, despite a smattering of decisions siding with deportable or excludable aliens on statutory interpretation grounds, the fact remains that “[t]he courts have never imposed meaningful constraints on the executive branch in [the immigration] context.”<sup>85</sup> But “[t]hat does not mean they couldn’t or that they won’t here.”<sup>86</sup>

Constitutional history and context may help provide the answers. While a theory that plenary power simply does not exist goes too far, the history underlying such a theory may yet help inform when an

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and perhaps the legislative history of the relevant provision. But it did not. . . . Justice Stephen Breyer devoted eight pages of his twenty-one-page majority opinion to the ‘obvious’ constitutional difficulty ‘arising out of a statute that . . . permits an indefinite, perhaps permanent, deprivation of human liberty without any [judicial] protection.’” (quoting *Zadvydas*, 533 U.S. at 692)).

<sup>81</sup> *Zadvydas*, 533 U.S. at 689 (quoting *Cromwell v. Benson*, 285 U.S. 22, 62 (1932)).

<sup>82</sup> *Id.* at 690, 693 (“Freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that [the Fifth Amendment Due Process] Clause protects.”).

<sup>83</sup> *Id.* at 700 (emphasis added).

<sup>84</sup> *Id.*; see also Lindsay, *supra* note 60, at 229 (Justice Breyer “discount[ed] the relevance of the usual rationales for buffering federal immigration regulations against constitutional review. The case did not involve ‘terrorism or other special circumstances,’ he reasoned, ‘where special arguments’ grounded in national security might justify ‘preventive detention and . . . heightened deference to the judgments of the political branches.’” (quoting *Zadvydas*, 533 U.S. at 696)).

<sup>85</sup> Spiro, *supra* note 31.

<sup>86</sup> *Id.*; see also Lindsay, *supra* note 60, at 225 (claiming that “the encroachment of mainstream constitutional norms” may be removing the “exceptional” label from constitutional immigration law).

immigration order runs far afoul of a contemporary constitutional norm. As Chin persuasively asserts, it is at best a close question whether race-based or religious-based classifications in the nineteenth century; sexual orientation-based classifications in the early twentieth century; or gender-based classifications in the 1970s offended the contemporary moral and constitutional norms of the day.<sup>87</sup> Indeed, the historical and jurisprudential record strongly suggests they did not.

But what if a future discrimination immigration policy does “violate[] contemporary constitutional norms?”<sup>88</sup> Perhaps, “if a case arises which challenges discrimination on a ground that violates contemporary constitutional norms, the Court will be faced with a new situation.”<sup>89</sup> Chin called these the “easy, unlikely cases”<sup>90</sup>:

The best test of the plenary power doctrine would involve a statute discriminating on a basis which domestic law clearly forbids. If persons of African ancestry or Jewish religion or Democratic Party membership were made ineligible for immigration or naturalization . . . the Court would overwhelmingly vote to strike it down. Yet, it is not likely that we will see such a case. It is conceivable that Congress will cut immigration drastically, but it is extremely difficult to imagine in 1999 that any future Congress would pass, and a president would sign, anything like the National Origins Quota System or Chinese Exclusion Act. If the unlikely happened, such laws would probably be invalidated.<sup>91</sup>

If the Executive Orders serve as prologue for the next four years, the Supreme Court may soon face one of these easy, unlikely cases.

#### D. *Extreme Vetting: Have We Reached Plenary Power’s Limits?*

While President Trump’s policy positions can be difficult to define with any precision, his anti-Muslim campaign rhetoric, refusal to disavow his proposal for a Muslim ban, and the language and stated

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<sup>87</sup> See Chin, *supra* note 20, at 259–64.

<sup>88</sup> *Id.* at 259.

<sup>89</sup> *Id.* at 259. Indeed, the recent “encroachment of mainstream constitutional norms” in immigration jurisprudence may have less to do with a substantive shift by the Court than a recognition of the societal shift in what may generally be considered in modern American life to be a fundamental constitutional norm. Lindsay, *supra* note 60, at 225–26.

<sup>90</sup> Chin, *supra* note 20, at 285.

<sup>91</sup> *Id.* Some constitutional immigration scholars resist the notion that “[t]he transition to a constitutionally unexceptional immigration power is unlikely to be accomplished all at once in a dramatic act of judicial overturning.” Lindsay, *supra* note 60, at 259. But this contention presupposes a continuation of the sorts of traditional immigration cases coming before the Court. Just as few could or did predict the political rise of Donald Trump, few could or did predict the unlikely case of an immigration order in 2017 based on all-but explicit religious discrimination.

intent of the Executive Orders strongly suggest that extreme vetting may be little more than a proxy for religious discrimination. Domestic religious-based discrimination, while constitutionally permissible in the nineteenth century, is clearly forbidden in any conception of twenty-first century constitutional norms.<sup>92</sup> The same may be true for the types of nationality-based discrimination and due process limitations contemplated by extreme vetting measures, though these are closer questions.<sup>93</sup> What appears uncontroversial, however, is the notion that contemporary constitutional norms prohibit, at a minimum, invidious, intentional discrimination on the basis of religion. In this sense, the President may very well provide the Court “with a strong case to test” the limits of the plenary power doctrine.

Consider, for purposes of a case study on the limits of plenary power, the language, effect, and intent of the First Executive Order. Section 3(c) of the Order imposed a temporary ban on the entry of immigrants and non-immigrants from seven Muslim-majority nations: Iran, Iraq, Libya, Somalia, Syria, Sudan, and Yemen.<sup>94</sup> While facially religiously-neutral, the overwhelming evidence points to a discriminatory motive by the Administration to exclude at least some subset of Muslims from the country on the basis of their religious affiliation. In addition to the President’s consistent campaign promises to implement a Muslim ban and to “certainly implement” a Muslim registry in the United States,<sup>95</sup> Trump surrogate Rudy Giuliani

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<sup>92</sup> See *Bd. of Educ. v. Grumet*, 512 U.S. 687, 728 (1994) (Kennedy, J., concurring) (emphasizing the centrality of the constitutional prohibition against religious discrimination: “Just as the government may not segregate people on account of their race, so too it may not segregate on the basis of religion”); *Larson v. Valente*, 456 U.S. 228, 244 (1982) (holding that the “clearest command” of the Establishment Clause is that the government may not engage in “denominational preferentialism”).

<sup>93</sup> See Shawn E. Fields, *The Unreviewable Executive? National Security and the Limits of Plenary Power*, 84 TENN. L. REV. 731, 774–75 (2017) (“Immigration law and policy is in many ways defined by nationality-based discrimination that would be constitutionally unsupportable in a purely domestic context. The wholesale adoption of substantive constitutional rights jurisprudence in the immigration arena, while arguably justified in non-national security cases, would require, at a minimum, a radical rethinking of the entire field of immigration law.” (internal quotations omitted)); Michael Kagan, *Is the Chinese Exclusion Case Still Good Law? (The President Is Trying to Find Out)*, 1 NEV. L.J. F. 80, 87 (2017) (“Since the passage of the Chinese Exclusion Act there has never been a time when the United States had an immigration policy based entirely on individualized criteria, with country of citizenship playing no role.”).

<sup>94</sup> See Executive Order, *supra* note 4, at 8977 (“To temporarily reduce investigative burdens on relevant agencies . . . I hereby proclaim that the immigrant and nonimmigrant entry into the United States of aliens from countries referred to in section 217(a)(12) of the INA, 8 U.S.C. 1187(a)(12), would be detrimental to the interests of the United States, and I hereby suspend entry into the United States, as immigrants and nonimmigrants, of such persons for 90 days from the date of this order . . .”).

<sup>95</sup> See Alana Abramson, *What Trump Has Said About a Muslim Registry*, ABC NEWS (Nov. 18, 2016, 7:00 PM), <http://abcnews.go.com/Politics/trump-muslim-registry/story?id=43639946> (documenting then-candidate Trump’s numerous statements about a possible Muslim tracking system, including his answer to the question “is there going to be a database that tracks the

confirmed to Fox News the day after the Order was signed that Trump wanted to find a “legal” way to ban Muslims from the United States.<sup>96</sup> Moreover, when signing the Executive Order, Trump read out its title “Protecting the Nation from Foreign Terrorist Entry into the United States,” looked up and said “[w]e all know what [it] means . . . .”<sup>97</sup> These admissions “close in time” to the signing of the Executive Order square with then-candidate Trump’s explicit admission in a July 2016 interview on Meet the Press that he would revamp his extreme vetting proposals to target Muslims without expressly saying so.<sup>98</sup>

Within this context, it makes more sense why President Trump took the extraordinary step of providing a draft of the Executive Order to the Office of Legal Counsel (OLC) only hours before it was signed into law and charged the OLC with the narrow task of ensuring that the order was “lawful on its face and properly drafted.”<sup>99</sup> The OLC did not take into “account . . . statements made by an administration or it[s] surrogates close in time to the issuance of an Executive Order that may bear on the order’s purpose.”<sup>100</sup>

The Executive Order also explicitly stated, in Section 5(b), that the U.S. government would grant priority status to refugees from these seven countries who were persecuted on the basis of their religion, so long as that religion was a minority in one of the seven countries.<sup>101</sup> This

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Muslims here in this country?” To which he responded, “[o]h I would certainly implement that. Absolutely.”); *see also* Johnson, *supra* note 1.

<sup>96</sup> *See* Amy B. Wang, *Trump Asked for a ‘Muslim Ban,’ Giuliani Says—and Ordered a Commission to Do It ‘Legally’*, WASH. POST (Jan. 29, 2017), [https://www.washingtonpost.com/news/the-fix/wp/2017/01/29/trump-asked-for-a-muslim-ban-giuliani-says-and-ordered-a-commission-to-do-it-legally/?utm\\_term=.93ab42422ef7](https://www.washingtonpost.com/news/the-fix/wp/2017/01/29/trump-asked-for-a-muslim-ban-giuliani-says-and-ordered-a-commission-to-do-it-legally/?utm_term=.93ab42422ef7) (“So when [Trump] first announced it, he said, ‘Muslim ban.’ He called me up. He said, ‘Put a commission together. Show me the right way to do it legally.’” (Rudy W. Giuliani quoting President Trump)); *see also* Faiza Patel, *Yates Letter Points to Evidence Showing Executive Order Unconstitutional*, JUST SECURITY (Jan. 31, 2017), <https://www.justsecurity.org/37053/yates-letter-points-evidence-showing-executive-order-unconstitutional> (Giuliani then noted that his commission “came up with the idea of focusing on danger rather than religion; [that] the ban was based ‘on places where there are substantial evidence that people are sending terrorists into our country.’ Of course, as many have pointed out, the countries affected by the ban have hardly been a source of terrorist attacks in the United States.”).

<sup>97</sup> Patel, *supra* note 96 (And for what it’s worth, the son of then-National Security Advisor Michael Flynn praised the Executive Order the day after it was signed by tweeting: “#MuslimBan.”).

<sup>98</sup> *Id.* When NBC’s Chuck Todd asked if Trump was retreating from his Muslim ban proposal, Trump responded that he was actually expanding on that proposal but lamented that he could no longer be explicit about the intent of the proposal: “I actually don’t think it’s a rollback. In fact, you could say it’s an expansion . . . . People were so upset when I used the word Muslim. Oh, you can’t use the word Muslim. Remember this. And I’m OK with that, because I’m talking territory instead of Muslim.” Diamond, *supra* note 3.

<sup>99</sup> Patel, *supra* note 96.

<sup>100</sup> *Id.* (quoting Acting Attorney General Sally Yates).

<sup>101</sup> *See* Executive Order, *supra* note 4, § 5(b) (“Upon the resumption of USRAP admissions, the Secretary of State, in consultation with the Secretary of Homeland Security, is further directed to make changes, to the extent permitted by law, to prioritize refugee claims made

provision obviously excludes Muslim refugees from these seven Muslim-majority nations. Lest there be any confusion about the intent behind this provision, Trump told the Christian Broadcasting Network hours before signing the Executive Order that the purpose of the order was to prioritize Christian refugees over Muslims who had been “horribly treated” in these countries.<sup>102</sup>

These two provisions of the Executive Order, combined with contemporaneous evidence of the Order’s intent, appear to represent textbook government preference for one religion over another. Indeed, even assuming against all evidence that the seven-nation ban has a religiously-neutral intent and effect, the provision “prioritiz[ing] refugee claims made by individuals on the basis of religious-based persecution, provided that the religion of the individual is a minority religion in the individual’s country of nationality” itself violates the Establishment Clause for singling out minority faiths generally for favorable treatment.<sup>103</sup> In *Board of Education v. Grumet*, Justice Kennedy, in his concurring opinion, emphatically declared that

[w]hether or not the purpose is accommodation and whether or not the government provides similar gerrymanders to people of all religious faiths, the Establishment Clause forbids the government to use religion as a line-drawing criterion. In this respect, the Establishment Clause mirrors the Equal Protection Clause. Just as the government may not segregate people on account of their race, so too it may not segregate on the basis of religion.<sup>104</sup>

It appears, then, that the Executive Order likely violated the clearest of contemporary constitutional norms—the prohibition against government establishment of religion. This “clearest command” not only mirrors the now-inarguable prohibition against race-based segregation, but has been so viewed since at least 1885, when Justice Field declared that any law supporting an established religion would automatically be void as violative of the Constitution’s most fundamental norms.<sup>105</sup> One may at least plausibly argue, therefore, that the Executive Order may have been invalidated on the merits of a constitutional challenge, notwithstanding its singular purpose as a political branch form of immigration control.

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by individuals on the basis of religious-based persecution, provided that the religion of the individual is a minority religion in the individual’s country of nationality.”).

<sup>102</sup> Daniel Burke, *Trump Says US Will Prioritize Christian Refugees*, CNN (Jan. 30, 2017, 11:28 AM), <http://www.cnn.com/2017/01/27/politics/trump-christian-refugees>.

<sup>103</sup> Executive Order, *supra* note 4, § 5(b); see Nelson Tebbe et al., *How Trump’s Executive Order on Immigration Violates Religious Freedom Laws*, JUST SECURITY (Jan. 31, 2017), <https://www.justsecurity.org/37061/trumps-executive-order-immigration-violates-religious-freedom-laws/> (“That language expressly singles out minority faiths for favorable treatment.”).

<sup>104</sup> *Bd. of Educ. v. Grumet*, 512 U.S. 687, 728 (1994) (Kennedy, J., concurring).

<sup>105</sup> See *Chi., Rock Island & Pac. Ry. Co. v. McGlinn*, 114 U.S. 542, 546 (1885).

In addition to First Amendment constitutional challenges, several lawsuits claimed the Executive Order violated the Fifth Amendment's equal protection and due process protections for impermissibly singling out aliens from seven specified nations in a "patently arbitrary classification, utterly lacking in rational justification."<sup>106</sup> One argument advanced by these litigants is that no significant terrorist attacks have been committed by nationals of the seven banned countries, whereas fifteen of the nineteen 9/11 hijackers hailed from Saudi Arabia, a country not covered by the Executive Order.<sup>107</sup> But it is indisputable that the previous administration had singled out these seven countries as "countries of concern" for *future* terrorist attacks, and it would seem unwise for the judiciary to second-guess the predictive capabilities of the political branches' national security apparatus based solely on past events.<sup>108</sup> For purposes of this discussion, it suffices to note that these constitutional challenges present much closer questions than the Establishment Clause challenges, and thus may not sufficiently offend contemporary constitutional norms to defeat plenary power reasoning in the immigration context, even if the order might otherwise fail in the domestic context.<sup>109</sup>

Two further points require clarification at this stage. First, one may argue that this entire discussion will be rendered moot if and when the Supreme Court weighs in on the merits of the Second Executive Order. Not so. Unless Trump abandons entirely his doctrine of extreme vetting for incoming immigrants and refugees—an unlikely proposition—one may reasonably assume that future iterations of this doctrine will surface in one form or another, raising similar constitutionally-

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<sup>106</sup> Marty Lederman, *Getting a Handle on the Litigation Challenging the Seven-Nation "Travel Ban,"* JUST SECURITY (Feb. 6, 2017, 6:00 PM), <https://www.justsecurity.org/37315/getting-handle-litigation-challenging-seven-nation-travel-ban> (observing that lawsuits challenging the rational basis for singling out aliens from the seven specified nations, in violation of the equal protection component of the Fifth Amendment, are in fact articulating a "patently arbitrary classification" standard); see Plaintiff's Motion for TRO, *supra* note 8, at 9–11 (arguing that, "[e]ven under rational basis review, the Executive Order fails").

<sup>107</sup> See, e.g., Plaintiff's Motion for TRO, *supra* note 8, at 9; see also Uri Friedman, *Where America's Terrorists Actually Come From*, ATLANTIC (Jan. 30, 2017), <https://www.theatlantic.com/international/archive/2017/01/trump-immigration-ban-terrorism/514361>.

<sup>108</sup> Kyle Blaine & Julia Horowitz, *How the Trump administration Chose the 7 Countries in the Immigration Executive Order*, CNN (Jan. 30, 2017, 1:52 PM), <https://www.cnn.com/2017/01/29/politics/how-the-trump-administration-chose-the-7-countries/index.html> ("The seven Muslim-majority countries targeted in President Trump's executive order on immigration were initially identified as 'countries of concern' under the Obama administration.").

<sup>109</sup> A much stronger argument for litigants challenging the Executive Order on nationality grounds stems from a statutory violation of the INA, which prohibits facially discriminatory classifications based on nationality. See 8 U.S.C. § 1152(a)(1)(A) (2012) ("[N]o person shall receive any preference or priority or be discriminated against in the issuance of an immigrant visa because of the person's race, sex, nationality, place of birth, or place of residence."); cf. Defendants' Opposition to TRO, *supra* note 27, at 19–21.

troubling issues. Indeed, even if the administration becomes more astute at concealing its discriminatory motives, one wonders whether Trump will ever outrun his inflammatory and incendiary rhetoric underlying his entire immigration platform.

Second, and perhaps more importantly, constitutional challenges to immigration policies are not limited to broad facial challenges to an immigration law such as the Executive Order. Such challenges often can, and are, brought by individuals or entities within the United States, rendering moot any discussion of extraterritorial constitutional applicability. Instead, most immigration challenges arise from the decisions by individual immigration officials to deny entry to individual immigrants or refugees residing abroad. Given the history, rhetoric, and stated policy positions of this Administration, it seems highly likely that extraterritorial noncitizens will seek to challenge adverse immigration decisions on constitutional grounds, particularly if those noncitizens are Muslim or hail from a part of the world traditionally in the President's crosshairs. The question then becomes: can these extraterritorial noncitizens assert such constitutional challenges? The balance of this Article considers that question.

## II. THE EVOLUTION OF EXTRATERRITORIAL RIGHTS JURISPRUDENCE

To determine whether an immigrant residing abroad may assert constitutional protections to challenge an immigration policy or decision, one must first examine the uneven history of extraterritorial constitutional jurisprudence more generally. “The question of whether and to what extent the Constitution applies to U.S. government action abroad has historically oscillated between several broad, competing perspectives.”<sup>110</sup> The first is “a universalist theory of the Constitution, in which any U.S. government . . . is subject to all the limits imposed by the Constitution,” whenever and wherever it acts.<sup>111</sup> Adherents of this position claim alternately that the Constitution limits the power of the government at home and abroad or that the Constitution protects fundamental individual rights that cannot be “switched off” at the border.<sup>112</sup>

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<sup>110</sup> Jules Lobel, *Fundamental Norms, International Law, and the Extraterritorial Constitution*, 36 YALE J. INT'L L. 307, 312 (2011).

<sup>111</sup> *Id.* at 314.

<sup>112</sup> *Id.* at 314–15 (“While the universalist position has adherents in the academy, it finds little judicial support.” Echoing the concerns underpinning the plenary power doctrine, “the mainstream judicial hostility to this approach is premised on the practical fear of overly constraining the political branches’ ability to conduct U.S. foreign policy.”); see *Boumediene v. Bush*, 553 U.S. 723, 765 (2008) (rejecting the notion that “the political branches have the power to switch the Constitution on or off at will”).

The second perspective views the Constitution “as reflecting a social compact between the government and the people,” requiring a level of engagement between the two for constitutional protections to apply.<sup>113</sup> Like the universalist theory, social compact theorists have articulated the social compact theory in one of two ways: either from a strict territorial perspective,<sup>114</sup> or by examining the noncitizen’s “significant voluntary connection” with the United States.<sup>115</sup> Regardless of the approach, the social compact theory of extraterritoriality remains a restrictive one.

Finding a middle ground between these two extreme normative positions, a bare majority of the Court in *Boumediene v. Bush* adopted what has become known as the “functional approach” to extraterritorial constitutional applicability.<sup>116</sup> Rather than adopting a bright-line normative approach to extraterritoriality, the functional approach considers whether extending a particular constitutional provision to a particular individual in a particular circumstance would be “impracticable and anomalous.”<sup>117</sup> This consequentialist approach provides judicial flexibility to extend the Constitution on a case-by-case basis only “where it would be most needed,”<sup>118</sup> but its imprecision and malleability has created confusion and contradictory results at the lower courts in the nine years since *Boumediene* was decided.<sup>119</sup> This emphasis on practical considerations divorced from a firm theoretical grounding has led many courts to ignore the fundamental premise of the Court’s opinion, leading at least one scholar to conclude that lower courts have “effectively overruled” *Boumediene*.<sup>120</sup>

This Section outlines the century-old evolution of extraterritorial jurisprudence from each constitutional perspective: the broad universalist, the narrow social contract, and the practical functionalist. By reviewing the circumstances and reasoning of these disparate strands of extraterritorial thought, it should become clear that no one perspective has yet won the day, which helps explain the ongoing

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<sup>113</sup> Lobel, *supra* note 110, at 312; see Gerald L. Neuman, *Extraterritorial Rights and Constitutional Methodology After Rasul v. Bush*, 153 U. PA. L. REV. 2073, 2075–76 (2005) (“In this model, U.S. citizens have extraterritorial constitutional rights and foreign nationals do not.”).

<sup>114</sup> See *In re Ross*, 140 U.S. 453, 464 (1891) (holding that “the Constitution can have no operation in another country”).

<sup>115</sup> *United States v. Verdugo-Urquidez*, 494 U.S. 259, 271 (1990) (plurality opinion).

<sup>116</sup> *Boumediene*, 553 U.S. at 764; see also Gerald L. Neuman, *The Extraterritorial Constitution After Boumediene v. Bush*, 82 S. CAL. L. REV. 259, 261 (2009) (elucidating the “functional approach” adopted by Justice Kennedy in *Boumediene*).

<sup>117</sup> *Boumediene*, 553 U.S. at 759 (quoting *Reid v. Covert*, 354 U.S. 1, 74–75 (1957) (Harlan, J., concurring)).

<sup>118</sup> *Id.* at 759.

<sup>119</sup> See Neuman, *supra* note 28, at 1465–67 (discussing the uneven application of the functional test among lower courts).

<sup>120</sup> See Alexander, *supra* note 26.



confusion over the doctrine of extraterritoriality.

A. *A Global Constitution?: The Universalist Theory*

The question of whether the Constitution extends past the borders of the United States is not a novel issue. At the beginning of the twentieth century, the Court faced the question of whether full constitutional rights extended to newly acquired territories in the *Insular Cases*.<sup>121</sup> Though the Court splintered along ideological and pragmatic lines, a universalist theory emerged among a plurality of Justices urging far broader extraterritorial application of the Constitution than at any previous time.<sup>122</sup>

Within this universalist camp, two prevailing claims emerged, one structural and one rights-based.<sup>123</sup> The structural claim asserts the Constitution should apply extraterritorially to restrain government conduct and to maintain the separation of powers.<sup>124</sup> The rights-based claim is premised on the notion that certain constitutional rights are so fundamental to the concept of liberty that their import cannot stop at the border, but must be available to everyone everywhere regardless of nationality or location.

Structurally, the Court recognized that Congress had the power “to make laws for the government of territories, without being subject to all

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<sup>121</sup> The *Insular Cases* refer to a series of cases addressing America’s imperial maneuvers in the early twentieth century, and scholars disagree over precisely which cases are legitimate constituents of the *Insular Cases*. This Article references the most important of the *Insular Cases*, *Downes v. Bidwell*, 182 U.S. 244 (1901), and the progeny of *Downes* that most directly addressed the issue of extraterritorial constitutional applicability. For a more general discussion of the *Insular Cases*, see generally JAMES EDWARD KERR, *THE INSULAR CASES: THE ROLE OF THE JUDICIARY IN AMERICAN EXPANSIONISM* (1982); JUAN R. TORRUELLA, *THE SUPREME COURT AND PUERTO RICO: THE DOCTRINE OF SEPARATE AND UNEQUAL* (1985); see also Christina Duffy Burnett, *A Convenient Constitution? Extraterritoriality After Boumediene*, 109 COLUM. L. REV. 973, 982–83 (2009) (providing insightful background on the history of the *Insular Cases*).

<sup>122</sup> See Burnett, *supra* note 121, at 984 (endorsing the *Boumediene* reinterpretation of the *Insular Cases* that “the Constitution has independent force in these territories, a force not contingent upon acts of legislative grace,” thus suggesting a universality to the Constitution).

<sup>123</sup> See Gerald L. Neuman, *The Habeas Corpus Suspension Clause After Boumediene v. Bush*, 110 COLUM. L. REV. 537, 548–50 (2010) (describing the dual nature of the Suspension Clause as both a structural limitation and individual right, as conceived by Justice Kennedy and in the cases upon which he relied); Gerald L. Neuman, *Whose Constitution?*, 100 YALE L.J. 909, 914–20 (1991) (describing various theories of extraterritorial constitutionality); Lobel, *supra* note 25, at 1651 (examining why universalist “limitations stemming from separation of powers are treated differently from limitations based on provisions of the Bill of Rights”).

<sup>124</sup> This framework discusses extraterritoriality not as rights to be asserted by aliens abroad, but as limits on the power of the executive and legislative branches of the federal government. See Lobel, *supra* note 25, at 1653 (“Moreover, by focusing on the power of a branch to act, structural restraints relocate the inquiry away from who is being harmed and where that person suffers the harm, and instead to whether the actor has exceeded its power and jurisdiction to so act. The status of the person harmed thus ought to play no role in the inquiry.”).

the restrictions which are imposed upon that body when passing laws for the United States” itself.<sup>125</sup> However, the Court also observed that Congress’s law-making power was not without limits, and that the Constitution applied to these territories to the extent that its provisions operated as a limitation on governmental power.<sup>126</sup> Thus, “the real issue in the *Insular Cases* was not whether the Constitution extended to the Philippines or [to] Puerto Rico when [the United States] went there, but [rather] which . . . of its provisions were applicable by way of [a] limitation upon the exercise of executive and legislative power . . . .”<sup>127</sup>

From a fundamental rights perspective, the cases recognized that certain fundamental rights must be extended as an effective limit on legislative and executive power, even where that power is exercised thousands of miles from the United States.<sup>128</sup> To do otherwise is to create a place where the political branches of government may act without legal constraint.<sup>129</sup> Unlike the structural restraint approach, however, the rights-based approach did not purport to apply every constitutional provision, but only those provisions deemed fundamental in a historical or natural law sense.<sup>130</sup> As Justice Brown opined in *Downes v. Bidwell*, there “is a clear distinction between such prohibitions as go to the very root of the power of Congress to act at all, irrespective of time or place, and such as are operative only throughout the United States or among the several states.”<sup>131</sup> For Brown, while the Constitution did not apply to unincorporated territories, Congress was nevertheless bound by certain fundamental or natural rights, which

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<sup>125</sup> *Dorr v. United States*, 195 U.S. 138, 142 (1904).

<sup>126</sup> *Id.*; see also Gerald L. Neuman, *Understanding Global Due Process*, 23 GEO. IMMIGR. L.J. 365, 366 (2009) (“The *Insular Cases* also stand for another important principle, that the Constitution as such applies to the U.S. government wherever it acts. The Constitution is the source of federal power, and in that sense it applies everywhere, although particular constitutional provisions may have more limited geographic scope, just as they may have limited substantive or personal scope. In some cases the geographic limitations are explicit, but in other cases they are implied.”).

<sup>127</sup> *Balzac v. Porto Rico*, 258 U.S. 298, 312 (1922); see also *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 320 (1936) (finding that, even when examining the “plenary and exclusive power of the President” in the field of foreign relations, that power is “subordinat[e] to the applicable provisions of the Constitution”).

<sup>128</sup> See, e.g., *Dorr*, 195 U.S. at 146–47 (relying on the distinction between fundamental and non-fundamental rights to reject extending the right to a jury trial to the colonized people); Lobel, *supra* note 25, at 1667–68 (“The Court held in *Dorr* that the right to a jury trial was not fundamental, but repeated Justice White’s formulation that inherent principles that are the basis of all free government constitutionally limited U.S. actions in the territories.”); Neuman, *supra* note 126, at 367 (observing that the *Insular Cases* distinguished between “fundamental” and “non-fundamental” constitutional rights, finding that only the former “followed the flag”).

<sup>129</sup> See *Boumediene v. Bush*, 553 U.S. 723, 765 (2008).

<sup>130</sup> See Lobel, *supra* note 110, at 325 (“The *Insular Cases* most clearly reflect the older, fundamental rights jurisprudence. . . . [T]he Court . . . distinguished between those principles that were fundamental and those that were not. The former category of prohibitions would apply wherever the United States exercised authority.”).

<sup>131</sup> *Downes v. Bidwell*, 182 U.S. 244, 277 (1901) (internal quotations omitted).

apply “by inference and the general spirit of the Constitution . . . [rather] than by any express and direct application of its provisions.”<sup>132</sup>

In 1957, Justice Hugo Black voiced strong support for the universalist theory in a plurality opinion in *Reid v. Covert*.<sup>133</sup> There, the Court considered whether spouses of U.S. servicemen abroad could be tried by court martial for murder.<sup>134</sup> Black wrote for the plurality that the Bill of Rights protects citizens overseas, suggesting a universalist position that the government is a “creature of the Constitution . . . [and] can only act in accordance with all the limitations imposed by the Constitution.”<sup>135</sup>

The universalist theory has never found a majority of adherents at the Court, and no one has supported it as forcefully as Justice Black in *Reid*.<sup>136</sup> The most consistent objection to applying a “global Constitution” everywhere at all times stems from the political and military sensitivities of foreign affairs and the traditionally deferential role the judicial branch plays in these matters.<sup>137</sup> However, more narrowly couched versions of the structuralist or rights-based universalist theory continue to appear in contemporary cases, including *Boumediene* and its progeny.<sup>138</sup>

### B. *The Constitution as Contract: The Social Compact Theory*

In contrast to the universalist theory, supporters of the social compact theory—that the Constitution represents a voluntary contract

<sup>132</sup> *Id.* at 364; see Lobel, *supra* note 110, at 325–26.

<sup>133</sup> 354 U.S. 1 (1957); see also Kal Raustiala, *The Geography of Justice*, 73 *FORDHAM L. REV.* 2501, 2519 (2005) (observing that Justice Black “seemed to find the underlying territorial logic of *Ross*, which the government relied upon in *Reid*, abhorrent”).

<sup>134</sup> See *Reid*, 354 U.S. at 3–4.

<sup>135</sup> *Id.* at 5–6. “Although *Reid* only dealt with the rights of citizens abroad, not aliens, one could read into Black’s opinion the view that every provision of the Constitution must always be deemed applicable to U.S. government actions abroad.” Lobel, *supra* note 110, at 314; see also Raustiala, *supra* note 133, at 2519 (“As a doctrinal matter, this holding was limited to American citizens. But the underlying rationale for this limitation was unclear . . . . *Reid* certainly seems reflective of the rising rights consciousness of the 1950s—it was decided just a few years after *Brown v. Board of Education* and has a ringing, landmark tone.”).

<sup>136</sup> See Lobel, *supra* note 110, at 314–15.

<sup>137</sup> See *United States v. Verdugo-Urquidez*, 494 U.S. 259, 275 (1990) (plurality opinion) (“For better or worse, we live in a world of nation-states in which our Government must be able to ‘funcio[n] effectively in the company of sovereign nations.’” (quoting *Perez v. Brownwell*, 356 U.S. 44, 57 (1958))); see also Lobel, *supra* note 110, at 315 (noting the judiciary’s “practical fear of overly constraining the political branches’ ability to conduct U.S. foreign policy”).

<sup>138</sup> See Guinevere E. Moore & Robert T. Moore, *The Extraterritorial Application of the Fifth Amendment: A Need for Expanded Constitutional Protections*, 46 *ST. MARY’S L.J.* 1, 17–18 (2014) (highlighting Justice Kennedy’s restrained reliance on fundamental rights and separation of powers considerations when applying the functional test in *Boumediene*).

between a government and its people—have traditionally advocated for a much more circumscribed role for the Constitution abroad. At its strict territorial extreme, Justice Field held for a unanimous Court in *In re Ross* that “[t]he Constitution can have no operation in another country,” and thus that the restraints on government action articulated by the Constitution indeed could be switched off at the border.<sup>139</sup>

A majority of the Court appeared to embrace this approach in *Johnson v. Eisentrager*, decided seven years before *Reid*. There, the Court held that habeas corpus was unavailable to German nationals convicted of war crimes by military commission and then imprisoned in occupied Germany.<sup>140</sup> The majority opinion seemed to suggest that constitutional rights never protect foreign nationals outside the United States: “[I]t [is] the alien’s presence within its territorial jurisdiction that [gives] the [j]udiciary power to act,” and lacking that territorial connection the judiciary simply has no jurisdiction to grant habeas protections to aliens.<sup>141</sup> In other words, because all of the actions occurred outside the United States to a noncitizen with no ties to the country, there existed no social compact, no jurisdiction, and thus no constitutional protection.

Justice Rehnquist modified the reasoning of this restrictive social compact approach in 1990, in a case arising from increased U.S. government global law enforcement activity during the War on Drugs.<sup>142</sup> *United States v. Verdugo-Urquidez* represents perhaps the Court at its most divided in the extraterritoriality debate, but strangely united on the initial social contract premise. Justice Rehnquist, writing for a plurality of four Justices, found that the Fourth Amendment’s Warrant Clause did not apply to a search of an alien’s home in Mexico because “the people” protected by the Fourth Amendment refers to “a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community.”<sup>143</sup>

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<sup>139</sup> *In re Ross*, 140 U.S. 453, 464 (1891); see also *Boumediene v. Bush*, 553 U.S. 723, 765 (2008) (stating that if the extraterritorial application of habeas turned on the government’s formalistic sovereignty-based test, Congress and the President could “switch the Constitution on or off at will”). *In re Ross*, 140 U.S. 453 was decided two years after *Chae Chan Ping v. United States*, 130 U.S. 581 (1889), and collectively the two cases represent the enormously deferential approach to foreign affairs taken by the Court in the late nineteenth and early twentieth centuries.

<sup>140</sup> *Johnson v. Eisentrager*, 339 U.S. 763 (1950).

<sup>141</sup> *Eisentrager*, 339 U.S. at 771; see also Moore & Moore, *supra* note 138, at 11 (noting that the majority seemed to suggest the prisoners “were not entitled to access to the writ of habeas corpus because they had been captured, held, and tried outside of the United States where there was a lack of territorial jurisdiction” (citing *Eisentrager*, 339 U.S. at 768)).

<sup>142</sup> See *Verdugo-Urquidez*, 494 U.S. 259; see also Neuman, *supra* note 28, at 1458 (noting that the case arose from a warrantless search “of an alleged Mexican drug lord, who had already been convicted in a separate trial of the torture-murder of a U.S. drug enforcement agent”).

<sup>143</sup> *Verdugo-Urquidez*, 494 U.S. at 265.

While Rehnquist did not deny that certain aliens may possess constitutional rights, he denied them to Verdugo-Urquidez because he was “an alien who has had no previous *significant voluntary connection* with the United States . . . .”<sup>144</sup> Because the foreign national had not established a voluntary presence in the country, had not been in the country for any significant duration of time, and had not accepted the “societal obligations . . . with this country that might place him among ‘the people’ of the United States,” the social compact of the Constitution did not apply to him.<sup>145</sup>

In a stirring dissent, Justice Brennan invoked a broad interpretation of the social contract theory, arguing that aliens become a part of the social contract when they become entangled with our government, whether voluntarily or not.<sup>146</sup> Brennan relied, in part, on “basic notions of mutuality” to support the application of the Fourth Amendment to a search of an alien’s residence in Mexico.<sup>147</sup> To Brennan, Verdugo-Urquidez was “entitled to the protections of the Fourth Amendment because our Government, by investigating him and attempting to hold him accountable under United States criminal laws, has treated him as a member of our community for purposes of enforcing our laws. He has become, quite literally, one of the governed.”<sup>148</sup>

The lone dissenting voice from the social contract perspective, either broadly or narrowly conceived, was Justice Kennedy, who provided the crucial fifth vote in a separate concurrence that rejected the “formalistic” social compact approach for a “functional” approach.<sup>149</sup> As discussed below, Justice Kennedy relied heavily on this concurrence in *Boumediene* nearly two decades later.

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<sup>144</sup> *Id.* at 271 (emphasis added).

<sup>145</sup> *Id.* at 272–73; see also Neuman, *supra* note 28, at 1459 (criticizing Rehnquist’s “amorphous hurdles of presence, duration, and societal obligation that needed to be satisfied before ‘certain constitutional rights’ could be extended”). Rehnquist also invoked political sovereignty in foreign affairs as a reason to tread cautiously in extended constitutional rights extraterritorially. See *Verdugo-Urquidez*, 494 U.S. at 275 (“For better or for worse, we live in a world of nation-states in which our Government must be able to ‘functio[n] effectively in the company of sovereign nations.” (quoting *Perez v. Brownell*, 356 U.S. 44, 57 (1958))). But in doing so, he created an ill-defined standard of the people to fit his social compact purposes, one “whose limiting effect Kennedy’s concurrence rejected.” Neuman, *supra* note 126, at 369.

<sup>146</sup> *Verdugo-Urquidez*, 494 U.S. at 279–98.

<sup>147</sup> *Id.* at 284 (“By concluding that respondent is not one of ‘the people’ protected by the Fourth Amendment, the majority disregards basic notions of mutuality. If we expect aliens to obey our laws, aliens should be able to expect that we will obey our Constitution when we investigate, prosecute, and punish them.”).

<sup>148</sup> *Id.*; see also Lobel, *supra* note 110, at 313–14 (“While the mutuality approach thus expands the national community to include persons the government seeks to impose our law on, it fundamentally derives from the social contract premise that constitutional rights only affix to members of our national community—either broadly or narrowly conceived.”).

<sup>149</sup> See *Verdugo-Urquidez*, 494 U.S. at 275–78.

C. *Function over Form: Boumediene v. Bush*

While the foregoing Sections suggest a century-long struggle between broad and narrow normative theories of extraterritoriality, Justice Kennedy viewed these same precedents as guided primarily by pragmatic concerns of what is possible and practical.<sup>150</sup> In an elegantly presented exegesis on the Court's extraterritoriality precedent, Kennedy grounded his majority opinion in *Boumediene* on these consequentialist principles. It is to *Boumediene* and its functional approach that this Article now turns.

A united majority of five in *Boumediene* held that alleged "enemy combatants" held at Guantánamo Bay Naval Base in Cuba could initiate habeas proceedings in federal court to challenge their indefinite detention.<sup>151</sup> The Court was presented with extreme normative extraterritorial positions by both sides. For its part, the Government made the formalistic, territorial argument that the United States lacked de jure sovereignty over Guantánamo, and that foreign nationals detained at locations outside the sovereign territory of the United States thus had no constitutional protections.<sup>152</sup> Petitioners, as well as Judge Rogers in her dissent at the lower court, argued that structural, separation of powers limitations on the political branches such as the Suspension Clause were always applicable, regardless of location.<sup>153</sup>

Justice Kennedy rejected both absolutist positions. Instead, the Court adopted a pragmatic, functional test that determined whether a particular constitutional provision applied extraterritorially on a case-by-case basis, emphasizing the particular circumstances and practical necessities of each situation, not formalistic principles.<sup>154</sup> In doing so, Kennedy summarized the Court's prior exploration of the Constitution's geographic scope, finding practical considerations of paramount importance in a century of extraterritorial jurisprudence.<sup>155</sup>

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<sup>150</sup> See Neuman, *supra* note 116, at 263–66 (summarizing Kennedy's historical review of precedent for strands of a pragmatic approach).

<sup>151</sup> *Boumediene v. Bush*, 553 U.S. 723 (2008).

<sup>152</sup> See Brief for the Respondents at 14, *Boumediene v. Bush*, 553 U.S. 723 (2008) (No. 06-1195). This position found support with a majority on the D.C. Circuit panel, *Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir. 2007), *rev'd*, 553 U.S. 723 (2008), and with Justice Scalia in dissent. See *Boumediene*, 553 U.S. at 842 (Scalia, J., dissenting) ("[A]liens abroad have no substantive rights under our Constitution.").

<sup>153</sup> See Brief for Petitioners at 12–16, *Al Odah v. United States*, No. 06-1196 (Aug. 24, 2007); see also *Boumediene*, 476 F.3d at 994–95 (Rogers, J., dissenting) ("[T]he court fundamentally misconstrues the nature of suspension: Far from conferring an individual right that might pertain only to persons substantially connected to the United States, the Suspension Clause is a limitation on the powers of Congress." (internal citation omitted)).

<sup>154</sup> See *Boumediene*, 553 U.S. at 764–67.

<sup>155</sup> See Neuman, *supra* note 116, at 263–64 (observing that Kennedy's lengthy discussion of practical concerns in these earlier cases thus "amplified the methodology he had outlined in his short concurring opinion in *United States v. Verdugo-Urquidez*"); see also *Boumediene*, 553 U.S.

Turning first to the *Insular Cases*, Kennedy observed the Court making two competing observations: 1) that the Constitution applied of its own force in the newly acquired territories, but that 2) there may be a “disruptive effect of immediately imposing a new legal culture on a society previously accustomed to a different legal system . . . .”<sup>156</sup> The Court resolved this tension with a compromise: only a subset of so-called fundamental constitutional rights would be extended to “unincorporated territories” not expected to become states of the Union.<sup>157</sup> “[N]oting the inherent practical difficulties of enforcing all constitutional provisions ‘always and everywhere,’ the Court devised in the *Insular Cases* a doctrine that allowed it to use its power sparingly and where it would be most needed.”<sup>158</sup>

In *Eisentrager*, Justice Kennedy discounted Justice Jackson’s broad territorial limitations as dictum and focused instead on the “practical considerations” guiding the discussion and decision in *Eisentrager*.<sup>159</sup> Kennedy found the substantial discussion of practical reasons why habeas corpus should be unavailable to the German war prisoners as necessary to the judgment.<sup>160</sup> In short, the case should be understood as consistent with the functional approach: “A constricted reading of *Eisentrager* overlooks what we see as a common thread uniting the *Insular Cases*, *Eisentrager*, and *Reid*: the idea that questions of extraterritoriality turn on objective factors and practical concerns, not

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at 756–64.

<sup>156</sup> Neuman, *supra* note 116, at 264; see *Boumediene*, 553 U.S. at 757 (“At least with regard to the Philippines, a complete transformation of the prevailing legal culture would have been . . . disruptive . . . .”); see also *United States v. Verdugo-Urquidez*, 494 U.S. 259, 277–78 (1990) (Kennedy, J., concurring) (plurality opinion) (recalling the *Insular Cases*’ broad finding that the Constitution applies wherever the government acts, although that does not mean every provision applies in every situation).

<sup>157</sup> See *Boumediene*, 553 U.S. at 757 (framing the resultant “doctrine of territorial incorporation, under which the Constitution applies in full in incorporated Territories surely destined for statehood but only in part in unincorporated Territories” as a balance based on practical “considerations” rather than a bright line normative judgment).

<sup>158</sup> *Id.* at 759 (internal citation omitted).

<sup>159</sup> See *id.* at 762–63 (“True, the Court in *Eisentrager* . . . noted the prisoners ‘at no relevant time were within any territory over which the United States is sovereign, 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.’ . . . [But] we do not accept the idea that the above-quoted passage from *Eisentrager* is the only authoritative language in the opinion and that all the rest is dicta.” (quoting *Johnson v. Eisentrager*, 339 U.S. 763, 778 (1950))).

<sup>160</sup> See *id.* at 763–66 (“[T]he [*Eisentrager*] Court mentioned the concept of territorial sovereignty only twice in its opinion. That the Court devoted a significant portion of Part II to a discussion of practical barriers to the running of the writ suggests that the Court was not concerned exclusively with the formal legal status of Landsberg Prison but also with the objective degree of control the United States asserted over it. Even if we assume the *Eisentrager* Court considered the United States’ lack of formal legal sovereignty over Landsberg Prison as the decisive factor in that case, its holding is not inconsistent with a functional approach to questions of extraterritoriality.” (internal citation omitted)).

formalism.”<sup>161</sup>

Justice Kennedy saw the functional approach again at work in *Reid*, this time discounting as dictum the broad universalist theory of Justice Black, and focusing on the concurrences of Justices Frankfurter and Harlan.<sup>162</sup> Unlike Black, Frankfurter and Harlan concluded that the Constitution required civilian jury trial for capital cases but not necessarily for lesser offenses.<sup>163</sup> As Kennedy emphasized, both Frankfurter and Harlan relied on “practical considerations that made jury trial a more feasible option” in the current situation.<sup>164</sup> Harlan’s opinion articulated a flexible methodology that Kennedy himself later employed in his *Verdugo-Urquidez* concurrence: “[W]hether a constitutional provision has extraterritorial effect depends upon the ‘particular circumstances, the practical necessities, and the possible alternatives which Congress had before it’ and, in particular, whether judicial enforcement of the provision would be ‘impracticable and anomalous.’”<sup>165</sup>

Justice Kennedy’s *Verdugo-Urquidez* concurrence, which provided the crucial fifth vote denying Fourth Amendment protections to a Mexican national, breathed new life into Harlan’s *Reid* concurrence.<sup>166</sup> Kennedy first rejected both the absolutist views of the social compact theorists and the universalists.<sup>167</sup> In framing the Constitution as a form of structural restraint on the government, Kennedy argued that the lack of a contractual relation between noncitizens and the government does not act as a limiting force on the Constitution’s extraterritorial applicability:

Though it must be beyond dispute that persons outside the United States did not and could not assent to the Constitution, that is quite irrelevant to any construction of the powers conferred or the

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<sup>161</sup> *Id.* at 764. Justice Kennedy also noted that the petitioners in *Eisentrager* had access to a form of due process much closer to constitutional due process than the summary military commissions at issue in *Boumediene*. *Id.* at 766–67.

<sup>162</sup> *See id.* at 759 (citing *Reid v. Covert*, 354 U.S. 1, 75 (1957)).

<sup>163</sup> *Id.* (“Justice Harlan . . . was most explicit in rejecting a ‘rigid and abstract rule’ for determining where constitutional guarantees extend. He read the *Insular Cases* to teach that whether a constitutional provision has extraterritorial effect depends upon the ‘particular circumstances, the practical necessities, and the possible alternatives which Congress had before it’ and, in particular, whether judicial enforcement of the provision would be ‘impracticable and anomalous.’” (quoting *Reid*, 354 U.S. at 74–75) (citation omitted)).

<sup>164</sup> *Id.* at 761.

<sup>165</sup> *Id.* at 759 (quoting *Reid*, 354 U.S. at 74–75 (Harlan, J., concurring)).

<sup>166</sup> *United States v. Verdugo-Urquidez*, 494 U.S. 259, 275–78 (1990) (Kennedy, J., concurring) (plurality opinion).

<sup>167</sup> *See id.* at 277 (finding that “[t]he force of the Constitution is not confined because it was brought into being by certain persons who gave their immediate assent to its terms,” but cautioning that “I cannot agree with the suggestion that every provision of the Constitution must always be deemed automatically applicable to American citizens in every part of the world” (quoting *Reid*, 354 U.S. at 74)).



limitations imposed by it. . . . The force of the Constitution is not confined because it was brought into being by certain persons who gave their immediate assent to its terms.<sup>168</sup>

But Kennedy also rejected the absolutist view of the universalists. In quoting Justice Harlan's concurrence in *Reid*, Kennedy reasoned that extraterritorial applicability of a specific constitutional provision must take into account "the conditions and considerations . . . that would make adherence to a specific guarantee altogether impracticable and anomalous."<sup>169</sup> In citing the "wholly dissimilar traditions and institutions" in Mexico, Kennedy concluded:

The absence of local judges or magistrates available to issue warrants, the differing and perhaps unascertainable conceptions of reasonableness and privacy that prevail abroad, and the need to cooperate with foreign officials all indicate that the Fourth Amendment's warrant requirement should not apply in Mexico as it does in this country.<sup>170</sup>

On the basis of these general considerations, Kennedy concluded in *Boumediene* that:

[A]t least three factors are relevant in determining the reach of the Suspension Clause: (1) the citizenship and status of the detainee and the adequacy of the process through which that status determination was made; (2) the nature of the sites where apprehension and then detention took place; and (3) the practical obstacles inherent in resolving the prisoner's entitlement to the writ.<sup>171</sup>

The first factor actually implicated three distinct concepts: citizenship (petitioners were noncitizens); status (petitioners were alleged "enemy combatants"); and the adequacy of the process leading that determination, which fell "well short of the procedures and adversarial mechanisms that would eliminate the need for habeas corpus review."<sup>172</sup> Regarding the second factor, the apprehensions and detentions occurred outside the de jure borders of the United States, "a factor that weighs against finding they have rights under the Suspension Clause." However, Kennedy found that U.S. control at Guantánamo was absolute and indefinite, in contrast with U.S. control in occupied Germany, which was temporary and "answerable to its Allies . . . ."<sup>173</sup> Kennedy emphasized that "[i]n every practical sense Guantánamo is not abroad . . . ."<sup>174</sup> Regarding "practical obstacles," Kennedy found an

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<sup>168</sup> *Id.* at 276.

<sup>169</sup> *Id.* at 277–78 (citation omitted).

<sup>170</sup> *Id.* at 278.

<sup>171</sup> *Boumediene v. United States*, 553 U.S. 723, 766 (2008).

<sup>172</sup> *Id.* at 766–67.

<sup>173</sup> *Id.* at 768.

<sup>174</sup> *Id.* at 769.

absence of political instability, military insecurity, or “friction with the host government” sufficient to render extension of the writ impracticable and anomalous.<sup>175</sup> “Were that not the case, or if the detention facility were located in an active theater of war, arguments that issuing the writ would be ‘impracticable or anomalous’ would have more weight.”<sup>176</sup>

Taking these factors together, Kennedy concluded that the Suspension Clause “has full effect at Guantánamo Bay,” and that Congress had stripped the federal courts of habeas jurisdiction without providing an adequate substitute in violation of the Suspension Clause.<sup>177</sup>

While the *Boumediene* functional compromise purports to find a practical balance between two extreme normative positions, throughout the opinion Kennedy emphasizes the dual universalist importance of fundamental rights and separation of powers when discussing habeas corpus. For example, the Court viewed habeas as both an individual right and a critical, structural, separation-of-powers provision, terming habeas “a right of first importance”<sup>178</sup> and “an essential mechanism in the separation-of-powers scheme,” and noting that the Suspension Clause served “the need for structural barriers against arbitrary suspensions of the writ.”<sup>179</sup> Kennedy also argued that when the government acts abroad against aliens or citizens, its powers are not “absolute and unlimited,” but are subject “to such restrictions as are expressed in the Constitution,” including restrictions against suspending the writ.<sup>180</sup>

These normative universalist underpinnings stand “in considerable tension with the separation of powers concerns that the Court claimed were central to its opinion.”<sup>181</sup> For example, the Court rejected the

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<sup>175</sup> *Id.* at 769–70.

<sup>176</sup> *Id.* at 770 (citing *Reid v. Covert*, 354 U.S. 1, 74 (1957) (Harlan, J., concurring)).

<sup>177</sup> *Id.* at 771.

<sup>178</sup> *Id.* at 798.

<sup>179</sup> *Id.* at 743–45; *see also id.* at 765 (noting that concern about manipulation was particularly relevant in the context of habeas corpus, which “is itself an indispensable mechanism for monitoring the separation of powers”); Neuman, *supra* note 116, at 266 (“Under the constitutional separation of powers, it is the Supreme Court’s responsibility to say what the Constitution requires.”).

<sup>180</sup> *Boumediene*, 553 U.S. at 765 (quoting *Murphy v. Ramsey*, 114 U.S. 15, 44 (1885)); *see also* Baher Azmy, *Executive Detention, Boumediene, and the New Common Law of Habeas*, 95 IOWA L. REV. 445, 466 (2010) (arguing that “the normative justification that most fully accounts for [Justice Kennedy’s] view is rooted in separation of powers”); Stephen I. Vladeck, *Boumediene’s Quiet Theory: Access to Courts and the Separation of Powers*, 84 NOTRE DAME L. REV. 2107, 2110 (2009) (asserting that Kennedy’s decision was driven by “a structural mechanism” more than any individual rights theory).

<sup>181</sup> *See* Lobel, *supra* note 110, at 317; *see also Boumediene*, 553 U.S. at 843 (Scalia, J., dissenting) (noting that the majority opinion’s “rule” would seem to lead to executive detentions without judicial review, while the separation-of-powers “rationale” would preclude such a result).

formalistic sovereignty-based test as a way “for the political branches to govern without legal constraint.”<sup>182</sup> To do so would allow for a “striking anomaly in our tripartite system of government, leading to a regime in which Congress and the President, not this Court, say ‘what the law is,’” and “switch the Constitution on or off at will.”<sup>183</sup> “But the Court’s functional test permits and indeed encourages the government to do just that.”<sup>184</sup>

This tension between the universalist reasoning and the functional test holding of *Boumediene* has caused considerable confusion for lower courts in the post-*Boumediene* era, as highlighted below.

#### D. Lower Court Resistance: “Effectively Overruling” *Boumediene*?

While Kennedy’s *Boumediene* decision lacked precision in articulating the theoretical grounding for the functional test, it remained consistent on one point—that for at least a five-member majority of the Court, the strict social compact test of the *Verdugo-Urquidez* plurality was no longer favored. However, “[d]espite the Supreme Court’s repudiation of the *Verdugo-Urquidez* plurality’s approach in *Boumediene*, some lower courts have continued to give that approach careful, or even eager, allegiance.”<sup>185</sup> The D.C. Circuit, which was reversed in *Boumediene*, has narrowly limited *Boumediene*’s reach to the Suspension Clause and has continued to employ a strict territorial sovereignty test that aliens without presence or property in the United States have no constitutional rights—not even the right not to be tortured.<sup>186</sup>

The D.C. Circuit even followed the approach of the *Verdugo-Urquidez* plurality to hold that the Guantánamo detainees were not

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<sup>182</sup> *Boumediene*, 553 U.S. at 765.

<sup>183</sup> *Id.*

<sup>184</sup> See Lobel, *supra* note 110, at 317 (“Indeed, the Court’s three-factor functional test for determining the reach of the Suspension Clause virtually ignores the separation of powers concerns that purportedly were crucial to its analysis.”); see also *Boumediene*, 553 U.S. at 843 (Scalia, J., dissenting) (noting that the majority opinion’s “rule” would seem to lead to executive detentions without judicial review, while the separation-of-powers “rationale” would preclude such a result).

<sup>185</sup> Neuman, *supra* note 28, at 1465.

<sup>186</sup> See, e.g., *Ali v. Rumsfeld*, 649 F.3d 762, 771–72 (D.C. Cir. 2011) (denying that *Boumediene* affected circuit precedent denying extraterritorial due process rights to aliens alleging torture in Iraq and Afghanistan); *Rasul v. Myers (Rasul II)*, 563 F.3d 527, 529 (D.C. Cir. 2009) (*per curiam*) (same at Guantánamo). Some lower courts have continued to cite *Verdugo-Urquidez* as denying nonresident aliens “standing” to raise constitutional claims. See, e.g., *Chevron Corp. v. Donziger*, No. 1:12-MC-65 LAK/CFH, 2013 WL 3228753, at \*11–14 (N.D.N.Y. June 25, 2013) (denying Ecuadorian litigants standing to object to subpoenas on First Amendment grounds, because they are not part of the “people” under *Verdugo-Urquidez*); *Doe v. United States*, 95 Fed. Cl. 546, 551, 575–76 (Fed. Cl. 2010) (denying Iraqi national standing to challenge military occupation of his home in Fallujah as a taking).

“persons” within the meaning of the Religious Freedom and Restoration Act (RFRA), because Congress did not intend for RFRA to exceed the scope of the First Amendment, and aliens outside the de jure sovereign territory of the United States had no First Amendment rights.<sup>187</sup> This steady stream of lower court decisions ignoring or narrowly cabining *Boumediene*’s functional test in favor of the formalistic *Verdugo-Urquidez* test has led at least one scholar to observe that these decisions have “effectively overruled” *Boumediene*.<sup>188</sup>

At times the D.C. Circuit has purported to invoke a version of the *Boumediene* functional test, even offering lip service to the structural separation of powers reasoning underlying that decision. But to the extent any functional test factors are applied at all they are done so in a highly formalistic, territorial manner. For example, in *Atamirazayeva v. United States*, decided just one month after *Boumediene*, the D.C. Circuit denied an Uzbek woman from asserting a claim that the U.S. embassy’s forcible expulsion of her and destruction of her cafeteria to increase embassy security amounted to an unconstitutional taking.<sup>189</sup> The Court appeared to be applying a hybrid of the *Verdugo-Urquidez* significant voluntary connection test and the *Boumediene* “impracticable and anomalous” test,<sup>190</sup> but then only mentioned one factor as dispositive in the functional analysis: the fact that the claim had been brought by a noncitizen abroad.<sup>191</sup>

#### E. *The Next Chapter: Hernandez v. Mesa*

A more recent case, *Hernandez v. United States*, has squarely pitted the *Verdugo-Urquidez* territorial holdovers against the *Boumediene* consequentialists.<sup>192</sup> In *Hernandez*, a border patrol officer standing in the United States shot and killed a Mexican national standing on Mexican soil. The Fifth Circuit held that the U.S. Constitution afforded no protection to the Mexican national because he was not on U.S. soil.<sup>193</sup> In their respective briefs before the Supreme Court, the parties squarely

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<sup>187</sup> See *Rasul v. Myers (Rasul I)*, 512 F.3d 644, 671–72 (D.C. Cir. 2008). A concurring judge objected to the panel’s acquiring “the unfortunate and quite dubious distinction of being the only court to declare those held at Guantánamo are not ‘person[s],’” and would have rested the decision on qualified immunity. *Id.* at 676 (Brown, J., concurring) (alteration in original).

<sup>188</sup> See Alexander, *supra* note 26, at 593–606.

<sup>189</sup> *Atamirzayeva v. United States*, 77 Fed. Cl. 378, 387 (Fed. Cl. 2007), *aff’d*, 524 F.3d 1320 (Fed. Cir. 2008).

<sup>190</sup> The Court referred alternately to the “substantial connections” test and the “without inconvenience and practical difficulty test.” *Id.*

<sup>191</sup> See *id.*

<sup>192</sup> *Hernandez v. United States*, 785 F.3d 117 (5th Cir. 2015) (per curiam), *vacated sub nom. Hernandez v. Mesa*, 137 S. Ct. 2003 (2017) (per curiam), *reh’g en banc granted*, 869 F.3d 357 (5th Cir. 2017).

<sup>193</sup> *Id.* at 121.

framed the issue as whether the *Boumediene* functional approach or the *Verdugo-Urquidez* formalist approach applies.<sup>194</sup>

Constitutional scholars eagerly awaited the Court's ruling in *Mesa*, which seemed poised to resolve the simmering tension between the formalist social compact and functional consequentialist approaches.<sup>195</sup> The Court left these scholars—and more importantly, the litigants themselves—empty handed. After years of anticipation, the Court vacated and remanded the case to the Fifth Circuit Court of Appeals to reconsider the availability of a *Bivens* action in light of the Court's recent decision in *Ziglar v. Abassi*.<sup>196</sup> The Court avoided the extraterritorial question altogether, but not without first recognizing that “[t]he Fourth Amendment question in this case . . . is sensitive and may have consequences that are far reaching.”<sup>197</sup> Interestingly, Justices Breyer and Ginsburg dissented, adopting the plaintiffs' functionalist view of extraterritoriality and the Fourth Amendment.<sup>198</sup>

While the issue remains unsettled for now, cases like *Hernandez v. Mesa* have brought “to light other configurations . . . unrelated to counterterrorism, where the implications of *Boumediene* for extraterritorial application of the Bill of Rights can be explored.”<sup>199</sup> Trump's doctrine of extreme vetting promises to raise other configurations where “the depth or shallowness of Justice Kennedy's functional approach [can] become clear.”<sup>200</sup>

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<sup>194</sup> See Brief for Petitioners at i, *Hernandez v. Mesa*, 137 S. Ct. 2003 (2017) (No. 15-118) (“Does a formalist or functionalist analysis govern the extraterritorial application of the Fourth Amendment's prohibition on unjustified deadly force . . .?”); Brief on the Merits for Respondent at 4, *Mesa*, 137 S. Ct. 2003 (No. 15-118) (“The Petitioners' claim for Fourth Amendment protection was answered in *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990); and the functionality test put forth in *Boumediene v. Bush*, 553 U.S. 723 (2008) does not apply in cases where the United States clearly exercises no power, control, or authority over the area/territory where the incident complained of occurs.”).

<sup>195</sup> See, e.g., Andrew Kent, *What Happened in Hernandez v. Mesa?*, LAWFARE (June 27, 2017, 2:23 PM), <https://lawfareblog.com/what-happened-hernandez-v-mesa> (remarking that the case “had the potential to generate a very important opinion: the Fourth Amendment issue in the case could impact the legality of worldwide extraterritorial national security activities by the U.S. government like electronic surveillance and drone strikes”).

<sup>196</sup> See *Mesa*, 137 S. Ct. at 2006–07 (“The Court of Appeals here, of course, has not had the opportunity to consider how the reasoning and analysis in *Abassi* may bear on this case . . . . In these circumstances, it is appropriate for the Court of Appeals, rather than this Court, to address the *Bivens* question in the first instance.” (citations omitted)).

<sup>197</sup> *Id.* at 2007 (“It would be imprudent for this Court to resolve that issue when, in light of the intervening guidance provided in *Abassi*, doing so may be unnecessary to resolve this particular case.”).

<sup>198</sup> See *id.* at 2008–11 (Breyer, J., dissenting) (applying the functional factors of *Boumediene v. Bush*).

<sup>199</sup> Neuman, *supra* note 28, at 1469.

<sup>200</sup> *Id.*

### F. Summary

Part II illustrates the continuing force of competing normative and consequentialist strands of extraterritorial theory. While “[d]etention in custody by the United States, with or without criminal prosecution, should ordinarily be enough to start the analysis . . . . In non-custodial situations, threshold criteria relevant to the particular right may need to be identified.”<sup>201</sup> Part III attempts to establish those threshold criteria by examining how the various strands of extraterritorial jurisprudence might be applied to the non-custodial situation of immigrants abroad.

## III. THEORIES OF EXTRATERRITORIAL IMMIGRATION JURISPRUDENCE

Part II highlights the unsettled nature not just of extraterritorial jurisprudential outcomes, but of the very underlying theories guiding these outcomes. Given this current state, any predictive application of extraterritoriality must take into account all of the disparate normative and consequentialist strands of extraterritoriality that continue to surface. This Part examines these strands individually and applies them specifically to the immigration context. As illustrated below, the answer to the question whether and how the Constitution applies abroad to immigration law varies greatly depending on the underlying philosophical approach employed, highlighting the need for a unified, coherent, and justifiable theory.

### A. *Geographic Formalism: Physical Limits of Extraterritorial Rights*

Despite Justice Kennedy’s clear rejection of a formalistic, territorial approach to extraterritorial jurisprudence in *Boumediene*, the century-old approach continues to have life in the D.C. Circuit and elsewhere.<sup>202</sup> Perhaps no case encapsulates this formalistic adherence to *Verdugo-Urquidez* quite like *Hernandez v. Mesa*, in which the Fifth Circuit Court of Appeals held that the Constitution did not extend the few feet beyond the U.S. southern border into Mexico where a child was shot and killed by a U.S. border patrol agent.<sup>203</sup>

Clearly, under this approach, no immigrant outside the physical

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<sup>201</sup> *Id.* at 1467 (“Until the Supreme Court better articulates the threshold for applying the functional approach, lower courts are likely either to be groping case by case, or to rely on crude categorizations that the Court has rejected . . . . For the present, the indeterminate concept of a substantial connection may continue to play a role.”).

<sup>202</sup> See *infra* Section III.D.

<sup>203</sup> See *supra* text accompanying notes 194–98.

borders of the United States would have recourse to challenge any of President Trump's immigration policies on constitutional grounds. This formalistic approach not only would foreclose the possibility of relief for the Syrian national with valid immigration paperwork but stuck in his home country, but also for the Iraqi or Somali national detained at JFK airport and subject to the "entry fiction."<sup>204</sup> This second scenario would appear to directly contradict the holding in *Boumediene*,<sup>205</sup> yet lower courts' ongoing willingness to ignore or arbitrarily limit that holding at least call into question the outcome of such a scenario.

The more difficult geographic formalism question concerns not the physical presence of the individual immigrant but of the U.S. government. In virtually all of the prior cases in the extraterritorial canon, the United States government undoubtedly had engaged in some affirmative action abroad, whether it be the establishment of new territories,<sup>206</sup> the detention of German war prisoners<sup>207</sup>, or the demolition of an Uzbeki woman's diner.<sup>208</sup> The enactment and enforcement of a nationwide immigration policy, by contrast, arguably is an action taken by the U.S. government within the United States and merely enforced at its border.

This highly formalistic approach to "presence" fails for several reasons. First, to the extent that individual immigrants remain outside the United States at ports of entry due to the entry fiction, so too should the action taken by immigration officials at the border be considered extraterritorial. Second, existing precedent supports, at a minimum, the analysis of certain immigration challenges under a rubric of extraterritorial government action abroad, regardless of the ultimate outcome.<sup>209</sup> Third, and perhaps most importantly, a broad, universally-applied immigration classification system such as the Executive Order is

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<sup>204</sup> See Slocum, *supra* note 49, at 1023–25 (discussing the history and development of the entry fiction, including the "notorious cases" holding that an alien detained for years at New York's Ellis Island is not within the territorial borders of the United States); see also Ernesto Hernández-López, *Kiyemba, Guantánamo, and Immigration Law: An Extraterritorial Constitution in a Plenary Power World*, 2 U.C. IRVINE L. REV. 193, 195 (2012) (discussing the dependability of the entry fiction and plenary power doctrine to foreclose any discussion of extraterritorial constitutional rights applicability).

<sup>205</sup> See Brief of the American Civil Liberties Union and ACLU of Washington as Amici Curiae in Opposition to Appellant's Motion for a Stay at 4–5, *Washington v. Trump*, 847 F.3d 1151 (9th Cir. 2017) (No. 17-35105), ECF No. 24-2 (ACLU amicus brief asserting that immigrants detained at airports after implementation of the Executive Order violates *Boumediene*).

<sup>206</sup> See, e.g., *Downes v. Bidwell*, 182 U.S. 244 (1901) (discussing whether constitutional provisions applied in newly acquired territory of Puerto Rico).

<sup>207</sup> See *Johnson v. Eisentrager*, 339 U.S. 763 (1950).

<sup>208</sup> See *Atamirzayeva v. United States*, 524 F.3d 1320 (Fed. Cir. 2008).

<sup>209</sup> See *Ibrahim v. Dep't of Homeland Sec.*, 669 F.3d 983, 995–97 (9th Cir. 2012) (analyzing lawful permanent resident's extraterritorial due process challenge under the *Verdugo-Urquidez* "significant voluntary connection" test).

but one method of immigration control. Indeed, the vast majority of immigration decisions are made on an individualized basis at embassies, consulates, and refugee resettlement processing centers across the globe. To the extent a constitutional challenge is leveled arising from one of these individual encounters, the challenged government action undoubtedly would have occurred extraterritorially. Unfortunately, under a geographic formalism approach, the extraterritorial immigrant also would have no recourse under a Constitution which reaches its end at the U.S. border.

The simplistic appeal of such an approach is obvious. Yet what this approach offers in ease of application it lacks in moral or logical foundation. At its root, this approach fails entirely to answer “the eternal question of why a state should be permitted to violate in one location a right that it must respect as fundamental in another location.”<sup>210</sup> It also fails to account for the highly peculiar result that an immigrant who illegally crosses the border onto U.S. soil immediately gains the protection of virtually all constitutional provisions while the foreign national waiting for years to lawfully enter enjoys none of those protections.<sup>211</sup>

#### B. *The Constitution as Contract: The Social Compact Theory*

The enduring appeal of *Verdugo-Urquidez* to lower courts seeking to dodge the impact of *Boumediene* also ensures that the “significant voluntary connection” test will continue to play a role in future extraterritoriality cases.<sup>212</sup> This test, premised on the amorphous hurdles of presence, duration, and societal obligation continue to be applied with predictably troubling results. For example, the Court of Appeals for the Armed Forces found that a foreign interpreter working as a civilian contractor in Iraq could not assert Fifth or Sixth Amendment rights in a court martial hearing for minor offenses because his years of “service with the Armed Forces of the United States in the uniform of the United States in sustained combat” after receiving pre-deployment military training in Georgia did not amount to a sufficient significant voluntary

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<sup>210</sup> Neuman, *supra* note 116, at 260.

<sup>211</sup> Kendall Coffey, *The Due Process Right to Seek Asylum in the United States: The Immigration Dilemma and Constitutional Controversy*, 19 YALE L. & POL’Y REV. 303, 309 (2001) (“Because aliens who illegally crossed borders in the dead of night achieved a ‘deportable’ status while aliens detained when attempting to enter lawfully were deemed ‘excludables,’ the law rewarded those illegal and undocumented aliens who successfully avoided our laws by evading interception.”).

<sup>212</sup> See Neuman, *supra* note 28, at 1469 (“Until the Supreme Court better articulates the threshold for applying the functional approach, lower courts are likely either to be groping case by case, or to rely on crude categorizations that the Court has rejected . . . . For the present, the indeterminate concept of a substantial connection may continue to play a role.”).



connection under *Verdugo-Urquidez*.<sup>213</sup>

The “xenophobic rhetoric”<sup>214</sup> of *Verdugo-Urquidez* and untethered invocation of one-sided obligations notwithstanding, the strict significant voluntary connection test provides greater extraterritorial constitutional protections to at least some classes of immigrants than does the geographic formalism approach.<sup>215</sup> Presumably, at least those immigrants who have lawfully resided in the United States for years will have established sufficient presence, duration, and societal obligation to invoke constitutional protection should they find themselves on the wrong end of a government action while abroad.

Consider the case of *Ibrahim v. Department of Homeland Security*.<sup>216</sup> A Malaysian national had lawfully resided in the United States for four years as a doctoral student at Stanford.<sup>217</sup> She flew to Malaysia for a conference connected to her studies but was never allowed reentry into the United States because of her (mistaken) presence on the government’s No-Fly List.<sup>218</sup> A divided Ninth Circuit panel applied *Verdugo-Urquidez* to find that she had established a significant voluntary connection with the United States and could assert claims under the First and Fifth Amendments.<sup>219</sup> Notably, however, the Ninth Circuit’s analysis rested in part on the fact that the petitioner’s travels abroad were specifically for “[t]he purpose of . . . further[ing] . . . her connection to the United States.”<sup>220</sup> One wonders, therefore, whether a lawful resident’s travel abroad for some reason other than to further her voluntary connections with the United States, such as attending a funeral, would sever the cord of voluntariness.

For immigrants with a less substantial connection to the United

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<sup>213</sup> *United States v. Ali*, 71 M.J. 256, 278 (C.A.A.F. 2012) (Concurring only in the result, Chief Judge Baker challenged the application of the *Verdugo-Urquidez* test, noting that “service with the Armed Forces of the United States in the uniform of the United States in sustained combat is a rather substantial connection to the United States.”).

<sup>214</sup> Neuman, *supra* note 28, at 1466 (positing that the “xenophobic rhetoric” has infected various areas of jurisprudence, and may be responsible for the mythical proposition by at least one court that nonresidential aliens ought to be denied federal court access on prudential standing grounds to litigate common law claims).

<sup>215</sup> At least theoretically, the petitioner in *Verdugo-Urquidez* might have prevailed had he voluntarily lived in the United States for ten years prior to having his home in Mexico searched. A geographic formalist would have denied even that claim because at the time of the search both *Verdugo-Urquidez* and his home were in Mexico.

<sup>216</sup> 669 F.3d 983 (9th Cir. 2012).

<sup>217</sup> *Id.* at 987.

<sup>218</sup> *Id.*

<sup>219</sup> *Id.* at 997 (“She voluntarily established a connection to the United States during her four years at Stanford University while she pursued her Ph.D. She voluntarily departed from the United States to present the results of her research at a Stanford-sponsored conference. The purpose of her trip was to further, not to sever, her connection to the United States, and she intended her stay abroad to be brief.”).

<sup>220</sup> *Id.*

States than years of lawful residency, the prospects of extraterritorial constitutional protection under this test appear markedly less bright. In particular, those immigrants and refugees who have subjected themselves to years of screenings, interviews, and background checks by U.S. government officials to receive the privilege of entering the country but have not yet physically entered, likely lack the “presence” necessary to establish a substantial voluntary connection. Moreover, until they have physically entered the country, a *Verdugo-Urquidez* rationale would find that these individuals are pursuing the privilege of societal obligation with the United States, but have not yet assumed that obligation.<sup>221</sup>

“The main difficulty with the compact approach is that it removes any constitutional limits whatsoever on the government’s powers to act against the class of aliens who can be viewed as outside the social contract.”<sup>222</sup> This failing rests in Justice Rehnquist’s one-sided definition of “connection” in *Verdugo-Urquidez*. In dismissing the connections that are made between government and individual when one is involuntarily subjected to U.S. power, he put the entire onus on noncitizens to establish connections while absolving the government entirely from any obligation when it establishes such connections.<sup>223</sup> Indeed, “[t]he holding in *Boumediene* frontally contradicts one of the most unsavory aspects of the *Verdugo-Urquidez* plurality opinion: the suggestion that when foreign nationals are arrested or kidnapped abroad and brought forcibly to U.S. territory, their involuntary presence is a reason for denying them constitutional rights even within the territory.”<sup>224</sup>

For a less dramatic, more relevant example, consider the immigrant in Libya denied a visa to enter the United States because she is Muslim, whether that discriminatory motive is expressed openly or concealed by immigration officials. Leaving aside that no right to enter the country extends to this noncitizen, the U.S. government nevertheless is establishing a connection with the alien by enforcing its discriminatory immigration laws to the alien’s detriment.<sup>225</sup> Clearly, an

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<sup>221</sup> See *United States v. Verdugo-Urquidez*, 494 U.S. 259, 273 (1990) (plurality opinion) (assuming that one must be physically present in the United States, even illegally, to “[have] accepted some societal obligations”).

<sup>222</sup> Lobel, *supra* note 110, at 314.

<sup>223</sup> See *Verdugo-Urquidez*, 494 U.S. at 283 (Brennan, J., dissenting) (“What the majority ignores, however, is the most obvious connection between *Verdugo-Urquidez* and the United States: he was investigated and is being prosecuted for violations of United States law and may well spend the rest of his life in a United States prison.”).

<sup>224</sup> Neuman, *supra* note 28, at 1459.

<sup>225</sup> Though not as dramatic as being investigated and prosecuted for crimes carrying a life sentence, an immigrant nonetheless subjects himself to the immigration laws of the United States, and the government does subject the immigrant to those laws. This establishes at least some connection. Whether it amounts to a significant voluntary connection under Justice

immigrant in this situation would find no recourse under the *Verdugo-Urquidez* substantial voluntary connection test.

However, Justice Brennan’s “far broader, more alien-protective” social compact theory might provide a theoretical avenue for relief for such non-detained extraterritorial immigrants.<sup>226</sup> Brennan’s “basic notions of mutuality” approach focuses not on the alien’s actions but on the government’s actions to “treat[] him as a member of our community for purposes of enforcing our laws . . . . He [then] has become, quite literally, one of the governed.”<sup>227</sup> In the immigration context, an immigrant adversely affected by the enforcement of our laws may thus become a member of our community and have the protections of the Constitution as one of the governed.

One may criticize this approach as unduly extending constitutional rights where someone has affirmatively requested a benefit (admission to the country) to which she has no right and the government has merely responded to that request. Yet constitutional protections routinely attach in similar situations. For example, the government has no constitutional obligation to provide welfare or social security benefits, nor does anyone have a constitutional right to such benefits.<sup>228</sup> However, once Congress affirmatively decides to offer such entitlements, it becomes constitutionally obligated to do so in accordance with the Constitution.<sup>229</sup> Likewise, the United States has no affirmative constitutional obligation to accept immigrants, though it has made international commitments to accept a certain annual quota of refugees.<sup>230</sup> But once its government decides to accept immigrants, it must do so within its restrained powers as expressed in the

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Brennan’s approach remains an open question.

<sup>226</sup> See Lobel, *supra* note 110, at 313 (“A far broader, more alien-protective perspective that is ultimately derived from a social contract understanding of the Constitution’s scope is . . . articulated most forcefully in Justice Brennan’s dissent in *United States v. Verdugo-Urquidez* . . .”).

<sup>227</sup> *Verdugo-Urquidez*, 494 U.S. at 284 (Brennan, J., dissenting).

<sup>228</sup> See *Flemming v. Nestor*, 363 U.S. 603, 610 (1960) (holding that no constitutional “accrued property rights” exist with respect to any aspect of the Social Security system).

<sup>229</sup> See *Mathews v. Eldridge*, 424 U.S. 319 (1976) (holding that individuals have a statutorily granted right to Social Security benefits and a constitutional right to some due process before denial of those benefits, but not a pre-termination hearing); *Goldberg v. Kelly*, 397 U.S. 254 (1970) (holding that the Due Process Clause of the Fourteenth Amendment requires an evidentiary hearing before a welfare recipient can be denied benefits).

<sup>230</sup> See, e.g., James C. Hathaway, *Executive (Dis)order and Refugees—The Trump Policy’s Blindness to International Law*, JUST SECURITY (Feb. 1, 2017), <https://www.justsecurity.org/37113/executive-disorder-refugees-the-trump-policys-blindness-international-law> (discussing U.S. international commitments to refugee resettlement); Philip E. Wolgin, *Renewing the United States’ Global Commitment to Refugee Resettlement*, CTR. FOR AM. PROGRESS (Sept. 19, 2016, 9:03 AM), <https://www.americanprogress.org/issues/immigration/news/2016/09/19/144339/renewing-the-united-states-global-commitment-to-refugee-resettlement> (summarizing some of the U.S. resettlement commitments by country, including a commitment to accept 10,000 Syrian refugees in 2016).

Constitution. To hold otherwise would be to treat the immigrant differently from the citizen for no other reason than status, an extreme approach that has been roundly rejected.<sup>231</sup>

The real problem with Brennan's expansive social contract theory is less theoretical than practical. By extending the full panoply of constitutional protections to all noncitizens abroad who encounter a U.S. government official, the Court would invite an endless stream of due process-related litigation that would prove functionally impractical to litigate from a fact-finding perspective. More fundamentally, such an extreme normative approach would ignore the practical difficulties of establishing global due process protections in the innumerable and vastly different circumstances in which our ever-expanding government finds itself throughout the globe.<sup>232</sup> In much the same way that the plenary power doctrine risks resting too much power in the political branches, this approach would risk resting too much foreign policy power in the hands of an ill-equipped judiciary. At most, while this broad social compact theory has moral and theoretical appeal, its application should be tempered by a *Boumediene*-style functional approach.<sup>233</sup>

### C. *A Global Constitution: The Universalist Approach*

At its most extreme, the universalist approach to extraterritoriality states simply that "the Constitution must always be deemed automatically applicable . . . in every part of the world."<sup>234</sup> Analytically, it is easy to predict whether such a universalist would apply the Constitution to an immigration challenge. She would. The trickier question becomes *how* a universalist would apply the Constitution to an immigration challenge. Again, at its most logical extreme, a universalist would support application in precisely the same manner in which it is

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<sup>231</sup> See, e.g., *Boumediene v. Bush*, 553 U.S. 723, 765 (2008) (rejecting formalistic extraterritorial test based solely on nationality); *Verdugo-Urquidez*, 494 U.S. at 268–69 (same); *Reid v. Covert*, 354 U.S. 1 (1957) (same); cf. *Boumediene*, 553 U.S. at 843 (Scalia, J., dissenting) (arguing that aliens have no rights under the Constitution).

<sup>232</sup> See Sarah H. Cleveland, *Embedded International Law and the Constitution Abroad*, 110 COLUM. L. REV. 225, 286–87 (2010) ("Global legal obligations are becoming increasingly complex . . . . These challenges will become more acute as transnational interaction increases with growing collaboration on international trade, law enforcement, and security efforts . . . . In these and other circumstances, effective control may, as a practical matter, be possessed by multiple actors, and workable international and constitutional doctrines for establishing accountability will need to be flexible and sensitive to practical realities.").

<sup>233</sup> See Burnett, *supra* note 121, at 1000–15 (discussing the practical benefits of a *Boumediene* functional approach, including the ability to account for cultural differences and border permeability).

<sup>234</sup> *Reid*, 354 U.S. at 74 (Harlan, J., concurring) (rejecting such an absolute universalist approach).

applied domestically, regardless of culture, circumstance, or custom.

To do so in the immigration context would require the direct invalidation of 125 years of plenary power precedent.<sup>235</sup> In reality, no Justice nor Court opinion has ever directly espoused such a rigid universalist view. Rather, as highlighted above, universalists have sought a limited, principled extraterritorial application by focusing either on those fundamental rights that can never be abridged or on those structural limitations inherent in the Constitution to limit government action.<sup>236</sup>

### 1. Fundamental Principles: The Rights-Based Approach

Justice Brown's opinion in *Downes* argued that Congress was bound by certain fundamental or natural rights, which apply "by inference and the general spirit of the Constitution" rather "than by any express and direct application of its provisions."<sup>237</sup> Justice White attempted to put specificity to this inherent, unwritten rights philosophy, arguing that any law "support[ing] . . . an established religion, or abridging the freedom of the press, or authorizing cruel and unusual punishments" constitutes "absolute withdrawals of power" and would automatically be voided as violative of the Constitution.<sup>238</sup>

In *Reid v. Covert*, Justice Harlan enunciated the premise that only those constitutional rights that can be deemed fundamental to any civilized society apply to government action abroad.<sup>239</sup> "These cases

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<sup>235</sup> See generally Martin, *supra* note 16 (discussing the "enduring legacy" of 125 years of plenary power). It also would require the Court to turn its back on the reasoning guiding the plenary power doctrine: namely, that in the fields of foreign affairs, international relations, and national security, courts are ill-equipped to understand the dynamics at play in a myriad of volatile and often dangerous circumstances that may require a more flexible approach that domestic constitutional doctrine can provide. See *Chae Chan Ping v. United States*, 130 U.S. 581, 606 (1889) (explaining that the government has the highest duty "to preserve . . . independence, and give security against foreign aggression and encroachment . . . its determination, so far as the subjects affected are concerned, are necessarily conclusive upon [the judiciary]").

<sup>236</sup> See *Boumediene*, 553 U.S. at 769 (accepting that the government is always limited by the Constitution, but rejecting claim that all provisions apply "always and everywhere"); Lobel, *supra* note 25, at 1651–60 (discussing the historical unwillingness to apply "individual-rights provisions" of the Constitution extraterritorially).

<sup>237</sup> *Downes v. Bidwell*, 182 U.S. 244, 268 (1901).

<sup>238</sup> *Id.* at 297–98. Justice White's reference to "absolute withdrawals of power" sound in structural restraints on governmental action more so than positive individual rights. As discussed *infra*, the overlap between these two types of constitutional provisions—structural and rights-based—renders any principled distinction between them "elusive at best, if not downright illusory . . ." Stephen I. Vladeck, *The Suspension Clause as a Structural Right*, 62 U. MIAMI L. REV. 275, 276 (2008).

<sup>239</sup> See *Reid*, 354 U.S. at 53 (Harlan, J., concurring) (relying on "[t]he 'fundamental right' test . . . which the Court has consistently enunciated in a long series of cases" to determine extraterritorial constitutional applicability); *Downes*, 182 U.S. at 291 (White, J., concurring)

defined fundamental rights against the backdrop of the substantive due process incorporation jurisprudence of the first half of the twentieth century, which denoted as fundamental those rights that were ‘of the very essence of a scheme of ordered liberty.’”<sup>240</sup>

This observation that fundamental rights extraterritoriality mirrors domestic incorporation may be descriptively accurate from a historical perspective, but it does not provide a normative justification for such expansion. The uneven history of substantive rights incorporation to the states has been driven as much by the history and intent of the Fourteenth Amendment and the history of post-Civil War Reconstruction as it has been by any principled jurisprudence. Given this highly specific history, there seems little principled reason to graft domestic incorporation onto foreign extraterritoriality.

Another fundamental rights approach that perhaps fits better is the international human rights approach. In *Boumediene*, the Court was urged by several amici filed on behalf of the detainees to make use of concepts from international human rights law to develop the contours of which rights might extend extraterritorially.<sup>241</sup> Focusing on, among other things, those rights so fundamentally entrenched in modern civilized society (as codified in various United Nations treaties) as to be considered nonderogable or *jus cogens*, the amici urged that U.S. law be construed consistently with those obligations.<sup>242</sup>

In the immigration and refugee context, a fundamental norm that has become part of the *jus cogens* international lexicon is the universal obligation of *non-refoulement* of refugees.<sup>243</sup> Non-refoulement is a norm found in international refugee, human rights, and humanitarian law, which requires that states must never send any individual to a country where she faces a real risk of torture or ill-treatment, persecution,

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(“[T]here may nevertheless be restrictions of so fundamental a nature that they cannot be transgressed, although not expressed in so many words in the Constitution.”).

<sup>240</sup> Lobel, *supra* note 25, at 1661 (quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)).

<sup>241</sup> See, e.g., Brief of International Humanitarian Law Experts as Amici Curiae in Support of Petitioners, *Boumediene v. Bush*, 553 U.S. 723 (2008) (Nos. 06-1195, 06-1196); Brief of Amicus Curiae United Nations High Commissioner for Human Rights in Support of Petitioners, *Boumediene v. Bush*, 553 U.S. 723 (2008) (Nos. 06-1195, 06-1196).

<sup>242</sup> See Brief of Amicus Curiae United Nations High Commissioner for Human Rights in Support of Petitioners at 6–8; see also Lobel, *supra* note 110, at 310 (“The argument made here is premised on international law’s post-World War II recognition that certain basic norms of civilized society, such as the prohibitions on torture, genocide, slavery, extrajudicial execution, and prolonged arbitrary detention without any judicial review are so fundamental as to be nonderogable under any circumstances.”); Neuman, *supra* note 116, at 275 (discussing UNHCR brief: “It propounded the current view that all human rights obligations under the Covenant apply not only within a state’s sovereign territory, but also to other territory under the state’s effective control, and to individuals within a state’s effective control regardless of location. The brief observed that this ‘authoritative’ international interpretation conflicted with the interpretation favored by the United States.”).

<sup>243</sup> See Hathaway, *supra* note 230.

enforced disappearance, or arbitrary deprivation of life.<sup>244</sup> This principle finds expression in the 1951 Refugee Convention, the Convention Against Torture, and several other international treaties. These treaties have also been offered as possible grounds for challenging the Executive Order or future extreme vetting iterations.<sup>245</sup>

This attempt to ground extraterritorial application in normative *jus cogens* international law is laudable but problematic to the extent that it purports to articulate the full range of rights that should apply extraterritorially. These norms should be viewed as the “floor” of rights that extend beyond our borders, a baseline of rights that need no consequentialist approach to determine whether they should restrain government actions at a particular time or place.<sup>246</sup> But outside the context of arbitrary or indefinite detention, torture, or other fundamental *jus cogens* norms a functional approach may be relevant to determine whether and how a less fundamental constitutional principle applies.<sup>247</sup>

## 2. Separation of Powers: The Structural Approach

As discussed above, the structural approach to extraterritorial constitutional application focuses not on the status, location, or rights of the individual noncitizen, but rather on the limitations the Constitution places on government action. “Since the beginnings of the republic, the Court and the political branches have generally viewed the Constitution’s separation-of-powers restraints as applicable wherever and against whomever the U.S. government acts.”<sup>248</sup>

At first blush, this approach may seem to give carte blanche to the political branches to deny any extraterritorial rights to immigrants, insofar as the Constitution and the plenary power doctrine give broad discretion to the political branches over immigration controls. After all, if the Constitution applies extraterritorially only to constrain

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<sup>244</sup> *Id.*

<sup>245</sup> *Id.*

<sup>246</sup> See Neuman, *supra* note 116, at 395 (“I believe it unlikely at the present stage of U.S. constitutional history that the Supreme Court would announce a methodology in which comparison with a particular international instrument such as the CCPR would operate as sufficient justification for the application of a constitutional right. Rather, the function served by an external benchmark would be as part of the response to the concern that the Court was requiring the United States to comply unilaterally with extraterritorial rights to which the rest of the world does not adhere.”).

<sup>247</sup> See *id.* at 276 (“Yet even if the majority had been willing to invoke international practice, the international human rights arguments did not specifically favor the functional approach to extraterritoriality. The claim that all civil and political rights, not merely habeas corpus, should extend to all individuals within the government’s effective control greatly simplifies and makes highly constraining an inquiry that the functional approach treats as complex and flexible.”).

<sup>248</sup> Lobel, *supra* note 25, at 1631.

impermissible government actions, and the Constitution gives the political branches of the government a blank check to control immigration as they see fit, then does it not follow that no provisions of the Constitution apply extraterritorially to immigrants at all?<sup>249</sup>

As discussed in Part II, the answer to this question must be no. While a century of plenary power precedent confirms that political discretion to control immigration is broad, it remains “subject to important constitutional limitations.”<sup>250</sup> Those limitations include, at a minimum, the judiciary’s ability to review and invalidate immigration regulations that clearly “violate contemporary constitutional norms.”<sup>251</sup>

The question remains, then, what provisions of the Constitution sufficiently implicate structural separation of powers concerns to apply extraterritorially? Some have argued that “a structural limitation remove[s] the basic competency or power of the government to act . . . while individual-rights provisions accepted the government’s power to act but limited the permissible manner in which the government exercises its authority.”<sup>252</sup> Others have focused on whether the text of the Constitution itself provides a positive individual right or a negative structural restraint. But this distinction proves more difficult in practice than theory, “[f]or, at bottom, whether the President or Congress violates the First Amendment, conducts an unreasonable search, denies aliens due process, tortures them, or violates separation of powers, the government has exceeded its constitutional authority.”<sup>253</sup>

Take, for example, the religious clauses of the First Amendment. Textually, the Establishment Clause appears to create a negative restraint on the government prohibiting it from establishing a religion, while the free exercise provision appears to grant a positive right of individuals to freely practice the religion of their choice.<sup>254</sup> Does it follow, then, that the Establishment Clause challenges to the Executive Order would survive as implicating extraterritorial structural restraints on government action while the free exercise challenges would not? This result seems illogical, given the intertwined nature of these clauses and the overlap in jurisprudential tests. Moreover, the entire First Amendment begins with the structural restraint, “Congress shall make no law . . . .”<sup>255</sup>

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<sup>249</sup> See Spiro, *supra* note 2.

<sup>250</sup> *Zadvydas v. Davis*, 533 U.S. 678, 695 (2001).

<sup>251</sup> Chin, *supra* note 20, at 259.

<sup>252</sup> Lobel, *supra* note 25, at 1656 (discussing amicus brief in *Hamdan*).

<sup>253</sup> *Id.* (internal quotation marks omitted).

<sup>254</sup> See *Lamont v. Woods*, 948 F.2d 825, 835 (2d Cir. 1991) (holding that an overseas religious program violated the Establishment Clause and reasoning that the First Amendment “prohibition against establishments of religion targets the competency of Congress to enact legislation of that description—irrespective of time or place”).

<sup>255</sup> U.S. CONST. amend. I.



Or consider the equal protection provision of the Fifth Amendment. No one questions the government's lawful authority to discriminate among classes of people in enacting legislation and regulations. Because the government has the "power to act" in this regard but is limited in the "permissible manner in which [it] exercises its authority," does this mean that the Equal Protection Clause creates a positive individual right rather than a negative structural restraint, meaning that the government is free to discriminate extraterritorially in noxious ways it could not at home?<sup>256</sup> The same analysis applies to the Due Process Clause of the Fifth Amendment. Undoubtedly, the government has the power to act to enact and control legal processes, so is due process of law an individual right that constrains this power to act? From a textual perspective, does the clause "[n]o person shall be . . . deprived of life, liberty, or property without due process of law" implicate a structural restraint or an individual right?<sup>257</sup> Would the analysis truly differ if the Fifth Amendment said "persons shall have the right to due process of law" or "Congress shall not deprive persons of due process of law?"

Thus, it appears a strict structuralist interpretation of the Constitution might deprive immigrants from any meaningful extraterritorial constitutional protections, even those fundamental rights such as freedom of religion, equal protection, and due process of law.<sup>258</sup> But this approach is unsound, because a bright line distinction between rights and limitations is unworkable in practice, as many provisions of the Constitution implicate structural and rights-based concerns.<sup>259</sup> For example, Justice Kennedy emphasized the importance of habeas relief as "an essential mechanism in the separation-of-powers scheme," but also emphasized the importance of habeas as a fundamental constitutional right.<sup>260</sup> Similarly, the framers viewed the constitutional prohibition on Bills of Attainder as an important individual right even though it has largely been viewed by courts and

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<sup>256</sup> Lobel, *supra* note 25, at 1655.

<sup>257</sup> U.S. CONST. amend. V.

<sup>258</sup> See *Downes v. Bidwell*, 182 U.S. 244 (1901) (recognizing that the Constitution's "absolute withdrawals of power" included such individual rights as those contained in the First, Fifth, and Eighth Amendments).

<sup>259</sup> See Lobel, *supra* note 25, at 1654–55 ("Other important rights also serve a dual structural and individual function. For example, the Warrant Clause of the Fourth Amendment was in part designed to serve a separation-of-powers function by interposing a judicial officer between the police and the target of the search. So too, the guarantees of a jury trial reflect not merely individual rights, but also basic structural concerns about the amount of power granted to a particular judge. Yet neither the Fourth Amendment's Warrant Clause nor the Sixth Amendment's right to a jury trial is applicable extraterritorially to non-citizens, despite their clear structural functions.").

<sup>260</sup> *Boumediene v. Bush*, 553 U.S. 723, 743–45 (2008) (noting that the Suspension Clause served "the need for structural barriers against arbitrary suspensions of the writ").

scholars as a structural restraint.<sup>261</sup>

In short, it has long been recognized that “the Government may act only as the Constitution authorizes, whether the actions in question are foreign or domestic.”<sup>262</sup> But if one rejects the structural/individual-rights dichotomy and views the entire Constitution as a limiting power on the government, whether its actions are foreign or domestic, one returns to the absolutist view that all of the Constitution applies “always and everywhere.” This creates the same judicial usurpation problems discussed above. Two important limitations can and should work to limit these problems. First, even if all of the provisions of the Constitution apply extraterritorially, *how* they apply abroad need not precisely mirror how they are applied domestically.<sup>263</sup> Second, practical considerations can and should play a role in determining the extent to which it would be impracticable and anomalous to constraint government power abroad in particular situations. It is to those practical concerns we now turn.

#### D. *Function over Form: Back to Boumediene*

Given the moral failings of a strict social compact approach and practical limitations of a broad universalist approach, Justice Kennedy’s functional approach appears again to provide a preferable rubric for examining extraterritorial constitutional applicability. It also happens to fit both the descriptive and normative tendencies of modern extraterritorial case law.<sup>264</sup>

Because the *Boumediene* functional test is designed by the Court to be flexible, adaptable, and changing to the circumstances of a particular case, it stands to reason that the test itself could and should be modified when different structural limitations or fundamental rights are implicated.<sup>265</sup>

In the immigration context, additional factors unique to that area, such as foreign policy or political stability considerations, may be

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<sup>261</sup> See Lobel, *supra* note 25, at 1655–56.

<sup>262</sup> United States v. Verdugo-Urquidez, 494 U.S. 259, 277 (1990) (Kennedy, J., concurring) (plurality opinion).

<sup>263</sup> See Neuman, *supra* note 116, at 288 (“It may bear repetition that the functional approach does not present a binary choice between nonapplication of a constitutional right and application of the right precisely as it operates in an analogous domestic setting.”).

<sup>264</sup> *Id.* at 268–70.

<sup>265</sup> In fact, in *Boumediene*, Justice Kennedy emphasized that the “habeas right is itself an indispensable mechanism” but did not list the importance of the right implicated as a factor in his three-part functional test. 553 U.S. at 765–66; see also Neuman, *supra* note 116, at 287 (“The Court in *Boumediene* identified (at least) three sets of factors as relevant to the reach of the Suspension Clause: status and status certainty; locations of arrest and detention; and practical obstacles. This nonexclusive list was tailored to the Suspension Clause and its case law, and would presumably need modification to address other rights.”).

relevant. However, it would be prudent first to apply the articulated *Boumediene* factors in deference to the continued precedential value of that decision. Then, this Section will take Justice Kennedy's suggestion to adapt this inherently flexible test to the unique situation of immigrants abroad.

### 1. Application of the *Boumediene* Test

The first factor articulated by Justice Kennedy, “the citizenship and status of the detainee and the adequacy of the process through which that status determination was made,” facially applies only to the extraterritorial detention context.<sup>266</sup> However, this factor may still have relevance in the non-detention context if the word “detainee” is replaced with the word “individual.” In doing so, we must then consider three distinct aspects of this first factor: 1) the citizenship of the immigrant or refugee; 2) the legal status of that individual; and 3) the adequacy of the process through which that legal status was conferred.

In the immigration context, all extraterritorial petitioners would be foreign nationals. Their “status” most naturally would implicate their status as immigrants or refugees—either immigrants with validly issued entry documents, potential immigrants who are seeking or have been denied status, legally recognized refugees, asylum seekers, or those denied refugee status. This non-exhaustive list illustrates the potentially limitless application of this first factor to the unique individual circumstances of extraterritorial immigrants.

Finally, this first factor requires one to consider the adequacy of the process through which the immigration or refugee decision was made. For the immigrant whose application is denied, the court would consider the nature of the immigration official's fact-finding process preceding that denial, including whether the official conducted in-person interviews with the applicant and his or her family, what individualized background checks were conducted, and the basis for the denial.<sup>267</sup> While neither issuance of a visa nor approval for resettlement

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<sup>266</sup> *Boumediene*, 553 U.S. at 766. In this sense, the ACLU's invocation of *Boumediene* to challenge the detention of foreign nationals detained at ports of entry in the hours after entry of the Executive Order made logical and legal sense. See American Civil Liberties Union and ACLU of Washington's Motion for Leave to File Brief as Amici Curiae at 4–5, *Washington v. Trump*, 847 F.3d 1151 (9th Cir. 2017) (No. 17-35105), ECF No. 24-1 (asserting that immigrants detained at airports after implementation of the Executive Order violates *Boumediene*).

<sup>267</sup> A similar evaluation would be undertaken in the case of an asylum seeker denied status, though in that circumstance the United States is not responsible (at least not solely responsible) for making that determination when the asylum seeker resides outside U.S. borders. A closer analog would be the legally recognized refugee seeking but being denied resettlement to the United States by USCIS or another executive agency. See *United States Refugee Admissions Program (USRAP) Consultation & Worldwide Processing Priorities*, USCIS, <https://>

is a right, the question is not whether the immigrant or refugee possesses a constitutional right to the status but whether a constitutional protection was violated in the course of denying conferral of that status.

However, for the immigrant issued a valid visa after successfully completing the vetting process who later has the visa summarily canceled in response to a blanket travel ban such as the Executive Order, which process does the court review for adequacy: the initial screening process preceding issuance of the visa, or the “process” preceding the summary revocation? I would argue the latter, as it is the immigrant’s status as a former visa holder that gives rise to the action. In that sense, there appears to be no individualized process at all, but a blanket revocation of a benefit previously conferred.<sup>268</sup>

The second *Boumediene* factor, “the nature of the sites where apprehension and then detention took place,” again facially applies only to the detention context.<sup>269</sup> But it takes little imagination to retrofit this factor to the non-detention context. For immigration purposes, the court would consider the nature of the sites where the immigration or refugee decision was made. In the individual status determination context, the types of sites at which such determinations are made are as diverse as the cultural, political, and topographical diversity of the earth itself. Different analytical considerations would be implicated depending on whether the contact with and determination by an immigration official took place in an embassy or consulate in a stable country, in a crowded refugee camp bordering an active conflict, or in an isolated and remote desert southern border crossing. A narrow reading of *Boumediene* would caution against applying the Constitution extraterritorially to *any* of these situations, because in none of them does the United States exercise the kind of indefinite, de facto control present at Guantánamo Bay.<sup>270</sup> Even a more alien-protective interpretation would struggle to square the reasoning of *Boumediene* to the extension of constitutional protections outside of the most stable, embassy-based locales, in friendly foreign nations.<sup>271</sup> At a minimum, as

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[www.uscis.gov/humanitarian/refugees-asylum/refugees/united-states-refugee-admissions-program-usrap-consultation-worldwide-processing-priorities](http://www.uscis.gov/humanitarian/refugees-asylum/refugees/united-states-refugee-admissions-program-usrap-consultation-worldwide-processing-priorities) (last updated May 5, 2016) (discussing national refugee and resettlement admissions programs).

<sup>268</sup> The “process” considered in such a scenario may in fact be the process by which the government decided to enact the broad policy implicated, which may very well require judicial review of the substantive justifications for a particular immigration classification or decision.

<sup>269</sup> 553 U.S. at 766.

<sup>270</sup> See *id.* at 769 (“In every practical sense, Guantánamo is not abroad . . .”); see also *Hernandez v. United States*, 785 F.3d 117, 127–28 (5th Cir. 2015) (per curiam) (finding that the *Boumediene* functional test did not apply because the United States exerts neither de jure nor de facto control over Mexico, even a few feet from the United States’ border), *vacated sub nom. Hernandez v. Mesa*, 137 S. Ct. 2003 (2017) (per curiam), *reh’g en banc granted*, 869 F.3d 357 (5th Cir. 2017).

<sup>271</sup> Contrary to the common misconception, embassies in foreign countries are not the “sovereign territory” of that country, but territory of the host country that is afforded special

with the reasonable reluctance to extend a full panoply of constitutional due process protections to detainees in active or unsettled war zones, courts applying the functional test likely would caution against imposing identical constitutional restraints to an emergent migration crisis as an office-based consulate hearing.<sup>272</sup>

As to the third *Boumediene* factor, “the practical obstacles inherent in resolving the prisoner’s entitlement to the [right],” the existence of practical obstacles in the immigration context depends on the unique circumstance of each individualized situation. While U.S. immigration officials certainly exercise some level of control wherever they conduct official business on behalf of the executive branch, the permanency of such control varies depending on whether a permanent U.S. Citizenship and Immigration Services (USCIS) office exists on U.S. embassy grounds in the United Kingdom, a mobile unit of immigration officials is conducting screenings in a U.N.-administered refugee camp in a hostile country, or government officials are responding to a migration crisis next door to an active civil war. The nature of the relationship with the host country itself plays a critically important role, particularly given the political sensitivity inherent in refugee crises and, more broadly, issues of transnational migration. Serious and legitimate concerns about the ability of the judicial branch to adequately understand and weigh these political considerations underlies the plenary power doctrine and itself gives reason to tread carefully in the area of extraterritorial constitutional immigration law.<sup>273</sup>

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status under international law. See Vienna Convention on Diplomatic Relations art. 22, Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95 (explaining that “[t]he premises of the mission . . . shall be immune from search, requisition, attachment, or execution,” but that the territory itself remains that of the host country); Alfred P. Rubin, Letter to the Editor, *U.S. Embassies Are Not U.S. Territory*, N.Y. TIMES (Mar. 1, 1984), <http://www.nytimes.com/1984/03/01/opinion/1-us-embassies-are-not-us-territory-022156.html> (esteemed professor of international law explaining that, “[a]s a matter of international law, an embassy is not ‘territory’ of the sending state; it is territory of the receiving state that is accorded, through various treaties and customs, some immunities from host-country law”).

<sup>272</sup> Courts may have to engage in fact-specific inquiries regarding the nature of the purported crisis or threat and the nexus between the threat and the challenged immigration measure to make the extraterritorial determination. But courts have done this for decades. See, e.g., *Boumediene*, 553 U.S. at 757–69 (discussing the nature of the naval base and the nexus between denying of habeas and fighting the war on terror); *Johnson v. Eisentrager*, 339 U.S. 763, 775–80 (1950) (discussing specific nature of the German war prison and the extent of control exercised by the United States in Allied territory).

<sup>273</sup> “Another [concern] is the tendency of the right to interfere with intergovernmental cooperation in contexts where the United States cannot operate unilaterally.” Neuman, *supra* note 116, at 269; see also Cleveland, *supra* note 232, at 287 (noting the increasing complexity facing extraterritorial constitutional application in a global world governed by “multiple actors” at once). To this extent, the government may raise legitimate concerns about judicial review of an immigration decision adversely affecting a “foreign relations mission” with a foreign power. However, courts should reject any government suggestion that judicial review of an immigration decision would adversely affect the government’s “immigration mission” because such an argument rests on circular logic.

Another pressing practical obstacle may well be the “logistical constraints that may result from distance or from the disorder prevailing in the location where the right would be enforced.”<sup>274</sup> This logistical concern relates directly in many respects to the level-of-governmental-control concern and should be evaluated along the same lines.

In short, application of the existing *Boumediene* factors to the immigration context requires some mild retrofitting but otherwise appears to function as Justice Kennedy intended: in a flexible, adaptable way that likely would yield different results in different contexts. That said, the imprecision of the *Boumediene* decision itself and lack of guidance on how this functional test should apply outside the detention context leaves much room for speculation as to how that test would actually apply in the immigration context. A narrow reading of *Boumediene* would suggest that non-detained immigrants enjoy no extraterritorial constitutional protections because they are neither detained nor otherwise controlled by the United States, they reside in territories outside the de jure or de facto control of the United States, and/or the practical obstacles of adjudicating potentially politically sensitive immigration decisions thousands of miles away in potentially unstable environments makes such application impractical and anomalous.<sup>275</sup> However, a more sympathetic approach to the functional test may yield some measure of extraterritorial applicability, at least in limited circumstances.

## 2. Application of Other Factors

The list of factors employed in *Boumediene* “would presumably need modification to address other rights” besides the right to habeas.<sup>276</sup> One such additional factor—the importance of the right implicated—was discussed at length by Justice Kennedy in *Boumediene* but ultimately went unlisted in his functional test approach.<sup>277</sup> Whether the constitutional right implicated is fundamental in a broad sense has occupied the Court’s extraterritoriality jurisprudence for over a century. Thus, identification and application of other possible *Boumediene* factors should start with consideration of the nature and importance of the right implicated.

In the immigration context, there exists no right to enter the

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<sup>274</sup> Neuman, *supra* note 116, at 269.

<sup>275</sup> Reid v. Covert, 354 U.S. 1, 75 (1957) (Harlan, J., concurring).

<sup>276</sup> Neuman, *supra* note 116, at 287.

<sup>277</sup> *Boumediene*, 553 U.S. at 798 (calling habeas “a right of first importance”).

country, constitutional or otherwise.<sup>278</sup> However, the Constitution does protect against various forms of impermissible discrimination, including on the basis of religion. As early as 1885, Justice Field declared that any law supporting an established religion would automatically be void as violative of the Constitution's most fundamental norms.<sup>279</sup> For that proposition, Field relied on Chief Justice John Marshall's 1828 opinion in *American Insurance Company v. Canter*, which invoked the "usage of the world" and various treatises on international law to declare the right to be free from religious discrimination, an inherent fundamental norm akin to an international *jus cogens* norm.<sup>280</sup>

It then appears that at a minimum, the right to be free from religious discrimination has a sufficiently fundamental judicial pedigree as to be invoked extraterritorially to challenge religiously based immigration classifications or individual immigration decisions based on invidious religious discrimination. On the other hand, although freedom of religion is an internationally recognized human right, its content in the international system and in other countries does not coincide with U.S. free exercise doctrine.<sup>281</sup> Moreover, government prohibitions against establishing a preferred religion clearly have not gained widespread international application, perhaps most notably in the very countries affected by the Executive Order itself.<sup>282</sup>

This uneven international application of religious discrimination doctrine does not require, however, categorical denial of extraterritorial freedom of religion rights to all foreign nationals in all circumstances. First Amendment free exercise and establishment doctrines are complex

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<sup>278</sup> See *Fong Yue Ting v. United States*, 149 U.S. 698, 730 (1893) (observing that no right exists for a noncitizen to enter or remain in the country, and thus deportation cannot be considered a "punishment").

<sup>279</sup> See *Chi., Rock Island & Pac. Ry. Co. v. McGlinn*, 114 U.S. 542, 546 (1885).

<sup>280</sup> 26 U.S. 511, 542 (1828); see also Chimène I. Keitner, *Rights Beyond Borders*, 36 YALE J. INT'L L. 55, 61 (2011) (discussing role for considering "a set of fundamental values" in extraterritoriality analysis); Cleveland, *supra* note 232, at 282–84 (discussing concept of *jus cogens* norms).

<sup>281</sup> See Neuman, *supra* note 126, at 393 (emphasizing the need for a coherent extraterritorial jurisprudence to "focus on the problem of cultural variation and the possible anomaly of extending a U.S. constitutional right to foreign territory where a different version of the right (or none at all) prevails").

<sup>282</sup> See Salma Abdelaziz et al., *Christian in Sudan Sentenced to Death for Faith; 'I'm Just Praying,' Husband Says*, CNN (May 16, 2014, 8:31 AM), <http://www.cnn.com/2014/05/15/world/africa/sudan-christian-woman-apostasy/index.html> (reporting that a Sudanese court sentenced a pregnant woman to death "when she refused to recant her Christian faith"); U.S. Report on Religious Freedom in Middle East, WILSON CTR. (May 20, 2013), <https://www.wilsoncenter.org/article/us-report-religious-freedom-middle-east> (reporting that in Yemen, "[t]he [C]onstitution declares that Islam is the state religion" and that "other laws, policies, and government practices restrict [freedom of religion]" and reporting that the Syrian constitution "protect[s] religious freedom, although the government imposed restrictions on this right").

and variable even within U.S. territory.<sup>283</sup> As Neuman emphasized, “the functional approach does not present a binary choice between non-application of a constitutional right and application of the right precisely as it operates in an analogous domestic setting. Intermediate positions with modified application of the right are also possible.”<sup>284</sup> One wonders, however, what an “intermediate” position might look like when the challenged immigration policy denies entry based on one’s status as a Muslim. A person either belongs to the religion or does not, and the government either discriminates on the basis of that membership or does not.

An intermediate position under the functional approach may be more easily applied to the liberty interests of would-be immigrants. For example, “[t]he free speech rights of government employees, of soldiers, and of citizens present on domestic military bases all undergo adjustment to their circumstances.”<sup>285</sup> Likewise, the functional approach contemplates flexibly authorizing the rejection of an immigrant or refugee’s application based on that applicant’s past public anti-American statements, even though such statements undoubtedly would be protected under the First Amendment inside the United States. After all, while one has free speech rights in the United States to criticize the government, constitutional jurisprudence does not recognize critics of America as a protected class under equal protection standards. This example highlights where the flexibility of the functional approach works well—in moderating the extraterritorial applicability of certain fundamental liberty interests—and not so well—in moderating the extraterritorial applicability of fundamental equality rights.<sup>286</sup>

In terms of practical obstacles, one additional factor to consider in an adapted functional test is the extent to which affirmative government intervention is required, which implicates resource and logistical constraints. Whereas “[t]he right to habeas corpus is the right to affirmative governmental intervention—the right to the benefit of a governmental institution by which the U.S. judiciary exercises control over custodians,” the free exercise and establishment clauses primarily involve negative duties of restraint.<sup>287</sup> Extension of protections

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<sup>283</sup> See, e.g., *Lemon v. Kurtzman*, 403 U.S. 602 (1971) (establishing a three-part test to determine whether a particular legislation violates the Establishment Clause, and setting forth flexible factors to assist the determination, including the character and purpose of the institution benefitted, the nature of the aid the state provides, and the resulting relationship between the government and religious authorities).

<sup>284</sup> Neuman, *supra* note 116, at 288.

<sup>285</sup> *Id.*

<sup>286</sup> Under such reasoning, the functional approach would appear to work particularly well in the area of procedural rights, where domestic constitutional jurisprudence contemplates a flexible continuum of procedural protections depending on the unique circumstances of the case.

<sup>287</sup> Neuman, *supra* note 116, at 287.



stemming from such negative duties of governmental restraint is normatively consistent with structural separation of powers concerns underlying the Court's extraterritorial jurisprudence and consistent with a consequentialist perspective concerned with practical application of rights beyond our borders.

Finally, the most important additional factor for any consideration of extraterritorial applicability in the immigration context must be the inherently political nature of immigration and refugee law and policy, particularly to the extent that it affects sensitive foreign relations.<sup>288</sup> While a more searching judicial inquiry may be appropriate where a particularly blunt immigration policy appears untethered to either national security interests or constitutional norms, deference to the more knowledgeable political branches remains appropriate when a sufficient showing has been made that national security, foreign relations, or diplomatic efforts require curtailment of constitutional protections in a certain situation.<sup>289</sup>

#### IV. TOWARDS A COHERENT EXTRATERRITORIAL IMMIGRATION JURISPRUDENCE

Part III highlights the disparate strands of normative and consequentialist theories underlying the Court's extraterritorial jurisprudence and the vastly different results each theory, operating in isolation, would yield in the immigration context. This Part attempts to unify these disparate theories, first by identifying normative commonality among them, and second by injecting some consequentialist realism unique to the needs of extraterritorial immigration law.

##### A. *A Unified Theory of Extraterritorial Constitutional Law*

When carefully considered, the fundamental individual rights

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<sup>288</sup> See *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542 (1950) (“The exclusion of aliens is a fundamental act of sovereignty . . . inherent in the executive power to control the foreign affairs of the nation.”); *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 320 (1936) (discussing “the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations”).

<sup>289</sup> Courts should remain vigilant, however, and invoke plenary power-like deference only after a substantial showing by the government that an otherwise unconstitutional immigration policy or decision serves important foreign relations purposes, lest plenary power reasoning simply provide “a fallback or default set of legal justifications” to deny extraterritorial constitutional rights. Hernández-López, *supra* note 204, at 195 (discussing the government’s reliance on immigration law to “preclude[] judicial remedies” to five Uighurs held at Guantánamo Bay more than four years after *Boumediene*).

approach, structural separation of powers approach, and Justice Brennan's broad social compact approach all share one important trait: they contemplate some restraint on official government action when the government engages with an individual abroad. The exact contours of that restraint derive not from the physical location or the status of the alien, but from the inherent limits on governmental power as expressed in the Constitution.

As an initial matter, the individual rights/separation of powers dichotomy is "elusive at best, if not downright illusory."<sup>290</sup> Indeed, all of the rights contained in the Bill of Rights can properly be cast as limitations on government power, precisely because they involve the right to be free from some oppressive or improper exercise of government power.<sup>291</sup> The right of the person to be free from such governmental power and the limit of the government to exercise such power against the person are merely two sides of the same coin. Indeed, the framers viewed the Bill of Rights in structural terms rather than in terms of positive individual rights.<sup>292</sup> When viewed in this light, it becomes clear that all provisions of the Constitution, read holistically as a constraint on government power, ought to apply "always and everywhere."<sup>293</sup>

This view of extraterritorial applicability as one of a structural restraint on government power is entirely consistent with Justice Brennan's "mutuality of legal obligation" social compact theory from *Verdugo-Urquidez*.<sup>294</sup> According to Brennan, when the United States government engages with an individual, whether at home or abroad, and attempts to impose its will in any capacity, the government "has treated him as a member of our community for purposes of enforcing our laws. He has become, quite literally, one of the governed."<sup>295</sup>

This approach squares with the view of many of the framers, who "viewed the original Constitution's limitations on federal power as rendering a Bill of Rights unnecessary."<sup>296</sup> As Lobel cogently argued:

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<sup>290</sup> Vladeck, *supra* note 238, at 276.

<sup>291</sup> See Lobel, *supra* note 25, at 1656 ("Since both individual constitutional rights and separation of powers provide restrictions and limitations on government power, it is unclear why those two categories of constitutional limitations should result in differing extraterritorial applicability.").

<sup>292</sup> See Lobel, *supra* note 25, at 1655 ("Perhaps most fundamentally, many of the framers viewed the original Constitution's limitations on federal power as rendering a Bill of Rights unnecessary.").

<sup>293</sup> *Balzac v. Porto Rico*, 258 U.S. 298, 312 (1922).

<sup>294</sup> *United States v. Verdugo-Urquidez*, 494 U.S. 259, 284 (1990) (Brennan, J., dissenting) (plurality opinion); GERALD L. NEUMAN, STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW 7-8 (1996).

<sup>295</sup> *Verdugo-Urquidez*, 494 U.S. at 284.

<sup>296</sup> See Lobel, *supra* note 25, at 1655 (citing THE FEDERALIST NO. 84, at 515 (Alexander Hamilton)).

The framers saw these rights as protected by the structural limitations imposed by the original Constitution. Had the Bill of Rights never been enacted, aliens could have argued that the framers' intent was not to accord the government the power to invade those natural rights that pre-existed the Constitution and were structurally protected by the Constitution's limited grant of power to the federal government. It is implausible to claim that the enactment of the Bill of Rights increased the Federal government's power over aliens abroad by removing the structural restraints that the framers believed they had enacted and replacing those limitations with individual rights that would only protect certain classes of people.<sup>297</sup>

[B]y focusing on the power of a branch to act, structural restraints relocate the inquiry away from who is being harmed and where that person suffers the harm, and instead to whether the actor has exceeded its power and jurisdiction to so act. The status of the person harmed thus ought to play no role in the inquiry.<sup>298</sup>

This approach stands in stark contrast to the restrictive “significant voluntary connection” social compact test of the *Verdugo-Urquidez* plurality, which ought to be seen as a virtue. Not only does that test rely upon unsupported and unworkable hurdles to constitutional protection such as presence, duration, and societal obligation, but it also offends basic notions of justice by imposing artificial barriers to constitutional protection for noncitizens while giving the government a blank check to do as it pleases in return. Indeed, post-*Boumediene* courts have invoked this *Verdugo-Urquidez* significant voluntary connection test to deny extraterritorial aliens the right to be free even from torture or extrajudicial killing by agents of the federal government.<sup>299</sup>

In sum, a normative extraterritorial approach grounded in a structural governmental restraint theory finds deep support in the framers' intent, the individual rights theory, the separation of powers theory, and the broad social compact theory. However, taken to its logical extreme, this approach would require the federal government to act precisely in accordance with every provision of the Constitution in every international context as it does domestically. Such a bright line approach would ignore the diverse, on-the-ground realities of the U.S. government's engagements around the globe and would risk usurping fundamental sovereign powers from the political branches in the fields of foreign policy, war, diplomacy, and immigration. Thus, there remains a role for Justice Kennedy's functional approach in *Boumediene* to temper the potentially impracticable and anomalous consequences of an

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<sup>297</sup> Lobel, *supra* note 25, at 1655–56.

<sup>298</sup> *Id.* at 1653.

<sup>299</sup> See *Ali v. Rumsfeld*, 649 F.3d 762, 771–72 (D.C. Cir. 2011).

inflexible normative theory.<sup>300</sup> How these normative and consequentialist approaches merge in the area of extraterritorial immigration law are considered below.

B. *A Coherent and Practical Extraterritorial Constitutional Immigration Law*

Recognizing the need for normative consistency in extraterritorial jurisprudence, the limits of Kennedy's functionalist approach to flexibly adapt to certain unconstitutionally discriminatory conduct and the unique deference traditionally enjoyed by the political branches in the field of immigration law and policy, I submit the following three proposals for a coherent and workable extraterritorial constitutional immigration jurisprudence.

1. Universal Extraterritorial Application of Fundamental Constitutional Equality Norms

Equality under the law stands as perhaps the oldest, most fundamental principle of justice in Western Civilization.<sup>301</sup> The classical liberal tradition, from which our liberal constitutional democracy springs, was premised on the fundamental notion that liberty can only be secured through equal treatment under the law.<sup>302</sup>

In recognition of the fundamental nature of the right to equal treatment under the law, as well as the important governmental restraints constitutional equality principles impose, the Constitution's Equal Protection provisions of the First, Fifth, and Fourteenth Amendments should apply universally whenever and wherever the U.S. government acts. Moreover, these protections should apply to whomever purports to have been unfairly treated by the government.

This proposal contemplates the extraterritorial application of equal protection precisely as it operates in the analogous domestic setting.<sup>303</sup> If

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<sup>300</sup> *Boumediene v. Bush*, 553 U.S. 723, 759 (2008).

<sup>301</sup> At the 431 B.C.E. funeral oration of Pericles, the following statement was recorded: "If we look to the laws, they afford equal justice to all in their private differences; if no social standing, advancement in public life falls to reputation for capacity, class considerations not being allowed to interfere with merit; nor again does poverty bar the way . . . ." See THUCYDIDES, *THE HISTORY OF THE PELOPONNESIAN WAR* (Richard Crawley trans., Longmans, Green & Co. 1874) (431 B.C.).

<sup>302</sup> See Chandran Kukathas, *Ethical Pluralism from a Classical Liberal Perspective*, in *THE MANY AND THE ONE: RELIGIOUS AND SECULAR PERSPECTIVES ON ETHICAL PLURALISM IN THE MODERN WORLD* 55, 61 (Richard Madsen & Tracy B. Strong eds., 2003); see also JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 114–26 (Peter Laslett ed., 1960).

<sup>303</sup> This approach contrasts with Neuman's suggestion that extraterritorial constitutional application need not precisely mirror domestic extraterritorial application. See Neuman, *supra*

a domestic law receives heightened scrutiny because it affects a protected class under Equal Protection jurisprudence, the same law would receive the same heightened scrutiny in the international immigration context. For example, no domestic law providing for disparate treatment of citizens on the basis of race or religious affiliation would ever pass muster under contemporary constitutional norms, absent a governmental showing that a compelling justification existed for that treatment and a no more narrowly tailored process could achieve the desired result.<sup>304</sup> Neither should an immigration policy.

At first blush, this proposal would seem to completely upend immigration law and policy, which largely function on the premise that certain classes of people are allowed entry into the country and others are not. But virtually all laws “draw a distinction among people and thus are potentially susceptible to an equal protection challenge . . . . [T]he issue is whether the government can identify a sufficiently important objective for its discrimination.”<sup>305</sup> The level of judicial review employed in such circumstances depends on the type of discrimination contemplated.

Indeed, though potentially far-reaching, this proposal merely reflects the historical application of the political branches’ plenary power under a contemporary constitutional norms analysis. The government once denied aliens entry on the basis of race at a time when it discriminated domestically on the basis of race; the government once denied aliens entry on the basis of religion at a time when it discriminated domestically on the basis of religion; and the government once denied aliens entry on the basis of sexual orientation at a time when it discriminated domestically on the basis of sexual orientation.<sup>306</sup> To the extent this proposal seems radically out of step with prior precedents, it is less that it meaningfully changes immigration policy than it codifies for the first time a universal extraterritorial application of a constitutional “right.” But properly viewed, this proposal merely reinforces the uncontroversial proposition that the government can only act in ways consistent with the Constitution, whether it acts at home or abroad.<sup>307</sup>

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note 116, at 288 (“It may bear repetition that the functional approach does not present a binary choice between nonapplication of a constitutional right and application of the right precisely as it operates in an analogous domestic setting.”).

<sup>304</sup> See *Fisher v. Univ. of Tex.*, 136 S. Ct. 2198 (2016) (articulating strict scrutiny standard for race-based classifications).

<sup>305</sup> ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 669 (4th ed. 2011) (“For example, those under age 16 might claim to be discriminated against by the age requirement for obtaining a driver’s license . . . the issue is whether the government can identify a sufficiently important objective for its discrimination.”).

<sup>306</sup> See *Chin*, *supra* note 20, at 259.

<sup>307</sup> See *United States v. Verdugo-Urquidez*, 494 U.S. 259, 277 (1990) (Kennedy, J., concurring) (plurality opinion) (“[T]he Government may act only as the Constitution

No intermediate approach guided by *Boumediene*-style practical considerations is needed for the extraterritorial application of fundamental equality norms. Indeed, no intermediate approach is possible in this context when the only constitutional question is whether the government may or may not discriminate on the basis of a particular classification.

## 2. Extraterritorial Application of Fundamental Substantive Liberty Interests, Moderated as Needed by Foreign Policy and Other Practical Considerations

Like equal protection principles, fundamental liberty principles operate both as individual rights and as structural governmental restraints. Moreover, the fundamental rights to life, liberty, and property are inherent not just in the constitutional DNA of our nation, but indeed form the very bedrock of international *jus cogens* norms.<sup>308</sup> Normatively, then, it appears these fundamental liberty interests should apply extraterritorially in the same way as fundamental equality interests—namely, universally. There exists one significant difference between equality and liberty for purposes of extraterritoriality, however. Crudely put, equality is binary: one is either treated equally or unequally. The unequal treatment is not necessarily unconstitutional but must be justified. But liberty exists on a continuum: one's free speech rights may be curtailed a little, a lot, or entirely.<sup>309</sup> And each level of curtailment may be constitutionally justified, depending on the circumstances.<sup>310</sup>

Therefore, given the more inherently flexible nature of liberty interests and their domestically differing treatment by courts depending on case-by-case circumstances, the extraterritorial application of these fundamental interests ought also to be susceptible to a functionalist

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authorizes, whether the actions in question are foreign or domestic.” (citing *Reid v. Covert*, 354 U.S. 1, 6 (1957))).

<sup>308</sup> See THOMAS WEATHERALL, *JUS COGENS: INTERNATIONAL LAW AND SOCIAL CONTRACT* 432 (2015) (observing that the fundamental norms of life, liberty, and property have been universally recognized as bedrocks of human rights since the time of Locke and Rousseau); Moore & Moore, *supra* note 138, at 23 (finding that the concept of fundamental liberty interests “has gone beyond the U.S. Constitution and has become an important, widely accepted norm at international law. The Universal Declaration of Human Rights specifically states that ‘everyone has the right to life, liberty and the security of person.’” (quoting G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948))).

<sup>309</sup> See *Ward v. Rock Against Racism*, 491 U.S. 781 (1989) (reaffirming that the political branches may permissibly restrict speech at certain times, in certain places, and in a certain manner).

<sup>310</sup> *Id.* at 791, 794 (finding that time, place, and manner restrictions are permissible if they are content neutral, narrowly tailored, serve an important governmental interest, and leave open ample alternative channels for communication).

approach. Under this rubric, the default position of a court would be to presume extraterritorial application of a fundamental substantive liberty interest subject to consideration of whether such extraterritorial applicability would be impractical and anomalous.<sup>311</sup>

In the immigration context, substantive liberty interests likely would be implicated less frequently than constitutional equality protections. For the immigrant or refugee seeking admission, the substantive issue almost universally concerns whether the applicant should be admitted, and the substantive constitutional claim arising from any denial almost universally concerns whether the applicant was denied admission based on his membership in a particular suspect classification. Denial of admission rarely turns on whether and to what extent the applicant has participated in a constitutionally protected activity.

In the unusual instance where the exercise of a substantive constitutional right does bear on an applicant's admissibility—such as in the free speech example discussed above<sup>312</sup>—greater judicial deference should be paid to the political branches in determining the scope of extraterritorial constitutional protection. While the government's desire to exclude an individual based solely on his inherent membership in a protected class ought to be reviewed with the strictest of scrutiny, the government's desire to exclude an individual based on his voluntary engagement in unsavory activity deserves greater deference, even if that activity would otherwise be constitutionally protected on American soil.

### 3. Extraterritorial Application of Procedural Due Process Interests, Moderated as Needed by Foreign Policy and Other Practical Considerations

Unlike equal protection principles, which are binary in nature and not easily susceptible to a functional, case-by-case approach, procedural due process protections are perhaps the most flexible and adaptable of all constitutional rights. Indeed, the Court's own procedural due process jurisprudence contemplates a three-factor balancing test to determine what exact procedural protections are required in specific circumstances.<sup>313</sup> Such a flexible approach to procedural due process is especially appropriate in the extraterritorial context, where U.S.

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<sup>311</sup> See *Reid*, 354 U.S. at 75 (Harlan, J., concurring).

<sup>312</sup> See *supra* Section IV.D.2.

<sup>313</sup> See *Mathews v. Eldridge*, 424 U.S. 319, 336 (1976) (holding that the amount due process protections constitutionally require depends on the interests of the individual threatened with government action, the risk of error through the procedures used and probable value of any additional safeguards, and the cost and administrative burden of implementing the additional procedures).

government action abroad takes place in various states of instability, urgency, and political tension.

That said, basic procedural due process norms—such as the right for some level of review—are increasingly recognized as a fundamental component of international human rights.<sup>314</sup> This recognition that some measure of procedural due process is as important as the protection of substantive equality or liberty interests again suggests that some universal extraterritorial application of procedural due process protections is appropriate.<sup>315</sup>

Therefore, as with substantive liberty interests, courts should presume in all extraterritorial circumstances that noncitizens have some constitutional due process rights, but the exact scope and contours of those rights need not precisely mirror the protections afforded in domestic proceedings. In the immigration context, courts should assume that summary rejection or revocation of a status without any procedural protections violates constitutional principles,<sup>316</sup> and beyond this minimal threshold apply the functional approach on a case-by-case basis to determine what exact protections are necessary to ensure constitutional fairness that is neither impracticable nor anomalous in the given situation.

#### CONCLUSION

A perfect storm is brewing for extraterritorial constitutional immigration jurisprudence. The Court recently has expressed an increased willingness to scrutinize immigration decisions that test the limits of the plenary power doctrine. The Court also recently expanded constitutional protections for certain noncitizens outside the territorial

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<sup>314</sup> See generally Neuman, *supra* note 126 (discussing the concept of “global due process”); see also Moore & Moore, *supra* note 138, at 23 (“The Universal Declaration of Human Rights . . . provides that ‘everyone has the right to an effective remedy by the competent national tribunals for acts [that] violate the fundamental rights [that are] granted [to a person either] by the Constitution or by law.’” (quoting G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948))).

<sup>315</sup> See Moore & Moore, *supra* note 138, at 25 (“The idea of providing for due process as a requirement at international law is a concept that has been widely adopted.”).

<sup>316</sup> To the extent this proposal conflicts with decades-old plenary power precedent that whatever process Congress authorizes for an immigrant “is due process as far as an alien denied entry is concerned,” *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953), I submit that this proposal does not conflict with “contemporary constitutional norms” regarding procedural due process. Since *Mezei* was decided in 1953, the Court has found that the Constitution requires the availability of court-appointed attorneys for indigent criminal defendants, and in-person merit hearings for a range of administrative proceedings including denial of welfare benefits, parental termination proceedings, medical license revocation proceedings, and civil commitment proceedings. An immigration decision made summarily without any review or procedure whatsoever likewise would run afoul of such contemporary constitutional norms.



boundaries of the United States. Now, President Trump has promised to enact constitutionally suspect immigration policies that both test the limits of plenary power and affect millions of noncitizen immigrants abroad.

This Article makes a first attempt at squarely linking the previously parallel doctrines of immigration plenary power and extraterritorial constitutional law to examine what may happen in future court cases and to offer modest proposals for how to approach these unsettled and difficult issues. While the political branches' power over immigration remains broad and the extraterritorial extension of constitutional provisions remains limited and uneven, we may very well have entered a new era that will bring the comparative reach of these doctrines closer together. Whether any immigrants affected by extreme vetting will fit within this doctrinal Venn diagram remains to be seen.