

# Extraterritoriality and the Interest of the United States in Regulating Its Own

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## ESSAY

# EXTRATERRITORIALITY AND THE INTEREST OF THE UNITED STATES IN REGULATING ITS OWN

*Gerald L. Neuman*†

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### INTRODUCTION

As an exemplar of extraterritorial application of United States law, consider the recent decision of a Seventh Circuit panel in *United States v. Stokes*.<sup>1</sup> A teacher in Florida had been prosecuted for indecently touching two of his male pupils and after a guilty plea had been placed on probation. The Florida authorities then permitted him—whether naively or cynically—to move to Thailand for the remainder of his probation. Reports of his continued involvement there in abusing minors came to the attention of agents of the U.S. bureau of Immigration and Customs Enforcement (ICE) who were stationed in Thailand to combat child sex tourism.<sup>2</sup>

The ICE agents prompted and participated in a search of the ex-teacher's home by Thai police. Despite the role of U.S. agents, the search was not authorized by any U.S. warrant, but rather by a Thai warrant, which may have focused inaptly on the possibility of finding narcotics. They seized a digital camera, computer, and compact discs with ample photographic documentation of his sexual activities with adolescent and prepubescent Thai boys.

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<sup>1</sup> 726 F.3d 880 (7th Cir. 2013), *cert. denied*, 134 S. Ct. 713 (2013).

<sup>2</sup> *Id.* at 886; see Maureen Atwell, Note, *Combating American Child Sex Tourism in Cambodia Under the 2003 U.S. Protect Act*, 26 WIS. INT'L L.J. 163, 178–81 (2008) (describing overseas investigation of violations of federal law against child sex tourism by ICE agents).

The ex-teacher was eventually extradited to the United States, originally for trial under 18 U.S.C. § 2423(c). This provision criminalizes, inter alia, illicit sexual conduct with a minor by a U.S. citizen who travels in foreign commerce; the breadth of the prohibition has led to substantial controversy.<sup>3</sup> The prosecution then realized that this subsection had been enacted after the ex-teacher's arrival in Thailand. With the express consent of Thailand, the prosecution substituted charges under an older provision, 18 U.S.C. § 2423(b), which already criminalized travel in foreign commerce for the purpose of engaging in prohibited sexual acts with minors.<sup>4</sup>

Once brought to trial, the defendant moved for suppression of the seized evidence under both the Warrant Clause and the Reasonableness Clause of the Fourth Amendment. The trial and appeals courts rejected both claims, holding first that the Warrant Clause did not apply at all to a search by U.S. agents in Thailand, regardless of the target's citizenship, and secondly that the search was reasonable.<sup>5</sup> When the court of appeals turned to the question of reasonableness, it began its analysis with the following observations:

Whether a search is reasonable under the Fourth Amendment depends on the totality of the circumstances and requires the court to weigh the intrusion on individual privacy against the government's need for information and evidence. On the individual side of the ledger, the privacy of the home is central to the Fourth Amendment right. Against that core individual right is the government's strong interest in preventing the sexual exploitation of children.<sup>6</sup>

The court concluded that in view of the circumstances, including the existence of probable cause and the manner in which the Thai warrant was executed, the search was reasonable.<sup>7</sup>

The Seventh Circuit thus confirmed that the federal government has a strong, constitutionally cognizable interest in preventing the sex-

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<sup>3</sup> See, e.g., *United States v. Bianchi*, 386 F. App'x 156, 163 (3d Cir. 2010) (Roth, J., dissenting) (arguing that § 2423(c), as applied to unpaid sexual conduct, is beyond the scope of the commerce power); *United States v. Clark*, 435 F.3d 1100, 1117 (9th Cir. 2006) (Ferguson, J., dissenting) (arguing that § 2423(c) is beyond the scope of the commerce power); Naomi H. Goodno, *When the Commerce Clause Goes International: A Proposed Legal Framework for the Foreign Commerce Clause*, 65 FLA. L. REV. 1139, 1210–11 (2013) (arguing that the ability of the Commerce Clause to support prosecution under § 2423(c) depends on the facts of each case); Jessica E. Notebaert, Note, *The Search for a Constitutional Justification for the Noncommercial Prong of 18 U.S.C. § 2423(c)*, 103 J. CRIM. L. & CRIMINOLOGY 949 (2013) (arguing that § 2423(c) exceeds congressional power under the Foreign Commerce Clause but can be supported as the implementation of a treaty).

<sup>4</sup> *Stokes*, 726 F.3d at 888–90. The consent of Thailand served to waive the “rule of specialty” in extradition law, which restricts a receiving state from prosecuting an extradited individual on charges other than the charges on which extradition was granted.

<sup>5</sup> See *id.* at 887, 893.

<sup>6</sup> *Id.* at 893 (citations omitted).

<sup>7</sup> *Id.* at 893–94.

ual exploitation of foreign children abroad that is capable of justifying a relevant intrusion on the privacy of a U.S. citizen. That welcome proposition provides the starting point for the inquiry in this Essay. The plain wording of the proposition might be contrasted with the Supreme Court's hesitancy in *New York v. Ferber*, justifying a ban on distributing child pornography by reference to the risk that children within the state's borders would become involved in its production.<sup>8</sup>

This Essay will explore a few of the many legal dimensions of the federal government's regulation of harmful conduct of its own officials and its own nationals outside the borders of the United States.<sup>9</sup> First, Part I will discuss statutory regulation of the action of federal officials, as an essential aspect of defining their roles abroad. Second, Part II will address the currently disputed power of Congress, under the Foreign Commerce Clause, to protect foreign citizens against harm—including sexual abuse—inflicted by U.S. nationals in foreign territory. Finally, Part III will examine recent developments concerning constitutional restrictions on extraterritorial federal action, including the denial that the Warrant Clause applies to U.S. citizens, and the surprisingly limited effect of the Supreme Court's 2008 decision in *Boumediene v. Bush*<sup>10</sup> on other constitutional rights of foreign nationals. The common theme that will emerge from these related inquiries is that legal interpretation must remain open to appropriate recognition of extraterritorial harm.

## I

### THE FEDERAL GOVERNMENT'S INTEREST IN REGULATING ITS OWN OFFICIALS

In the widely noted decision of the Supreme Court in *Morrison v. National Australia Bank Ltd.*, Justice Antonin Scalia gave characteristically stark statement to a presumption against extraterritorial applicability of federal statutes as a canon of interpretation.<sup>11</sup> Justice Scalia wrote, "When a statute gives no clear indication of an extraterritorial

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<sup>8</sup> 458 U.S. 747, 765–66 & n.19 (1982).

<sup>9</sup> The title of this Essay echoes that of John Hart Ely's classic study, *Choice of Law and the State's Interest in Protecting Its Own*, 23 WM. & MARY L. REV. 173 (1981). Ely decried a tendency of the interest analysis methodology in the conflict of laws to assume that states had lesser interest, or no interest, in extending protection to citizens of other states, and he explored the problematic character of such interstate discrimination under constitutional federalism. Ely also emphasized that states often had an interest in regulating the conduct of their own citizens, and in deterring them from misconduct by making them liable to noncitizens whom they harm. This Essay pursues the latter point, shifting the context from state to federal regulation and from interstate to international situations.

<sup>10</sup> 553 U.S. 723 (2008) (holding that the Habeas Corpus Suspension Clause of Article I, Section 9, applied to foreign nationals detained at the Guantanamo Bay Naval Base in Cuba).

<sup>11</sup> *Morrison v. Nat'l Austl. Bank Ltd.*, 130 S. Ct. 2869 (2010).

application, it has none.”<sup>12</sup> He emphasized that the “canon or presumption applies regardless of whether there is a risk of conflict between the American statute and a foreign law.”<sup>13</sup>

Nonetheless, later in the same opinion, Justice Scalia undermined the simplicity of his canon. First, he elaborated:

But we do not say, as the concurrence seems to think, that the presumption against extraterritoriality is a “clear statement rule,” if by that is meant a requirement that a statute say “this law applies abroad.” Assuredly context can be consulted as well.<sup>14</sup>

Second, recognizing that cases frequently arise from the combination of numerous acts, some of which may take place within the United States and others abroad, he placed reliance on the “focus” of a statute, insisting that the prohibition of deceptive conduct in connection with the purchase or sale of a security should be understood as centering on purchase-and-sale transactions and not on deceptive acts.<sup>15</sup>

The manipulable concept of “focus” has provoked commentary by others;<sup>16</sup> I will address here instead a question of “context.” I do not want to discuss how Justice Scalia may have understood “context,” but rather to give an example of how the “context” of a statute should be understood in giving it a sensible scope of geographic application.

The federal government has an important interest in regulating the conduct of its own officials. When they carry out their functions, they act on behalf of the government within a structure of constitutional, legislative, and administrative rules, as well as ad hoc orders from other officials with power to command. These rules confer powers, obligations, and benefits on the officials, and define at least partially their relationship to other federal officials. Federal officials also have personal lives that include activities outside the scope of their employment, although even their personal lives may be constrained by conflict of interest rules and other professional obligations.<sup>17</sup> When federal officials travel outside the national territory in order to perform their functions, they are not going on vacation in their personal and private capacity. Their official roles, and many of the entail-

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<sup>12</sup> *Id.* at 2878.

<sup>13</sup> *Id.* at 2877–78.

<sup>14</sup> *Id.* at 2883 (citation omitted).

<sup>15</sup> *See id.* at 2884.

<sup>16</sup> *See, e.g.,* Lea Brilmayer, *The New Extraterritoriality: Morrison v. National Australia Bank, Legislative Supremacy, and the Presumption Against Extraterritorial Application of American Law*, 40 SW. U. L. REV. 655 (2011); Hannah L. Buxbaum, *Morrison v. National Australia Bank: Defining the Domestic Interest in International Securities Litigation*, 105 AM. SOC'Y INT'L L. PROC. 402 (2011); John H. Knox, *The Unpredictable Presumption Against Extraterritoriality*, 40 SW. U. L. REV. 635 (2011); Austen L. Parrish, *Evading Legislative Jurisdiction*, 87 NOTRE DAME L. REV. 1673 (2012).

<sup>17</sup> *See* Beth Nolan, *Public Interest, Private Income: Conflicts and Control Limits on the Outside Income of Government Officials*, 87 NW. U. L. REV. 57, 58–59 (1992).

ments of those roles, travel with them. Depending on the situation, not every rule may apply—for example, officials may lack powers in foreign territory that they possessed at home, and different procedural requirements may be appropriate.<sup>18</sup> But the officials continue to act on behalf of their own government, which defines their place in its hierarchy and a framework within which they conduct themselves. They do not become unregulated plenipotentiaries when they cross the border.<sup>19</sup>

Neither do they become creatures of foreign law. There may indeed be exceptional circumstances where one government loans or “seconds” an official to another government or to an international organization, with the consent that the official’s role be temporarily redefined within a foreign hierarchy.<sup>20</sup> However, in ordinary circumstances when federal officials travel to foreign territory, the foreign government is not thereby empowered to rewrite the official’s duties, rights, and chain of command.<sup>21</sup> Federal officials may be constrained by foreign law, depending on the terms of their admission to foreign territory, but they are not primarily guided by it.

The “context” of government service thus provides an important element capable of supporting the interpretation of statutes determining federal officials’ status and activities as applying outside the borders of the United States. The federal government has an interest in structuring the executive branch, and indeed the Necessary and Proper Clause assigns to Congress the authority to enact legislation for that purpose.<sup>22</sup>

The federal government also has an interest in ensuring that the powers it confers on its officials are not used to impose harm. Their

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<sup>18</sup> See, e.g., RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 432(2) (1987) (“A state’s law enforcement officers may exercise their functions in the territory of another state only with the consent of the other state, given by duly authorized officials of that state.”); José A. Cabranes, *Our Imperial Criminal Procedure: Problems in the Extraterritorial Application of U.S. Constitutional Law*, 118 YALE L.J. 1660, 1679 n.74 (2009) (observing that the need for cooperation with foreign regulatory agencies affects the procedures that federal agencies are able to employ abroad).

<sup>19</sup> I emphasize the example of federal officials based in the United States and temporarily abroad, but similar statements could be made about officials stationed abroad for a longer period, or officials who were already living abroad when they were hired.

<sup>20</sup> See, e.g., David J. Scheffer, *U.S. Policy on International Criminal Tribunals*, 13 AM. U. INT’L L. REV. 1389, 1390 (1998) (describing U.S. contribution of “scores of seconded expert personnel” to the International Criminal Tribunal for the former Yugoslavia).

<sup>21</sup> See, e.g., Emoluments Clause and World Bank, 2001 WL 34610590, at \*1–3 (Op. O.L.C. 2001) (explaining how the Emoluments Clause of the Constitution is applied to prevent foreign governments from exerting influence on federal government employees but that it does not apply to international organizations of which the United States is a member).

<sup>22</sup> See John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939, 1943–44 (2011) (describing alternative interpretations of the scope of congressional power under the Necessary and Proper Clause to structure the executive branch).

acts are its own acts, and the federal government has an interest in the consequences. The acts may directly harm U.S. citizens, at home or abroad, or may harm outsiders in ways that provoke responses that harm U.S. citizens; they may damage the image of the United States abroad in ways that make it more difficult for the government to pursue other goals.<sup>23</sup> Even without such concrete reactions, imposition of external harm may violate citizens' conception of the duties that they owe to other human beings, or of the role that their political community should play as a responsible participant in a world largely organized by the interaction of political communities.<sup>24</sup>

The federal government has indisputable constitutional authority to take both internal and external harms into account in regulating the conduct of its own officials.<sup>25</sup> The sources of constitutional authority by which they act also provide the basis for authority to control their actions (coupled, if need be, with the Necessary and Proper Clause).<sup>26</sup>

The Supreme Court has not always construed spatially ambiguous statutory restraints on federal officials as affording protection against extraterritorial harms. In one prominent precedent,<sup>27</sup> the Supreme Court held in *Sale v. Haitian Centers Council, Inc.* that the statutory prohibition on the return of refugees to countries where they risked persecution (known in refugee law as "refoulement") did not apply on Coast Guard vessels engaged in the "interdiction" of Haitians on the high seas.<sup>28</sup> The majority opinion actually involved two distinct instances of statutory interpretation. First, it adopted an extremely counterintuitive interpretation of 8 U.S.C. § 1182(f) as providing au-

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<sup>23</sup> See Glenn R. Schmitt, *Closing the Gap in Criminal Jurisdiction over Civilians Accompanying the Armed Forces Abroad—A First Person Account of the Creation of the Military Extraterritorial Jurisdiction Act of 2000*, 51 CATH. U. L. REV. 55, 77 (2001) (listing adverse consequences when the United States is unable to punish crimes by civilian employees accompanying its troops abroad).

<sup>24</sup> See Kermit Roosevelt III, *Guantanamo and the Conflict of Laws: Rasul and Beyond*, 153 U. PA. L. REV. 2068–69 (2005) (arguing that extraterritorial limits on U.S. official action should reflect the kind of a people Americans aspire to be).

<sup>25</sup> See, e.g., *United States v. Ayesh*, 702 F.3d 162 (4th Cir. 2012) (applying conflict of interest statute, 18 U.S.C. § 208, to federal employee in Iraq); *United States v. Green*, 654 F.3d 637 (6th Cir. 2011) (involving crimes a soldier committed against civilians in Iraq); *Scarbeck v. United States*, 317 F.2d 546 (D.C. Cir. 1962), (applying statute on disclosure of classified documents, 50 U.S.C. § 783(b), to federal employee in Poland); *United States v. Mitchell*, No. 92-5072, 1993 WL 136996 (5th Cir. April 30, 1993) (discussing a federal employee who extorted bribes in Dominican Republic).

<sup>26</sup> See, e.g., *Hankins v. Lyght*, 441 F.3d 96, 106–07 (2d Cir. 2006) (observing that if Congress has the power to enact a statute, then Congress has power under the Necessary and Proper Clause to amend the statute for a permissible purpose).

<sup>27</sup> I should disclose that I was involved in the dispute, including by having written an amicus brief in support of the petitioners (who lost).

<sup>28</sup> 509 U.S. 155 (1993).

thority for high seas interdiction.<sup>29</sup> That subsection, contained in a section describing categories of aliens subject to exclusion from the United States,<sup>30</sup> authorized the President to “suspend the entry” of any class of aliens, and was most naturally read as empowering the President to make temporary additions to the list of excludable aliens, not to create an extraterritorial substitute for statutory methods of dealing with aliens who were already excludable.<sup>31</sup> However, it is understandable that the majority wished to endorse a statutory basis for the creation of the interdiction program, rather than leave it to rest on inherent executive power.

Second, the *Sale* majority turned to the question of whether the prohibition on refoulement applied to the interdiction program and required screening to ensure that asylum seekers with credible claims were not returned. (The interdiction program had originally recognized this requirement, but screening was abandoned in May 1992.) The majority invoked the presumption against extraterritoriality as an important part of its reasoning for concluding that the statutory prohibition on refoulement did not apply outside the territory of the United States, and therefore did not limit high seas interdiction.<sup>32</sup> The majority declined to give weight to the fact that the prohibition applied only to the action of government officials and could not conflict with the laws of other nations.<sup>33</sup>

In closing, the *Sale* majority emphasized that the presumption against extraterritoriality “has special force when we are construing treaty and statutory provisions that may involve foreign and military affairs for which the President has unique responsibility.”<sup>34</sup> In that field, it could be suggested that the presumption against extraterritoriality does not really operate but that the geographical scope of ambiguous statutory provisions will be construed broadly when they enhance presidential power and narrowly when they limit presidential power.

Outside this fraught field of presidential responsibility, however, the need for domestic rather than foreign law to control domestic officials should weigh as a contextual factor favoring extraterritorial application of statutes. From a perspective internal to the federal government, some provisions will ensure proper obedience of federal officials to their superiors, and others will ensure respect for the rights

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<sup>29</sup> *Id.* at 172.

<sup>30</sup> *See generally* 8 U.S.C. § 1182 (2012). The current version of § 1182(a) labels the categories as “inadmissible” rather than “excludable,” following a change of statutory terminology in 1996.

<sup>31</sup> *See Sale*, 509 U.S. at 200–01 n.9 (Blackmun, J., dissenting).

<sup>32</sup> *Id.* at 173–77 (majority opinion).

<sup>33</sup> *Id.* at 173–74.

<sup>34</sup> *Id.* at 188.



of subordinate officials.<sup>35</sup> From an external perspective, statutes may also afford protection to citizens or foreign individuals subject to federal power abroad.

## II

### THE FEDERAL GOVERNMENT'S POWER TO REGULATE ITS OWN CITIZENS

The defendant in the Seventh Circuit's *Stokes* decision had originally been extradited on the basis of 18 U.S.C. § 2423(c), but the prosecution substituted charges under an older provision after it noticed that the defendant's travel to Thailand preceded the enactment of § 2423(c).<sup>36</sup> Another result of the substitution was that the proceedings avoided any controversy over Congress's power to regulate the defendant's conduct abroad.<sup>37</sup>

As a matter of international law, regulation by the United States of the harmful conduct of its own nationals enjoys the support of a traditional basis of prescriptive jurisdiction: the nationality principle.<sup>38</sup> But the permissibility of legislation from the international perspective does not necessarily entail that the Constitution has vested in Congress the power to enact that legislation. That domestic question requires the identification of a source of federal power, with or without the assistance of international law as an interpretive input.<sup>39</sup>

Depending on the conduct at issue, a number of different express or implied powers of Congress may support extraterritorial regulation, either directly or with the aid of the Necessary and Proper Clause. Direct powers of regulation include the power to punish counterfeiting; the power to define and punish piracies and felonies committed on the high seas, and offenses against the law of nations; and the power to make rules for the government and regulation of the land and naval forces.<sup>40</sup> Indirect bases of regulation include the power to collect taxes, duties, imposts and excises, and the treaty

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<sup>35</sup> See, e.g., *Gonji v. Merit Sys. Prot. Bd.*, No. 94-3456, 1995 WL 348010, at \*4-5 (Fed. Cir. June 9, 1995) (employment-status dispute involving appointee of Department of Defense Dependent School in Germany); *N. Ger. Area Council, Overseas Educ. Ass'n v. FLRA*, 805 F.2d 1044, 1047-48 (D.C. Cir. 1986) (dispute over standard of discipline, ancillary to grievance proceeding of employee of Department of Defense Dependent School in Germany).

<sup>36</sup> See *United States v. Stokes*, 726 F.3d 880, 888 (7th Cir. 2013), *cert. denied*, 134 S. Ct. 713 (2013).

<sup>37</sup> See *id.* at 888-90.

<sup>38</sup> See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 402 & cmt. a (1987).

<sup>39</sup> In the past, the Supreme Court has repeatedly invoked international law in aid of its interpretation of the powers of the federal government. See Gerald L. Neuman, *International Law as a Resource in Constitutional Interpretation*, 30 HARV. J.L. & PUB. POL'Y 177, 184-85 (2006).

<sup>40</sup> See U.S. CONST. art. I, § 8, cls. 6, 10, 14.

power, both supplemented by the Necessary and Proper Clause.<sup>41</sup> In the absence of a relevant treaty,<sup>42</sup> a source for extraterritorial regulation is often sought in the power to regulate commerce with foreign nations. The discussion here will focus on this foreign commerce power.

In *United States v. Bianchi*, a divided Third Circuit panel upheld a conviction under § 2423(c) as within congressional power under the Commerce Clause.<sup>43</sup> Judge Roth dissented, arguing that non-commercial sexual abuse of a minor overseas by a U.S. citizen could not be reached by the foreign commerce power merely on the basis that the U.S. citizen had traveled abroad.<sup>44</sup> The dissenting judge applied the framework of *United States v. Lopez*<sup>45</sup> to the foreign commerce power.

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<sup>41</sup> See *id.* at cls. 1, 18; U.S. CONST. art. II, § 2, cl. 2.

<sup>42</sup> This Essay will not make claims about the extent of congressional power to implement treaties, given the ongoing revisionist attack on that power, which was raised but avoided in *Bond v. United States*, 134 S. Ct. 2077 (2014). Section 2423(c) has also been justified as an effort to implement a treaty, the Optional Protocol to the United Nations Convention on the Rights of the Child on the Sale of Children, Child Prostitution, and Child Pornography, although the prohibitions of § 2423(c) extend beyond the subject of child prostitution to include noncommercial sex. See 18 U.S.C. § 2423(c) (2012); Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, May 25, 2000, 2171 U.N.T.S. 227; *United States v. Bollinger*, No. 3:12-cr-173-RJC, 2013 WL 4495174, at \*4 (W.D.N.C. Aug. 19, 2013) (avoiding doubts about the Commerce Clause basis of § 2423(c) in relation to noncommercial sex by upholding it as rationally related to the Optional Protocol); *United States v. Martinez*, 599 F. Supp. 2d 784, 807–08 (W.D. Tex. 2009) (discussing relationship between § 2423(c) and the Optional Protocol while upholding it under the Commerce Clause); *United States v. Frank*, 486 F. Supp. 2d 1353, 1358 (S.D. Fla. 2007) (upholding § 2423(c), “insofar as commercial sex with minors is concerned,” as a reasonable implementation of the Optional Protocol).

<sup>43</sup> See 386 F. App’x 156, 162 (3d Cir. 2010).

<sup>44</sup> See *id.* at 163–64.

<sup>45</sup> 514 U.S. 549 (1995). The *Lopez* decision, a centerpiece of Rehnquist Court federalism, marked the first time since the 1930s that the Supreme Court struck down a congressional statute as reaching beyond the power to regulate interstate commerce. In so doing, Chief Justice Rehnquist summarized modern case law as identifying the following three broad categories of activity that Congress may regulate under its [interstate] commerce power. First, Congress may regulate the use of channels of interstate commerce. Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or person or things in interstate commerce, even though the threat may come only from intrastate activities. Finally, Congress’ commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, *i.e.*, those activities that substantially affect interstate commerce.

*Id.* at 558–59 (citations omitted). He also suggested that the use of the aggregation principle of *Wickard v. Filburn*, 317 U.S. 111 (1942), which adds up the effects of individual occurrences across the class of actions regulated by the statute in order to demonstrate substantial effect on interstate commerce, may be limited to statutes regulating “economic activity,” *Lopez*, 514 U.S. at 560, a suggestion that the Court strengthened in *United States v. Morrison*, 529 U.S. 598, 610–11 (2000).

She argued:

[T]here is no rational basis to conclude that an illicit sex act with a minor undertaken on foreign soil, perhaps years after legal travel and devoid of any exchange of value, substantially affects foreign commerce. Where the perpetrator does not pay, or give other value, for the illicit interactions, the activity being regulated is not economic, and it is therefore beyond the reach of Congress's power under the Commerce Clause.<sup>46</sup>

She concluded that “[v]esting Congress with such a general international police power would violate both Bianchi’s constitutional rights and the limited nature of our federal government.”<sup>47</sup>

In my view, the dissenting judge’s analysis is fundamentally misguided. The Foreign Commerce Clause should not be interpreted by rote transposition of the *Lopez* test for congressional power over interstate commerce. The *Lopez* categories cannot be equated with the meaning of the constitutional text but, rather, are doctrinal approximations adopted by the Supreme Court to systematize its case law concerning interstate commerce within a broader structural understanding of the relationship between state and federal power.<sup>48</sup> Applying these categories as the definition of congressional power over foreign commerce would require additional justification.

The main argument for applying the *Lopez* categories to foreign commerce is the ease of the transfer—it requires little additional thought, and it simplifies the judicial task by allowing the less frequent foreign commerce cases to be decided by analogy to the more frequent interstate commerce cases, thus fostering predictability.<sup>49</sup> It also creates an aesthetically pleasing symmetry between two components of a single clause of Article I and strengthens the legal fiction that the *Lopez* categories are derived logically from the meaning of the Constitution.<sup>50</sup>

On the other hand, the *Lopez* formulation serves purposes that are inapposite to the issues that the foreign commerce power raises.

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<sup>46</sup> *Bianchi*, 386 F. App’x at 163–64 (citations omitted).

<sup>47</sup> *Id.* at 164.

<sup>48</sup> See generally Mitchell N. Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1, 7–18 (2004) (proposing taxonomy of decision rules adopted to give effect in adjudication to constitutional provisions); Richard H. Fallon, Jr., *Foreword: Implementing the Constitution*, 111 HARV. L. REV. 54, 61–73 (1997) (explaining and illustrating the Supreme Court’s adoption of multifactor tests that supplement the Constitution’s meaning in order to implement it effectively).

<sup>49</sup> See, e.g., *United States v. Clark*, 435 F.3d 1100, 1117–18 (9th Cir. 2006) (Ferguson, J., dissenting) (objecting to majority’s failure to apply the “time-tested framework” of *Lopez* to foreign commerce cases).

<sup>50</sup> See, e.g., Saikrishna Prakash, *Our Three Commerce Clauses and the Presumption of Intrasentence Uniformity*, 55 ARK. L. REV. 1149, 1150 (2003) (applying “a more appealing and intuitive norm of intrasentence uniformity” to equate the powers of Congress over interstate and foreign commerce).

The most basic purpose of *Lopez* was to preserve state sovereignty by preventing the absorption of all regulatory functions by the federal government.<sup>51</sup> Foreign states are in no danger of having that happen—any intrusion of U.S. regulation would be interstitial at best, even if particular intrusions might be economically or politically significant. *Lopez* attempted to establish a barrier between “what is truly national and what is truly local,” putting particular emphasis on “areas such as criminal law enforcement or education where States historically have been sovereign.”<sup>52</sup> The traditional division between what has been national and what has been local reflects accidents of American historical development, which differ both from distinctions in the broader world between matters of transnational and domestic concern and from conceptions of federalism in other countries and regions.<sup>53</sup> Both the majority and the concurrence of Justices Anthony Kennedy and Sandra Day O’Connor in *Lopez* emphasized that the federal government was regulating matters that the states would otherwise have the power to regulate within their respective borders.<sup>54</sup> In contrast, effective extraterritorial regulation in foreign countries is generally beyond the power of the states to accomplish on their own, and the Constitution does not treat foreign legislation—which may be hostile to U.S. interests or inconsistent with U.S. values—as equivalent to U.S. domestic legislation, or as a reliable vehicle for accomplishing constitutional purposes.<sup>55</sup>

The concern is also sometimes expressed that it is necessary to apply the *Lopez* limits or their equivalent to congressional power over foreign commerce, because otherwise the limited nature of the federal government would not be respected, and once U.S. citizens traveled abroad, every action they engaged in there, no matter how long they stayed, would be subject to congressional regulation.<sup>56</sup> I do not mean to endorse the idea that the foreign commerce power is actually

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<sup>51</sup> See *United States v. Lopez*, 514 U.S. 549, 557 (1995).

<sup>52</sup> *Id.* at 564, 567–68.

<sup>53</sup> See Vicki C. Jackson, *Narratives of Federalism: Of Continuities and Comparative Constitutional Experience*, 51 DUKE L.J. 223, 272–74 (2001) (arguing that constitutional comparisons regarding federalism are less often useful than comparisons regarding individual rights, because allocations of powers in federal systems result from political compromises responsive to particular historical situations).

<sup>54</sup> See *Lopez*, 514 U.S. at 561–62; *id.* at 580–83 (Kennedy, J., concurring).

<sup>55</sup> The discussion in this Essay focuses on regulation of overseas conduct under the foreign commerce power. Federalism concerns may be more relevant to regulation of conduct within a U.S. state, for example, of citizens who have previously traveled in foreign commerce.

<sup>56</sup> See, e.g., *United States v. Clark*, 435 F.3d 1100, 1120 (9th Cir. 2006) (Ferguson, J., dissenting) (“On some level, every act by a U.S. citizen abroad takes place subsequent to an international flight . . .”).

that broad,<sup>57</sup> but I do want to point out that this supposed calamity would not be inconsistent with the American constitutional system. It would simply mean that Congress would possess, in substantive terms, the combined powers of the national legislature and a state legislature over U.S. citizens while they travel abroad. That is essentially the same power that Congress currently possesses over the District of Columbia, and historically it is the same plenary power that Congress exercised over the Western territories before they became states.<sup>58</sup> *Lopez* describes the limits of congressional power vis-à-vis the fifty states, not the limits of congressional power in general.

One might express a different concern about tyranny over U.S. citizens abroad, namely that the foreign commerce power might be exercised without constraint by the Bill of Rights because of the citizens' extraterritorial location.<sup>59</sup> That threat, however, would already result from a foreign commerce power defined in terms of the *Lopez* categories.<sup>60</sup> The solution surely lies more in an appropriate interpretation of the extraterritorial effect of the Bill of Rights than in an arbitrary reduction of the foreign commerce power.

As a result, the carve outs that the *Lopez* formulation makes from the ordinary operation of the Interstate Commerce Clause and the Necessary and Proper Clause in order to favor state sovereignty lack justification as criteria by which to judge congressional exercises of the foreign commerce power. This includes the heightened "substantial effect" standard, and especially the limitation on using the *Wickard v. Filburn* aggregation technique for satisfying that standard to "economic activity."<sup>61</sup> It is appropriate for Congress to be concerned

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<sup>57</sup> If pressed for an example at oral argument, I would describe a statute requiring all U.S. citizens who travel abroad to sleep on their backs, rather than a statute requiring or forbidding them to purchase foreign broccoli, as beyond the reach of the foreign commerce power.

<sup>58</sup> See, e.g., *Palmore v. United States*, 411 U.S. 389, 397–98, 402–03 (1973) (describing the power of Congress to legislate in the District of Columbia and the territories as combining the powers of national and state or local governments).

<sup>59</sup> See, e.g., Goodno, *supra* note 3, at 1194–95 (emphasizing the founders' vision of limited government and rights retained by the people as a reason to limit the reach of the Foreign Commerce Clause).

<sup>60</sup> See, e.g., *United States v. Getto*, 729 F.3d 221, 225, 228 (2d Cir. 2013) (denying the applicability of the Warrant Clause of the Fourth Amendment to search in Israel, in prosecution of U.S. citizen for mail fraud and wire fraud).

<sup>61</sup> Under *Lopez*, the criterion of "economic activity" applies only to limit the availability of *Wickard* aggregation within the "substantial effect" category. See *United States v. Lopez*, 514 U.S. 549, 560 (1995). The power of Congress to regulate also extends to noneconomic use of the channels of interstate commerce and noneconomic harms by or against travelers in interstate commerce. Indeed, walking across the border between two states is interstate commerce, and walking across the border between Mexico and the United States is undoubtedly foreign commerce. See *Marshall v. Victoria Transp. Co.*, 603 F.2d 1122, 1125 (5th Cir. 1979) (walking across a bridge from Mexico and then taking a local bus is foreign commerce). Cf. *United States v. Al-Zubaidy*, 283 F.3d 804, 812 (6th Cir.

about a single murder of a U.S. citizen abroad, even if Congress must ordinarily leave prosecution of murders at home to the states.<sup>62</sup>

When regulation is based on concern about harms that U.S. citizens may cause abroad, the reliance on jurisdictional elements, sometimes known as “jurisdictional hooks,” to support congressional power is appropriate.<sup>63</sup> U.S. citizens travel abroad under the protection of the United States, reside abroad under the protection of the United States, and have the right to return to the United States whenever they please.<sup>64</sup> The use of the United States as a base from which to inflict harms, the use of a U.S. passport to gain access to the locale in which the harms are inflicted, and the availability of the United States as a refuge from the consequences of one’s actions, all increase the risk to victims abroad. To borrow a phrase from Justice Samuel Alito, when the exercise of valid federal power “creates or exacerbates a dangerous situation . . . , Congress has the power to try to eliminate or at least diminish that danger.”<sup>65</sup> In some situations, Congress may find that the appropriate jurisdictional hook is travel from the United States with the purpose of engaging in misconduct; in other situations the appropriate jurisdictional hook may be travel from the United States that creates the occasion for misconduct. Another possibility would be misconduct abroad followed by flight to the United States to evade foreign prosecution.<sup>66</sup>

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2002) (ban on interstate stalking survives *United States v. Morrison*); *United States v. Wright*, 128 F.3d 1274, 1275 (8th Cir. 1997) (ban on interstate stalking survives *Lopez*); *Edwards v. California*, 314 U.S. 160, 177 (1941) (protecting interstate transportation of indigents by automobile under the dormant Commerce Clause).

<sup>62</sup> See 18 U.S.C. § 1119 (2012) (penalizing murder or attempted murder of a U.S. national in a foreign country by another U.S. national, but subordinating federal prosecution to prosecution abroad); *United States v. Wharton*, 320 F.3d 526 (5th Cir. 2003) (affirming conviction for violation of § 1119).

<sup>63</sup> See *Sabri v. United States*, 541 U.S. 600, 605 (2004) (observing that the Court does not “presume the unconstitutionality of federal criminal statutes lacking explicit provision of a jurisdictional hook”); *Lopez*, 514 U.S. at 561–62 (referring to the use of a “jurisdictional element”); *United States v. Sawyer*, 733 F.3d 228, 229 n.1 (7th Cir. 2013) (explaining the term “jurisdictional hook”); *United States v. Runyon*, 707 F.3d 475, 489–90 (4th Cir. 2013) (using the terms “jurisdictional hook” and “jurisdictional element” interchangeably).

<sup>64</sup> See, e.g., *United States v. Laub*, 385 U.S. 475, 481 (1967) (“A passport is a document identifying a citizen, in effect requesting foreign powers to allow the bearer to enter and to pass freely and safely, recognizing the right of the bearer to the protection and good offices of American diplomatic and consular officers.”); *Hernandez v. Cremer*, 913 F.2d 230, 236 (5th Cir. 1990) (emphasizing the constitutional right of a U.S. citizen to reenter the country after traveling abroad).

<sup>65</sup> *United States v. Kebodeaux*, 133 S. Ct. 2496, 2509 (2013) (Alito, J., concurring). I do not claim that Justice Alito would necessarily agree with my application of his principle.

<sup>66</sup> Cf. 18 U.S.C. § 1073 (penalizing, inter alia, travel in interstate or foreign commerce with intent to avoid prosecution under state law); *Hett v. United States*, 353 F.2d 761 (9th Cir. 1966) (involving prosecution for aiding and abetting flight to Brazil to avoid prosecution in Washington).

In fact, the jurisdictional hook of travel, although it may be reassuring, is misleading. Reliance on travel as a basis for regulating U.S. citizens abroad appears to reflect the assumption that the Foreign Commerce Clause relates only to interactions between the United States and foreign nations viewed as geographical entities. This assumption may lead to an exaggerated demand for a close “nexus” between the conduct being regulated and U.S. territory in order to validate an exercise of the foreign commerce power. Instead, it should be recognized that the Foreign Commerce Clause also relates to interactions between the United States and foreign nations as political communities.<sup>67</sup> Even U.S. citizens who were born abroad and remain abroad may be engaged in foreign commerce.

A different illustration of the poor fit between the *Lopez* doctrine and foreign commerce emerges from the second *Lopez* category, empowering Congress “to regulate and *protect* the instrumentalities of interstate commerce, or *persons or things in interstate commerce, even though the threat may come only from intrastate activities.*”<sup>68</sup> Within the United States, it is understandable that the federal government can protect travelers in interstate commerce from theft, assault, fraud, or discrimination while they travel, regardless of the identity of the culprit, and can back its regulation with criminal sanctions.<sup>69</sup> Outside the United States, however, the exercise of a corresponding power to penalize harms to traveling citizens, regardless of the identity of the culprit, would amount to a massive assertion of jurisdiction under the “passive personality” principle, far beyond what international law would support. Although foreign commerce doctrine can be understood as including placeholders, assigning Congress powers that it could not effectively exercise while awaiting favorable future conditions, it seems more pertinent to say that this *Lopez* category describes poorly what Congress does and can do abroad. Whereas Congress can regulate domestic transactions symmetrically, imposing a rule of conduct and defining the consequences for both parties,<sup>70</sup> for overseas transactions Congress may recognize the need to regulate asymmetrically, limiting the consequences to those within its capacity. Indeed, in the context of commercial sex tourism, the effective power of Congress to impose

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<sup>67</sup> See *Trade-Mark Cases*, 100 U.S. 82, 96 (1879) (“[C]ommerce with foreign nations means commerce between citizens of the United States and citizens and subjects of foreign nations . . . .”); *Henderson v. Mayor of New York*, 92 U.S. 259, 270 (1876) (same).

<sup>68</sup> *Lopez*, 514 U.S. at 558 (emphasis added).

<sup>69</sup> See *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 258 (1964). Cf. *United States v. Morrison*, 529 U.S. 598, 609 (2000) (referring to “violence directed at the instrumentalities of interstate commerce, interstate markets, or things or persons in interstate commerce”).

<sup>70</sup> See, e.g., *Gonzales v. Raich*, 545 U.S. 1, 18–19 (2005) (recognizing power of Congress under the Interstate Commerce Clause to control both the supply side and the demand side of a regulated commodity).

consequences on the citizen-buyer exceeds the effective power of Congress to impose consequences on the noncitizen-seller.<sup>71</sup>

For these reasons, I do not share Professor Anthony Colangelo's view that it is "unlikely, for example, that Congress could regulate noneconomic activity abroad under the Foreign Commerce Clause like the non-commercial sexual abuse of a minor proscribed under Section 2423(c)."<sup>72</sup> Professor Colangelo's analysis in this regard leans too heavily on the categories that the Supreme Court has crafted to give effect to the Interstate Commerce Clause in the context of dual federalism. I also disagree with his choice to put aside the "extraconstitutional" foreign affairs power,<sup>73</sup> for two related reasons. One may have reservations about Justice George Sutherland's theory of a truly extra-constitutional (and executive) power over foreign affairs, as expressed in *United States v. Curtiss-Wright Export Corp.*, without questioning the existence and relevance of an *implied* power of Congress in the field of foreign affairs, arising within the Constitution from a form of structural interpretation.<sup>74</sup> As Professor Colangelo otherwise recognizes, the interplay among powers of Congress, and their relations with other features of the Constitution, deserve consideration in deciding what dealings between a citizen and another person abroad the commerce power reaches.

The influence upon the Commerce Clause of the constitutionally recognized institution of citizenship lends additional support to an interpretation of the Foreign Commerce Clause as affording greater scope for extraterritorial regulation of U.S. citizens than for extraterritorial regulation of foreign nationals. The Supreme Court has, for example, interpreted the Militia Clauses in light of the constitutional conception of citizenship and international practice when it upheld conscription during the First World War, noting how the national character of citizenship embodied in the Fourteenth Amendment "operat[ed] . . . upon all the powers conferred by the Constitution . . ."<sup>75</sup> Accordingly, the power of Congress to regulate extraterritorial conduct of U.S. citizens should not be judged by comparison

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<sup>71</sup> I do not mean to imply that symmetrical regulation imposing *criminal sanctions* on foreign children who are deemed to be selling themselves would be the proper policy, even if Congress had the ability to effectuate it.

<sup>72</sup> Anthony J. Colangelo, *The Foreign Commerce Clause*, 96 VA. L. REV. 949, 1039–40 (2010).

<sup>73</sup> Anthony J. Colangelo, *What is Extraterritorial Jurisdiction?*, 99 CORNELL L. REV. 1303, 1316 n.56 (2014); Colangelo, *supra* note 72, at 952 n.10.

<sup>74</sup> 299 U.S. 304 (1936); *see, e.g.*, Louis Henkin, FOREIGN AFFAIRS AND THE U.S. CONSTITUTION 16–20 (2d ed. 1997) (describing Justice Sutherland's "singular constitutional theory [that] the powers of the United States to conduct relations with other nations do not derive from the Constitution").

<sup>75</sup> Selective Draft Law Cases, 245 U.S. 366, 389 (1918).



with the power to regulate conduct of all persons who have ever traveled to or from the United States.

The situation is simpler for U.S. business corporations, which have U.S. “nationality” for purposes of international law rules on legislative jurisdiction, but which are not U.S. citizens.<sup>76</sup> Corporations may have legal personality, but they have no personal lives. As a general proposition, everything they do abroad is integrally related to commerce between the United States and one or more foreign nations, by virtue of what they are and where they are.<sup>77</sup> Congress may choose to regulate those actions or leave them to regulation by foreign states. But ordinarily, given their integral relation to foreign commerce, all the harms they inflict in a foreign country should be subject to congressional regulation.

### III

#### THE EXTRATERRITORIALITY OF CONSTITUTIONAL OBLIGATION AFTER *BOUMEDIENE V. BUSH*

The Seventh Circuit’s decision in *Stokes* also deserves attention for its holding that the Warrant Clause of the Fourth Amendment does not apply to a search of a U.S. citizen’s home abroad.<sup>78</sup> In reaching this conclusion, the Seventh Circuit joined the Second Circuit, which adopted a similar interpretation in one of its decisions in the *Embassy Bombings* case.<sup>79</sup> Before discussing those holdings, it would be useful to recall some background about this special category of regulation of the federal government’s own officials.

It has long been settled that “the Government may act only as the Constitution authorizes, whether the actions in question are foreign or domestic.”<sup>80</sup> Congress derives its authority from Article I (supplemented by other provisions and implications), whether it acts with domestic or extraterritorial effect.<sup>81</sup> The President derives his authority from Article II, whether he acts with domestic or extraterritorial ef-

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<sup>76</sup> See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 213 & Reporters’ Note 5 (1987). Cf. *Hertz Corp. v. Friend*, 559 U.S. 77, 84–88 (2010) (discussing statutory criteria for *deeming* a corporation to be a citizen of one or more states for purposes of diversity jurisdiction).

<sup>77</sup> Instead, some U.S. corporations may operate abroad as contractors for the federal government. In that situation, their activities as contractors helping to implement various congressional powers provide an alternative basis for extraterritorial federal regulation.

<sup>78</sup> *United States v. Stokes*, 726 F.3d 880, 885 (7th Cir. 2013), *cert. denied*, 134 S. Ct. 713 (2013).

<sup>79</sup> See *In re Terrorist Bombings of U.S. Embassies in E. Africa* (Fourth Amendment Challenges), 552 F.3d 157, 171 (2d Cir. 2008).

<sup>80</sup> *United States v. Verdugo-Urquidez*, 494 U.S. 259, 277 (1990) (Kennedy, J., concurring).

<sup>81</sup> See *id.*; *Downes v. Bidwell*, 182 U.S. 244, 288–89 (1901) (White, J., concurring) (explaining that the federal government “was born of the Constitution, and all powers which it enjoys or may exercise must be either derived expressly or by implication from that

fect.<sup>82</sup> But these general propositions about the source of federal authority leave open questions about what the Constitution allows or forbids. Given relevant authority, particular constitutional limitations on that authority—such as the Fourth Amendment—may or may not be applicable in particular locations, and to particular categories of persons in those locations.<sup>83</sup>

Extraterritorial application of constitutional rules involves a set of considerations that differ in part from those relevant to extraterritorial application of statutory rules. Statutory interpretation takes place against the background assumption that Congress can change the rule prospectively if the court has chosen unwisely, whereas constitutional interpretations are extremely difficult to amend under Article V.<sup>84</sup> On the other hand, constitutional provisions often express fundamental and enduring commitments of the polity, rather than fluctuating or provisional policy choices that may be embodied in statute. The first difference invites caution in extending constitutional limitations extraterritorially; the second difference may argue in favor of extension, to ensure normative consistency and to avoid opportunities for evasion.

The leading case on this subject is now *Boumediene v. Bush*, involving the application of the Habeas Corpus Suspension Clause of Article I, Section 9, to security detainees who had been captured abroad and brought to the Guantanamo Bay Naval Base.<sup>85</sup> Writing for a bare but united majority of the Court, Justice Kennedy emphasized that “[e]ven when the United States acts outside its borders, its powers are not ‘absolute and unlimited’ but are subject to ‘such restrictions as are expressed in the Constitution.’”<sup>86</sup>

Kennedy’s synthesis of twentieth century precedents described the tension between fundamental commitments of the constitutional system and “the inherent practical difficulties of enforcing all constitutional provisions ‘always and everywhere.’”<sup>87</sup> The majority viewed

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instrument,” and that the Constitution is therefore “everywhere and all times potential in so far as its provisions are applicable”).

<sup>82</sup> Justice Sutherland’s contrary view, expressed in *United States v. Curtiss-Wright Export Corp.*, that the President exercises extra-constitutional powers of external sovereignty has been greatly criticized, and the Court has more commonly engaged in a broad construction of the President’s power under Article II. 299 U.S. 304, 315–24 (1936); see, e.g., *Am. Ins. Ass’n v. Garamendi*, 539 U.S. 396, 414–15 (2003) (deriving the President’s power to act in foreign affairs from a “historical gloss on the ‘executive Power’ vested in Article II”).

<sup>83</sup> See, e.g., *Verdugo-Urquidez*, 494 U.S. at 277 (Kennedy, J., concurring) (explaining that the government may act only as the Constitution authorizes, but that the question remains what constitutional standards apply).

<sup>84</sup> See U.S. CONST. art. V, § 5.

<sup>85</sup> See 553 U.S. 723, 732 (2008).

<sup>86</sup> *Id.* at 765 (quoting *Murphy v. Ramsey*, 114 U.S. 15, 44 (1885)).

<sup>87</sup> *Id.* at 759 (quoting *Balzac v. Porto Rico*, 258 U.S. 298, 312 (1922)).

these “[p]ractical considerations,”<sup>88</sup> and not a per se exclusion of aliens abroad from the regime of constitutional rights, as explaining the Court’s decision in *Johnson v. Eisentrager*, which had denied the availability of habeas corpus to convicted enemy aliens in an Allied prison in occupied Germany.<sup>89</sup> Under the resulting “functional approach,” the absence of similar complications at the Guantanamo prison weighed in favor of applying the Suspension Clause, despite the facts that the naval base lay outside U.S. sovereign territory, and that the detainees were noncitizens being held as “enemy combatants.”<sup>90</sup>

Although the holding of *Boumediene* concerned the Suspension Clause, Justice Kennedy described his functional approach as an overall framework derived from precedents involving a variety of constitutional rights.<sup>91</sup> The relevant citations included Justice Kennedy’s own concurring opinion in *United States v. Verdugo-Urquidez*, explaining why applying the Fourth Amendment’s Warrant Clause to the search of the foreign defendant’s home in Mexico would be “impracticable and anomalous.”<sup>92</sup> They did not include Chief Justice William Rehnquist’s opinion in *Verdugo-Urquidez*, superficially the opinion of the Court but effectively speaking for a plurality. In concurring, Justice Kennedy had simultaneously joined and distanced himself from that opinion.

*Verdugo-Urquidez* was a highly overdetermined case involving the prosecution 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>93</sup> The lower courts had suppressed evidence seized in a joint search of his home in Mexico by U.S. and Mexican officials, because no U.S. magistrate had issued a prior warrant.<sup>94</sup> A complicating factor, dismissed as fortuitous by Chief Justice Rehnquist, was that *Verdugo-Urquidez* had been brought to the United States shortly before the search took place.<sup>95</sup> Reversing the suppression order, Chief Justice Rehnquist employed a series of arguments that pointed toward different but overlapping conclusions: (1) that *Verdugo-Ur-*

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<sup>88</sup> See *id.* at 762–64.

<sup>89</sup> *Johnson v. Eisentrager*, 339 U.S. 763 (1950).

<sup>90</sup> See *Boumediene*, 553 U.S. at 764, 766–71.

<sup>91</sup> See *id.* at 764 (emphasizing “a common thread uniting the Insular Cases, *Eisentrager*, and *Reid*: the idea that questions of extraterritoriality [of constitutional rights] turn on objective factors and practical concerns, not formalism”).

<sup>92</sup> 494 U.S. at 278 (Kennedy, J., concurring). The phrase “impracticable and anomalous” was drawn from Justice Harlan’s concurring opinion in *Reid v. Covert*, regarding extraterritorial application of the Bill of Rights to citizen spouses of U.S. soldiers. 354 U.S. 1, 74 (1957).

<sup>93</sup> *Verdugo-Urquidez*, 494 U.S. at 262 (majority opinion).

<sup>94</sup> *Id.* at 262–63.

<sup>95</sup> See *id.* at 271–72.

guidez had no Fourth Amendment rights at all;<sup>96</sup> (2) that non-resident aliens have no Fourth Amendment rights with regard to U.S. government action abroad;<sup>97</sup> (3) that no alien has Fourth Amendment rights with regard to U.S. government action abroad;<sup>98</sup> (4) that aliens have no constitutional rights whatsoever with regard to U.S. government action abroad;<sup>99</sup> (5) that no one has Fourth Amendment rights abroad.<sup>100</sup>

*Boumediene* provided a long overdue repudiation of the Rehnquist opinion in *Verdugo-Urquidez*, and especially of the passages suggesting that “significant voluntary connection” to the United States was a prerequisite to possession of constitutional rights.<sup>101</sup> Chief Justice Rehnquist dismissed subjection to U.S. power as a reason for recognizing rights, and invoked amorphous hurdles of presence, duration, and societal obligation that needed to be satisfied before “certain constitutional rights” could be extended extraterritorially to noncitizens as members of “the people.”<sup>102</sup> Justice Kennedy’s nominally concurring opinion instead invoked practical reasons for hesitation about the extraterritorial effects of the Fourth Amendment, rather than characterizing foreigners subjected to search as undeserving of constitutional protection.<sup>103</sup>

*Boumediene* enshrined Justice Kennedy’s own concurrence, rather than the plurality approach, in the narrative of twentieth-century practice. The 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.

Justice Scalia, who had unqualifiedly joined the *Verdugo-Urquidez* plurality, dissented vehemently in *Boumediene*, and reiterated his support for a reading of the Constitution based on exclusive membership

<sup>96</sup> See *id.* at 273.

<sup>97</sup> *Id.* at 261.

<sup>98</sup> See *id.* at 274.

<sup>99</sup> See *id.* at 270.

<sup>100</sup> See *id.* at 274. It is, however, a mystery how Judge Easterbrook could claim, in *Vance v. Rumsfeld*, that the *Verdugo-Urquidez* decision casts doubt on whether *U.S. citizens* have the right not to be tortured by federal agents in interrogation abroad. 701 F.3d 193, 198 (7th Cir. 2012) (en banc), cert. denied, 133 S. Ct. 2796 (2013).

<sup>101</sup> *Verdugo-Urquidez*, 494 U.S. at 271–72; *Boumediene*, 553 U.S. at 759–60, 770–71 (citing only Justice Kennedy’s own concurring opinion in *Verdugo-Urquidez* and asserting the “lack of a precedent on point”).

<sup>102</sup> *Verdugo-Urquidez*, 494 U.S. at 270–73.

<sup>103</sup> *Id.* at 278 (Kennedy, J., concurring) (“The conditions and considerations of this case would make adherence to the Fourth Amendment’s warrant requirement impractical and anomalous.”).

in the social compact.<sup>104</sup> For Justice Scalia, only citizens can have extraterritorial constitutional rights in a “system in which rule is derived from the consent of the governed, and in which citizens (not ‘subjects’) are afforded defined protections against the Government.”<sup>105</sup>

It is regrettable that Justice Kennedy did not provide a more explicit normative response to Justice Scalia’s dissent in *Boumediene*, spelling out why the petitioners’ interest in liberty attracted the concern of the Suspension Clause, and not merely why practical obstacles did not outweigh the procedural consequences of their interest in liberty. One may conjecture that the decision rests on an assumption that imprisonment by the federal government always gives a prima facie reason for constitutional protection, even if contrary arguments sometimes prevail. The connection between imprisonment and the right to habeas corpus may also have been too self-evident for explanation. Still, for the sake of other rights it would have been helpful if the majority had hinted at the circumstances that can provide a starting point for applying the functional approach to the rights of non-citizens. Justice Kennedy’s concurring opinion in *Verdugo-Urquidez* made clear his view that some prima facie showing is needed, rejecting the notion that constitutional rights protect “some undefined, limitless class of noncitizens who are beyond our territory.”<sup>106</sup> It would be understandable, for example, if U.S. foreign aid did not trigger equal protection analysis under the Fifth Amendment on behalf of would-be recipients who are not otherwise subject to the power of the U.S. government.<sup>107</sup>

Shifting attention from the superior status of citizens over foreigners to the practical considerations that limit application of constitutional rights abroad increases the likelihood of an even-handed reduction in the extraterritorial rights of citizens, and in the post-2001 environment, so does the involvement of citizens with foreign terrorist organizations. The result may be seen in the *Embassy Bombings* prosecutions, which concerned the 1998 terrorist attacks on the U.S. embassies in Nairobi and Dar es Salaam.<sup>108</sup>

One of the defendants in the *Embassy Bombings* case was a U.S. citizen. His home in Nairobi had been searched by U.S. officials working with Kenyan authorities in 1997, after year-long U.S. intelligence

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<sup>104</sup> See *Boumediene*, 553 U.S. at 826–50 (Scalia, J., dissenting).

<sup>105</sup> *Id.* at 848–49.

<sup>106</sup> *Verdugo-Urquidez*, 494 U.S. at 275 (Kennedy, J., concurring).

<sup>107</sup> See Gerald L. Neuman, *Understanding Global Due Process*, 23 GEO. IMMIGR. L.J. 365, 374 (2009). Cf. William Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968) (explaining how the expansion of government power through employment and spending required constitutional constraint).

<sup>108</sup> See *In re Terrorist Bombings of U.S. Embassies in E. Africa* (Fourth Amendment Challenges), 552 F.3d 157, 159–60 (2d Cir. 2008).

surveillance of his land-based and cellular telephones in Kenya. He sought to suppress the resulting evidence due to the absence of a valid U.S. warrant and objections to the reasonableness of the searches.<sup>109</sup> The district court held that the searches were reasonable and that an exception to the warrant requirement for foreign intelligence surveillance should be recognized.<sup>110</sup> The Second Circuit affirmed, but held more broadly that the Warrant Clause did not apply extraterritorially at all.<sup>111</sup> The decision quoted Chief Justice Rehnquist's observation, toward the end of his *Verdugo-Urquidez* opinion, that a warrant issued by a U.S. magistrate "would be a dead letter outside the United States," and also passages from Justice Kennedy's concurrence, Justice John Paul Stevens's concurrence in the judgment, and Justice Harry Blackmun's dissent, all questioning the power of U.S. magistrates to authorize searches abroad.<sup>112</sup> The Second Circuit held that the reasonableness requirement of the Fourth Amendment still protected U.S. citizens, but that the search and surveillance were reasonable under the circumstances.<sup>113</sup>

This Second Circuit opinion did not actually cite *Boumediene*, and it placed more reliance on the various opinions in *Verdugo-Urquidez*, but a companion decision on Fifth Amendment issues in the same case did cite *Boumediene*,<sup>114</sup> and Judge José Cabranes (who wrote both opinions) shortly thereafter summarized the applicable framework in terms appropriate to Justice Kennedy's functional approach:

Although some Justices have written in favor of a categorical approach, the trend in cases decided in the last half century strongly suggests an aversion to a categorical rule in favor of a judicially administered, multifaceted analysis of the right invoked and the specific circumstances of the case.<sup>115</sup>

A recent Second Circuit decision, involving mail fraud and wire fraud by a U.S. citizen based in Israel, confirmed in dicta that the Warrant Clause does not apply to ordinary law enforcement searches or surveillance abroad.<sup>116</sup> The Seventh Circuit's holding in *Stokes*, finding the *Embassy Bombings* decision highly persuasive, squarely denied the applicability of the Warrant Clause to an ordinary law en-

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<sup>109</sup> *Id.* at 160.

<sup>110</sup> *Id.* at 161–64.

<sup>111</sup> *Id.* at 159, 171.

<sup>112</sup> *Id.* at 168–69.

<sup>113</sup> *Id.* at 176–77.

<sup>114</sup> See *In re Terrorist Bombings of U.S. Embassies in E. Africa* (Fifth Amendment Challenges), 552 F.3d 177, 201 (2d Cir. 2008). That decision applied a modified version of the *Miranda* warnings to overseas questioning of a foreign suspect in custody, while emphasizing that the privilege against self-incrimination concerned admission of statements into evidence at the trial within the United States. See *id.* at 201–16.

<sup>115</sup> Cabranes, *supra* note 18, at 1697.

<sup>116</sup> *United States v. Getto*, 729 F.3d 221, 224–25, 228 (2d Cir. 2013).

forcement search of a U.S. citizen abroad.<sup>117</sup> It is strange to think in retrospect that we could have been spared Chief Justice Rehnquist's opinion in *Verdugo-Urquidez*, with its disparagement of the rights of foreign nationals, because the Supreme Court could simply have held that warrants are never required for extraterritorial searches regardless of the nationality of the target.

In the current technological environment, however, the conclusion that the Warrant Clause does not apply extraterritorially could have serious consequences for U.S. citizens who remain within U.S. territory. The significance of the proposition depends on what it means to describe a search as extraterritorial. The situs of a search could be based on any number of factors, including the location of the citizen whose person, property, or communications are being searched; the location of the tangible or intangible object being searched, at the time of the search; the location of the agents performing the search; the location to which a communication is being sent; or the route taken by the communication. In traditional physical searches, the location of the agent and the object coincide, or are at least close enough that they are rarely separated by a border.<sup>118</sup> Information technology makes searching from a remote location increasingly practicable, and makes an increasing proportion of citizens' "effects" and personal lives vulnerable to remote searches.<sup>119</sup>

One may hope that the Supreme Court will confirm that merely connecting a computer to the Internet does not demonstrate a lack of reasonable expectation of privacy in its contents, and does not amount to consent to its penetration by government (either for the purpose of exploring the content of the computer, or for the purpose of converting the computer into an instrument for video and audio surveillance of the home).<sup>120</sup> Even if remote searching of a computer

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<sup>117</sup> *United States v. Stokes*, 726 F.3d 880, 892–93 (7th Cir. 2013), *cert. denied*, 134 S. Ct. 713 (2013).

<sup>118</sup> See Orin S. Kerr, *Search Warrants in an Era of Digital Evidence*, 75 *Miss. L.J.* 85, 86 (2005) (observing that in searches involving traditional physical evidence, "the investigators enter the place to be searched, seize the property named in the warrant, and leave").

<sup>119</sup> See generally Susan W. Brenner, *Fourth Amendment Future: Remote Computer Searches and the Use of Virtual Force*, 81 *Miss. L.J.* 1229 (2012) (explaining privacy issues posed by remote computer searches).

<sup>120</sup> That conclusion would seem to follow by analogy from the Supreme Court's recent decision in *Riley v. California*, 134 S. Ct. 2473 (2014), holding that the Fourth Amendment normally requires a warrant for a search of data stored on a cell phone. See also *United States v. Heckencamp*, 482 F.3d 1142, 1146 (9th Cir. 2007) (holding that a student's use of his computer to access the university's network "did not extinguish his legitimate, objectively reasonable privacy expectations" in its contents); *In re Warrant to Search a Target Computer at Premises Unknown*, 958 F. Supp. 2d 753 (S.D. Tex. 2013) (Smith, Mag.) (denying warrant to install data extraction software that would, inter alia, activate the computer's camera); Brenner, *supra* note 119, at 1229 ("[Courts] have not held that the mere act of linking a computer to a network (and thereby to the Internet) defeats the owner's reasonable expectation of privacy in the contents of the computer itself.").

is not considered the equivalent of a physical trespass, the Court could apply the adaptive approach to invasive new technologies that it articulated in *Kyllo v. United States*, and insist that “[w]here . . . the Government uses a device that is not in general public use, to explore details of the home that would previously have been unknowable without physical intrusion, the surveillance is a ‘search’ and is presumptively unreasonable without a warrant.”<sup>121</sup> One may also hope that the courts would dismiss any argument that changing the location of the federal agent conducting the penetration, so that a computer inside the United States could be explored from a U.S. facility outside the United States, would make the search “extraterritorial” and remove the protection of the Warrant Clause.

More difficult issues may arise, however, if the federal agents seek to acquire electronic information that passes from a citizen’s home computer into foreign territory. E-mail sent over the Internet from one U.S. computer to another is presumably private,<sup>122</sup> but it travels by unpredictable pathways, and could be routed through Canada without the sender’s intending or ever knowing it.<sup>123</sup> A citizen’s data stored remotely in the “cloud,” presumably private,<sup>124</sup> may be kept on a server in a foreign country, without the citizen’s being aware that the server is located abroad.<sup>125</sup> If the Warrant Clause has no application to information while it is present in foreign territory, then citizens

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<sup>121</sup> 533 U.S. 27, 40 (2001) (holding that advanced thermal imaging of the interior of a home from the outside amounts to a search). Admittedly, *Kyllo* was decided in June 2001. Moreover, the dissenters emphasized that thermal imaging involved passive reception of heat waves emanating from the house, rather than active penetration of the house to generate information, and that the method employed captured only crude data on the distribution of heat and not more intimate details of what was going on inside the house. *See id.* at 41–51 (Stevens, J., dissenting). In the Court’s more recent decision on GPS monitoring of a vehicle, the majority opinion stressed the physical trespass involved in attaching the GPS device, *see United States v. Jones*, 132 S. Ct. 945, 949 (2012), but one concurring Justice found that factor sufficient but not necessary to constitute a search, *see id.* at 955–56 (Sotomayor, J., concurring), and four Justices regarded the physical trespass as irrelevant to the Fourth Amendment violation, *see id.* at 960 (Alito, J., concurring).

<sup>122</sup> The analogy to traditional mail and telephone conversations, attended by a reasonable expectation of privacy, has support but is not settled. *See, e.g., United States v. Warshak*, 631 F.3d 266, 283–89 (6th Cir. 2010); *In re Application for Search Warrants for Info. Associated with Target Email Accounts/Skype Accounts*, Nos. 13-MJ-8163-JPO, 13-MJ-8164-DJW, 13-MJ-8165-DJW, 13-MJ-8166-JPO, 13-MJ-8167-DJW, 2013 WL 4647554 (D. Kan. Aug. 27, 2013) (Waxse, Mag.); Orin S. Kerr, *Applying the Fourth Amendment to the Internet: A General Approach*, 62 STAN. L. REV. 1005 (2010). *Cf. City of Ontario v. Quon*, 560 U.S. 746 (2010) (discussing without resolving general issue of Fourth Amendment expectations of privacy in text messages).

<sup>123</sup> *See LIBERTY AND SECURITY IN A CHANGING WORLD: REPORT AND RECOMMENDATIONS OF THE PRESIDENT’S REVIEW GROUP ON INTELLIGENCE AND COMMUNICATIONS TECHNOLOGIES* 183 (2013) [hereinafter *LIBERTY AND SECURITY IN A CHANGING WORLD*].

<sup>124</sup> *See Riley v. California*, 134 S. Ct. 2473, 2491 (2014) discussing cloud storage of data viewed on a cell phone); *United States v. Cotterman*, 709 F.3d 952, 965 (9th Cir. 2013) (en banc), *cert. denied*, 134 S. Ct. 899 (2014); Kerr, *supra* note 122, at 1043.

<sup>125</sup> *See LIBERTY AND SECURITY IN A CHANGING WORLD, supra* note 123, at 183.



may lose an important protection against unsupervised police investigations.

The significance of these problems should not be overstated. First, even if the Warrant Clause does not apply to extraterritorial searches of citizens' communications and data, both the Second Circuit and the Seventh Circuit held that the reasonableness requirement does apply.<sup>126</sup> How little protection the Fourth Amendment affords to citizens would then depend on how the reasonableness standard is interpreted, and how much the extraterritorial aspects of the search lower the courts' demands on the government.<sup>127</sup> Second, the Fourth Amendment as judicially defined and administered may be a blunt instrument for the protection of the privacy of data, and the better solution may be to seek stronger statutory protections rather than rely on constitutional law. And of course, the issues under discussion may be considered minor legal nuances in the face of the mass surveillance apparently being undertaken in the name of national security.<sup>128</sup>

The observation that warrants for overseas searches would amount to a "dead letter" merits fuller discussion in light of legislative developments since 1990. In July 2008, Congress enacted the equivalent of a warrant requirement for extraterritorial surveillance of U.S. citizens and other "U.S. persons" for foreign intelligence purposes.<sup>129</sup> Under 50 U.S.C. § 1881c, an order from the Foreign Intelligence Surveillance Court based on a showing of probable cause, with appropriate minimization procedures, is required (with specified exceptions) before a U.S. citizen located outside the United States can be targeted for surveillance as an agent of a foreign power.<sup>130</sup> Thus, an extraterritorial warrant may be a "dead letter" in the sense that foreign powers are not legally obliged to respect it, but it need not be

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<sup>126</sup> See *United States v. Stokes*, 726 F.3d 880, 893 (7th Cir. 2013), *cert. denied*, 134 S. Ct. 713 (2013); *In re Terrorist Bombings of U.S. Embassies in E. Africa* (Fourth Amendment Challenges), 552 F.3d 157, 176–77 (2d Cir. 2008).

<sup>127</sup> It may also depend on whether the overseas server is foreign-owned: if the courts allow the government to characterize the search as a search of the foreign-owned server, or hold that the citizen has no expectation of privacy in data stored on a foreign-owned server, rather than analogizing the citizen's remote storage contract to the lease of an apartment in a foreign apartment building.

<sup>128</sup> See, e.g., *Klayman v. Obama*, 957 F. Supp. 2d 1, 41–42 (D.D.C. 2013) (finding that plaintiffs were likely to succeed on their claim that the National Security Agency's Bulk Telephony Metadata Program violates the Fourth Amendment rights of U.S. citizens, and adding "I cannot imagine a more 'indiscriminate' and 'arbitrary invasion' than this systematic and high-tech collection and retention of personal data on virtually every single citizen for purposes of querying and analyzing it without prior judicial approval").

<sup>129</sup> For FISA purposes, a "U.S. person" is defined as including a U.S. citizen, a permanent resident alien, and certain legal entities. 50 U.S.C. § 1801 (2006 & Supp. V. 2011).

<sup>130</sup> Subsection (d) authorizes the Attorney General to authorize surveillance for up to seven days prior to obtaining a FISC order in an emergency situation if there is insufficient time to obtain a FISC order with due diligence. 50 U.S.C. § 1881c(d).

an empty gesture. In fact, the Foreign Intelligence Surveillance Act (FISA) warrant procedure went into effect while the Second Circuit's decision in the *Embassy Bombings* case was awaiting decision, and long before the Seventh Circuit's decision in *Stokes*. Thus far, at least, Congress has not authorized the issuance of extraterritorial warrants for normal law enforcement under the Federal Rules of Criminal Procedure.<sup>131</sup>

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Despite 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. The D.C. Circuit, which was reversed in *Boumediene*, has limited the effects of the Supreme Court's decision to the Habeas Corpus Suspension Clause, and has largely continued to adhere to its own doctrine that aliens without presence or property in the United States have no constitutional rights—not even the right not to be tortured.<sup>132</sup> Two judges of the D.C. Circuit have even suggested expanding *Verdugo-Urquidez* to overrule the well-established “minimum contacts” test for personal jurisdiction, which makes a foreign civil defendant's *absence* of contacts with a U.S. forum the basis for a procedural due process right not to be subjected to the forum; in telling language, they indicated that it “may be valuable for courts to reconsider [whether] private foreign corporations *deserve* due process protections.”<sup>133</sup> (Of course, if foreign litigants are not entitled to Fifth Amendment protection at all, then there is no constitutional obligation to afford them any procedural rights in the litigation.)

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<sup>131</sup> See FED. R. CRIM. P. 41. One exception should be mentioned: Rule 41(b)(5), added in 2008, authorizes magistrates to issue warrants to be executed on property associated with a U.S. diplomatic or consular mission abroad, which is within the “special maritime and territorial jurisdiction” of the United States. See 18 U.S.C. § 7(9) (2012). This provision descends from a broader proposal approved by the Judicial Conference in 1990 but not adopted, at a time when it was more widely believed that the Warrant Clause applied extraterritorially. See COMMITTEE ON RULES OF PRACTICE AND PROCEDURE, REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE, at A-5 to A-6 (1990).

<sup>132</sup> See, e.g., *Ali v. Rumsfeld*, 649 F.3d 762, 771 (D.C. Cir. 2011) (denying that *Boumediene* affected circuit precedent denying extraterritorial due process rights to aliens in Iraq and Afghanistan); *Rasul v. Myers (II)*, 563 F.3d 527, 529 (D.C. Cir. 2009) (per curiam) (same even at Guantanamo). The D.C. Circuit did, however, give a conscientious description of the reasoning in *Boumediene* before concluding that under its functional approach the Habeas Corpus Suspension Clause did not apply to foreign detainees in Afghanistan. See *Al Maqaleh v. Gates*, 605 F.3d 84, 93–98 (D.C. Cir. 2010). For a summary of how the D.C. Circuit's later decisions in Guantanamo cases have “effectively reversed” *Boumediene*, see Janet C. Alexander, *The Law-Free Zone and Back Again*, 2013 U. ILL. L. REV. 551, 555, 593–606 (2013).

<sup>133</sup> *GSS Group Ltd. v. Nat'l Port Auth.*, 680 F.3d 805, 818–19 (D.C. Cir. 2012) (Williams, J., concurring) (emphasis added).

Some lower courts have continued to cite *Verdugo-Urquidez* as denying nonresident aliens “standing” to raise constitutional claims.<sup>134</sup> Other courts have even cited *Verdugo-Urquidez* in support of a mythical rule of prudential standing denying nonresident aliens access to federal courts on common law claims. To its credit, the D.C. Circuit exposed the baselessness of this proposition in *Doe VIII v. Exxon Mobil Corp.*,<sup>135</sup> and the Fifth Circuit subsequently dismissed it as “totally without merit.”<sup>136</sup> Nonetheless, civil defendants are likely to continue asserting this convenient excuse from liability, and the xenophobic rhetoric of the *Verdugo-Urquidez* plurality lends it a degree of plausibility.<sup>137</sup>

The apparently unique case of the court martial of a civilian contractor illustrates the dangers of the “substantial connection” test, even when its use is unnecessary. In *United States v. Ali*,<sup>138</sup> the Court of Appeals for the Armed Forces invoked *Verdugo-Urquidez* as the basis for denying Fifth and Sixth Amendment rights to a foreign interpreter

<sup>134</sup> See, e.g., *Doe v. United States*, 95 Fed. Cl. 546, 551, 575–76 (2010) (denying Iraqi national standing to challenge military occupation of his home in Fallujah as a taking, citing *Verdugo-Urquidez*); *Chevron Corp. v. Donziger*, No. 1:12-MC-65 LAK/CFH, 2013 WL 3228753, at \*1, \*4 (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*). On the Federal Circuit’s standing doctrine concerning extraterritorial takings, see Jeffrey Kahn, *Zoya’s Standing Problem, or, When Should the Constitution Follow the Flag?*, 108 MICH. L. REV. 673, 694–700 (2010). The Court of Federal Claims recognized in *Doe* the traditional doctrine that the Fifth Amendment does protect aliens outside the United States against takings of property that they own inside the United States. See *Doe*, 95 Fed. Cl. at 567 (citing *Russian Volunteer Fleet v. United States*, 282 U.S. 481 (1931)).

<sup>135</sup> 654 F.3d 11, 65–68 (D.C. Cir. 2011), *vacated in part*, 527 F. App’x 7 (D.C. Cir. 2013). (The vacated portion concerned the Alien Tort Statute claims affected by *Kiobel*; the part regarding standing and common law claims remained in effect.)

<sup>136</sup> *Servicios Azucareros de Venezuela, C.A. v. John Deere Thibodeaux, Inc.*, 702 F.3d 794, 802 (5th Cir. 2012).

<sup>137</sup> The approach of the *Verdugo-Urquidez* plurality has also infected the interpretation of the Religious Freedom Restoration Act (RFRA). First, in *Rasul v. Myers (I)*, 512 F.3d 644, 671–72 (D.C. Cir. 2008), *vacated and remanded*, 129 S. Ct. 763 (2008), the panel majority held that even if RFRA applied extraterritorially, the Guantanamo detainees were not “person[s]” within the meaning of RFRA, because RFRA was not intended to exceed the scope of the Free Exercise Clause of the First Amendment, and aliens outside the sovereign territory of the United States had no First Amendment rights. 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 Guantanamo are not ‘person[s],’” and would have rested the decision on qualified immunity. *Id.* at 676 (Brown, J., concurring) (alteration in original). The D.C. Circuit panel reaffirmed this holding on remand after *Boumediene*, over the same objection. *Rasul v. Myers (II)*, 563 F.3d 527, 533 (D.C. Cir. 2009). Subsequently, a district judge invoked *Rasul v. Myers* in support of the proposition that a “nonresident alien” is not a “person” under RFRA, and concluded that foreign visitors detained within the United States pending resolution of their right to be admitted have no rights under the First Amendment or RFRA. *Bukhari v. Piedmont Reg’l Jail Auth.*, No. 01:09-cv-1270, 2010 WL 3385179, at \*5 (E.D. Va. Aug. 20, 2010).

<sup>138</sup> 71 M.J. 256 (C.A.A.F. 2012), *cert. denied*, 133 S. Ct. 2338 (2013).

working as a civilian contract employee in Iraq and tried by general court martial for minor offenses.<sup>139</sup> The majority insisted that his seven days of pre-deployment training at Fort Benning, Georgia, and his resulting service alongside the U.S. Army in Iraq, did not suffice to create a “substantial connection” with the United States under *Verdugo-Urquidez*.<sup>140</sup> Chief Judge Baker concurred only in the result in this respect, emphasizing that “*Boumediene* appears to significantly limit the blanket reach of both *Verdugo-Urquidez* and *Eisentrager* in favor of the more contextual and nuanced view,” and dryly observing that even if *Verdugo-Urquidez* applied, “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>141</sup> In successfully opposing certiorari, the Solicitor General did not rely on the *Verdugo-Urquidez* argument, stressing instead that Ali had received all the protections that the Constitution would require for a similarly situated citizen during active hostilities.<sup>142</sup>

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. Detention in custody by the United States, with or without criminal prosecution, should ordinarily be enough to start the analysis, given the control it gives the government over all aspects of the prisoner’s life. In non-custodial situations, threshold criteria relevant to the particular right may need to be identified. For the present, the indeterminate concept of a substantial connection may continue to play a role.

The Ninth Circuit’s decision in *Ibrahim v. Department of Homeland Security* provides a useful example. The Malaysian plaintiff in that case alleged that she had been attending Stanford as a doctoral student.<sup>143</sup> After more than three years there, she attempted to travel to a conference in Malaysia, and was prevented from boarding the plane on the

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<sup>139</sup> *Id.* at 266–69. Ali was born in Iraq, but fled to Canada in 1991, and naturalized there in 1996 without losing his Iraqi nationality. In 2007, he was hired in Canada by a U.S. company to work as an interpreter for the U.S. Army. *Id.* at 259.

<sup>140</sup> *Id.* at 268 & n.22.

<sup>141</sup> *Id.* at 271, 278 (Baker, C.J., concurring). Judge Effron also concurred narrowly. *Id.* at 279 (Efron, J., concurring).

<sup>142</sup> See Brief for the United States in Opposition at 23, *Ali v. United States*, 133 S. Ct. 2338 (2013) (No. 12-805), 2013 WL 1400226. The government’s brief in opposition also explained the unusual character of the prosecution, the first court martial of a civilian in decades, as resulting from Ali’s dual national status as both a Canadian and an Iraqi. *Id.* at 28. If he had not been a host country national, he could have been tried in civilian court in the United States under the Military Extraterritorial Jurisdiction Act of 2000. See 18 U.S.C. §§ 3261(a), 3267 (2012). If he had not also been a Canadian, he would probably have been transferred to Iraqi custody for prosecution under local law.

<sup>143</sup> *Ibrahim v. Dep’t of Homeland Sec.*, 669 F.3d 983, 987 (9th Cir. 2012). The facts recited are allegations in the complaint, not findings of fact.

ground that her name appeared (erroneously, she claims) on a DHS watch list. After an overnight detention, she was permitted to fly to the conference, but she has never been permitted to return.<sup>144</sup> When she attempted to challenge the government's conduct on First and Fifth Amendment grounds, the district court held that although she could seek damages for the events on her outward journey, she could not seek relief regarding her return, because once she departed from the United States she lost all constitutional protection under *Verdugo-Urquidez*.<sup>145</sup> On appeal, a divided Ninth Circuit panel reversed. The majority held that she had established a significant voluntary connection with the United States through her Ph.D. studies, and that she consistently sought to maintain that connection, including collaborative research with Stanford faculty.<sup>146</sup> Her departure for a conference, though voluntary, did not sever that connection, but was in pursuance of that connection. Expressly applying a combination of the functional approach of *Boumediene* and the "significant voluntary connection" test of *Verdugo-Urquidez*, the majority held that she was protected by the First and Fifth Amendments and that the merits of her claims should be analyzed on remand.<sup>147</sup>

Ibrahim's claims face significant hurdles on the merits, given the national security context of the No Fly list, and the traditionally diluted application of the First Amendment to restrictions on cross-border migration.<sup>148</sup> On the threshold issue, however, the idea that a student in a U.S. doctoral program who temporarily attends a conference overseas lacks any First Amendment interests ipso facto does not correspond to the underlying social realities. Such a rule would undermine freedom of speech within U.S. universities, in addition to attacking freedom of speech abroad. If "significant voluntary connection" is not a euphemism for "permanent resident alien," then

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

<sup>145</sup> *Ibrahim v. Dep't of Homeland Sec.*, No. C 06-00545 WHA, 2009 WL 2246194, at \*7-8 (N.D. Cal. July 27, 2009), *rev'd in part*, 669 F.3d 983 (9th Cir. 2012).

<sup>146</sup> *Ibrahim*, 669 F.3d at 997.

<sup>147</sup> *Id.* at 997, 999. One judge dissented, arguing that studying for several years in the United States did not amount to a substantial voluntary connection under *Verdugo-Urquidez*, and that under the majority's analysis any alien who spent time in the United States could raise constitutional issues in order to return. *Id.* at 1003 (Duffy, J., dissenting). The two points are separable but not unrelated. Under current constitutional doctrine, substantive constitutional rights place extremely weak limits on the power of the federal government to deport aliens or deny them admission to the United States. Recognizing a recently departed alien's right to First Amendment protection would not produce a change in that doctrine, but it could ultimately lead to rethinking the doctrine. See GERALD L. NEUMAN, STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW 125-38 (1996) (analyzing how extraterritorial constitutional rights of aliens would constrain immigration policy).

<sup>148</sup> See NEUMAN, *supra* note 147, at 128-31 (describing traditional limitations on judicial review of criteria for exclusion or deportation of aliens).

the Ninth Circuit majority's conclusion appears preferable—bearing in mind that it is a first stage in First Amendment analysis, leaving open the ultimate merits.

Although in one sense the *Ibrahim* decision pushes the envelope of First Amendment protection, it does not determine the boundary. Three years in a doctoral program should not be the minimum required to get over the threshold, and the No Fly regime is not the only context (indeed not the typical context) to which the First Amendment is relevant. Prosecution for speech acts committed abroad, and control of extraterritorial detainees' speech and correspondence, are also salient examples.<sup>149</sup>

Despite the stagnation in the D.C. Circuit, litigation in other circuits should eventually bring to light other configurations, preferably unrelated to counterterrorism, where the implications of *Boumediene* for extraterritorial application of the Bill of Rights can be explored. Only then will the depth or shallowness of Justice Kennedy's functional approach become clear.

#### CONCLUSION

In a diverse and interconnected world, simplistic prescriptions serve poorly for determining when constitutional or statutory rules should apply extraterritorially. That proposition was always valid, but its validity became more visible after the Second World War,<sup>150</sup> and the increased ease of travel and communication over the past twenty years have intensified the visibility. The United States has an interest in exercising power beyond its borders, including an interest in ensuring that its nationals and its officials do not abuse the power that their association with the United States confers on them. Legal interpretation needs to take cognizance of both these interests, rather than aim at maximizing irresponsible power.

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<sup>149</sup> See *United States v. Aguilar*, 883 F.2d 662, 684–85, 692 (9th Cir. 1989) (rejecting on the merits First Amendment challenge to prosecution of Mexican national for conspiring in Mexico to encourage refugees to enter United States unlawfully); *United States v. Al Bahlul*, 820 F. Supp. 2d 1141, 1242–45 (C.M.R. 2011) (finding that Yemeni national in Afghanistan had no lawful connection to the United States under *Verdugo-Urquidez* that would make the First Amendment applicable to the speech acts for which he was being prosecuted after his capture), *vacated and reh'g en banc granted*, No. 11-1324, 2013 WL 297726 (D.C. Cir. Apr. 23, 2013); Michael J. Lebowitz, “*Terrorist Speech*”: *Detained Propagandists and the Issue of Extraterritorial Application of the First Amendment*, 9 FIRST AMEND. L. REV. 573, 584–88 (2011) (arguing that the First Amendment generally does not protect noncitizens propagandizing abroad for terrorist organizations); Timothy Zick, *The First Amendment in a Trans-Border Perspective: Toward a More Cosmopolitan Orientation*, 52 B.C. L. REV. 941, 1018–20 (2011) (arguing that the First Amendment should be interpreted as preventing the United States from censoring and suppressing noncitizens' speech when exercising sovereignty abroad).

<sup>150</sup> See *Reid v. Covert*, 354 U.S. 1, 3, 39–40 (1957) (finding unconstitutional the trial by court martial of U.S. citizens for homicide abroad in peacetime).

As this Essay has argued, statutory interpretation should not treat government officials as presumptively unconstrained outside U.S. territory. The foreign commerce power should not be artificially truncated to achieve a symmetry with federalism limits on the interstate commerce power. The selective functional approach of *Boumediene v. Bush* should be developed and strengthened to reconcile commitment to constitutional values with the extraterritorial exercise of power. The United States needs to regulate its own.