Speech Beyond Borders: Extraterritoriality and the First Amendment

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Does the First Amendment follow the flag? In Boumediene v. Bush*, the Supreme Court categorically rejected the claim that constitutional rights do not apply at all to governmental actions taken against aliens located abroad. Instead, the Court made the application of such rights, the First Amendment presumably included, contingent on "objective factors and practical concerns." In addition, by affirming previous decisions,* Boumediene *also extended its functional test to cover even U.S. citizens, leaving them in a situation where they might be without any constitutional recourse for violations of their First Amendment rights. But lower courts have found in the recent case of* USAID v. Alliance for Open Society ("USAID") *an implication that free speech rights exist abroad, at least by U.S. registered entities or U.S. citizens.*

This Article resolves this doctrinal ambiguity, arguing courts should recognize that the First Amendment covers speech made beyond U.S. borders. It situates existing First Amendment precedents within the broader framework set by decisions pertaining to the Constitution's extraterritorial application and extends First Amendment coverage to both citizen and alien speech in cases where either speech has been subject to government regulation outside traditional national borders. Both conceptions of the First Amendment—either as a right that accrues to the individual or as a structural limitation against the government—support such an interpretation. But what are the implications of recognizing an extraterritorial First Amendment? In the last part of the

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Article, I compare and contrast the decisions in USAID *and* Holder v. Humanitarian Law Project *to show the judicial weight given to the foreign policy considerations of the government.*

I. INTRODUCTION

Imagine that Texas A&M University, a public university with a satellite campus located in Doha, Qatar, imposes a speech code banning religiously injurious speech within the confines of its overseas campus. Could its faculty members or students, both U.S. citizens and noncitizens alike, assert their First Amendment rights against the university? Or suppose that a foreign nongovernmental organization

("NGO") challenges federal grant restrictions that prevent NGOs from promoting certain reproductive health services abroad.[1] Could that entity be allowed to avail themselves of the same First Amendment protections accorded to its American counterpart?[2] These examples illustrate the uncertainty surrounding the question of whether the First Amendment applies beyond U.S. borders.

The extent to which geography and constitutional rules overlap is a question that has vexed courts and scholars alike since the wake of the Spanish-American war at the end of the nineteenth century.[3] But while other provisions of the Bill of Rights—such as the right to a jury trial,[4] the right to criminal due process,[5] the right against cruel and unusual punishment,[6] the right against unreasonable searches and seizures,[7] and most recently, the right to habeas corpus under Article I, Section 9[8]—have received some judicial and academic treatment for their extraterritorial applications, the right to freedom of expression has yet to garner such attention.[9]

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1. See *infra* note 74 and accompanying text.

2. *Compare* DKT Mem'l Fund Ltd. v. Agency for Int'l Dev., 887 F.2d 275 (D.C. Cir. 1989) (holding that policy limitations on foreign aid funds do not unconstitutionally infringe on the First Amendment rights of domestic nongovernmental organizations), *with* USAID, 133 S. Ct. 2321 (2013) (holding that policy limitations on foreign aid funds infringe on the First Amendment rights of nongovernmental organizations).

3. The literature is voluminous, but any canonical list would include the following: GERALD NEUMAN, STRANGERS TO THE CONSTITUTION (1996) [hereinafter STRANGERS]; KAL RAUSTIALA, DOES THE CONSTITUTION FOLLOW THE FLAG? (2009); Christina Duffy Burnett, *A Convenient Constitution? Extraterritoriality After* Boumediene, 109 COLUM. L. REV. 973 (2009); Sarah H. Cleveland, *Embedded International Law and the Constitution Abroad*, 110 COLUM. L. REV. 225 (2010); Louis Henkin, *The Constitution as Compact and as Conscience: Individual Rights Abroad and at Our Gates*, 27 WM. & MARY L. REV. 11 (1985); Jules Lobel, *Fundamental Norms, International Law, and the Extraterritorial Constitution*, 36 YALE J. INT'L. L. 307 (2011); Gerald L. Neuman, *The Extraterritorial Constitution After* Boumediene v. Bush, 82 S. CAL. L. REV. 259 (2009) [hereinafter *Extraterritorial Constitution*]; Gerald L. Neuman, *Extraterritorial Rights and Constitutional Methodology After* Rasul v. Bush, 153 U. PA. L. REV. 2073 (2005).

4. Balzac v. Porto Rico, 258 U.S. 298 (1922); Dorr v. United States, 195 U.S. 138 (1904).

5. Reid v. Covert, 354 U.S. 1 (1957); Johnson v. Eisentrager, 339 U.S. 763 (1950); Turney v. United States, 115 F. Supp. 457 (Ct. Cl. 1953).

6. *In re* Iraq & Afg. Detainees Litig., 479 F. Supp. 2d 85 (D.D.C. 2007).

7. United States v. Stokes, 726 F.3d 880 (7th Cir. 2013); *In re* Terrorist Bombings of U.S. Embassies in E. Afr., 552 F.3d 157 (2d Cir. 2008).

8. Boumediene v. Bush, 553 U.S. 723 (2008); Munaf v. Geren, 553 U.S. 674 (2008); Al Maqaleh v. Gates, 604 F. Supp. 2d (D.C. Cir. 2009).

9. There is a recent spate of writings on the subject, but none have directly addressed the various aspects of an extraterritorial First Amendment. At most, Zick argues for a reorientation of how courts see the First Amendment but does not address its doctrinal foundations. *See* TIMOTHY ZICK, THE COSMOPOLITAN FIRST AMENDMENT: PROTECTING TRANSBORDER EXPRESSIVE AND RELIGIOUS LIBERTIES (2013) [hereinafter THE COSMOPOLITAN FIRST AMENDMENT]; Timothy Zick, *Falsely Shouting Fire in a Global Theater: Emerging Complexities in Transborder Expression*, 65 VAND. L. REV. 123 (2012) [hereinafter *Shouting Fire in a Global Theater*]; Timothy Zick, *The*

The uncertainty surrounding the abovementioned scenarios suggests that this gap needs to be addressed. Moreover, recent headlines, such as the global dragnet surveillance activities of the National Security Agency ("NSA"), implicate similar issues. Its still-unfolding repercussions make it likely that the extraterritorial reach of the First Amendment will be an important, recurring question in the immediate future. In *Clapper v. Amnesty International,*[10] domestic human rights groups brought a facial challenge to a provision of the Foreign Intelligence Surveillance Act ("FISA") authorizing government electronic surveillance of non-U.S. persons located outside the United States. Justice Samuel Alito, writing for the majority, stated that these domestic groups lacked standing because they failed to identify any nonspeculative harm.[11]

Three months after *Clapper*, Edward J. Snowden, an exiled U.S. citizen and former independent contractor for the NSA, revealed the breathtaking scope of the NSA's programs, both domestic and international.[12] Under the Court's reasoning in *Clapper*, both citizens and noncitizens alike could now theoretically allege that their First Amendment rights, among others, have been violated—unlike with the plaintiffs in *Clapper*, the fear of surveillance is no longer speculative.[13] It is not obvious, however, that noncitizens could make such a claim or even have standing to do so. In a related scenario, would a noncitizen such as Wikileaks founder Julian Assange, who is still under threat of prosecution under the Espionage Act of 1917,[14] be able to invoke the protection of the First Amendment?

Finally, as a practical matter, this inquiry is long overdue. As the initial examples illustrate, advanced modern travel and

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First Amendment in Trans-Border Perspective: Toward a More Cosmopolitan Orientation, 52 B.C. L. REV. 941 (2011) [hereinafter *The First Amendment in Trans-Border Perspective*]; Timothy Zick, *Territoriality and the First Amendment: Free Speech at—and Beyond—Our Borders*, 85 NOTRE DAME L. REV. 1543, 1598 (2010). For a subject-specific treatment, see Michael J. Lebowitz, *"Terrorist Speech": Detained Propagandists and the Extraterritorial Application of the First Amendment,* 9 FIRST AMEND. L. REV. 573 (2010).

10. 133 S. Ct. 1138 (2013).

11. *Id.* at 1143.

12. Media coverage of the leaks is ubiquitous. *See, e.g.*, Ewen MacAskill & Gabriel Dance, *NSA Files: Decoded—What the Revelations Mean for You*, GUARDIAN (Nov. 21, 2013), http://www.theguardian.com/world/interactive/2013/nov/01/snowden-nsa-files-surveillance-revelations-decoded, *archived at* http://perma.cc/7CM4-VEAK; Joshua Eaton, *Timeline of Edward Snowden's Revelations*, AL-JAZEERA AMERICA (June 5, 2013), http://america.aljazeera.com/articles/multimedia/timeline-edward-snowden-revelations.html, *archived at* http://perma.cc/8PX9-LRU9.

13. *Clapper*, 133 S. Ct. at 1143.

14. *See* Dianne Feinstein, *Prosecute Assange Under the Espionage Act*, WALL ST. J. (Dec. 7, 2010, 12:01 AM), http://online.wsj.com/news/articles/SB10001424052748703989004575653280626335258.

communications technologies, increasingly porous national borders, and heightened government scrutiny and regulation of speech are now reopening classic questions on the reach of constitutional protections. Examining the myriad issues surrounding this question would lay out an initial framework for future inquiries.

Part of the problem lies in murky doctrine. The jurisprudential landscape involving the extraterritoriality question is, at best, ambiguous. While the Supreme Court's 2008 decision in *Boumediene v. Bush* categorically rejected the claim that constitutional rights do not apply at all to governmental actions taken against aliens located abroad, it also made the application of such rights—the First Amendment presumably included[15]—contingent on "objective factors and practical concerns."[16] In *Boumediene,* the Court answered the question whether an affirmative constitutional right to habeas extended to noncitizens detained in Guantanamo Bay.[17] Upholding previous decisions, the Court extended the functional test to cover even U.S. citizens, leaving them in a situation where they might be without any constitutional recourse. The import and application of the decision outside the habeas context, therefore, remains unclear. With regard to the First Amendment in particular, such ambiguity is marked with tension. In the recent case of *USAID v. Alliance for Open Society International, Inc. ("USAID"),*[18] several domestic NGOs filed a constitutional challenge against government regulations requiring them to sign a pledge espousing an antiprostitution message as a condition of receiving federal funds for humanitarian services abroad, particularly the promotion of reproductive health. The Court affirmed the free speech claims of the NGOs, holding that the pledge requirement fell outside the scope of the government program and hence was impermissible compelled speech.[19] Although the fact that the speech was going to be uttered abroad was not mentioned in the decision, this factor was raised in several instances in the lower courts and even during the oral arguments before the Supreme Court.[20] Hence *USAID* implies that free speech rights, at least those of U.S.-registered entities or U.S. citizens, already exist abroad.

This Article resolves this doctrinal confusion and argues that the First Amendment covers speech made beyond U.S. borders and so

15. Boumediene v. Bush, 553 U.S. 723, 764 (2008);

16. *Id.*

17. *Id.* at 770–71.

18. 133 S. Ct. 2321, 2324–25 (2013).

19. *Id.* at 2330.

20. Transcript of Oral Arguments at 15, *USAID*, 133 S. Ct. 2321 (2013) (No. 12-10), 2013 WL 1842090, at *15.

should be judicially recognized. It situates existing First Amendment precedents within the broader framework set by decisions pertaining to the Constitution's extraterritorial application. In particular, it extends First Amendment coverage to both citizen and alien speech subjected to government regulation outside traditional national borders. The distinct constitutional treatment of aliens and citizens has already been the subject of voluminous literature with respect to other rights;[21] however, it remains unexplored what difference, if any, an extraterritorial free speech right makes to the prevailing understandings. The two conceptions of the First Amendment—either as a right that accrues to the individual or as a structural limitation against the government—both support the interpretation of making its protections available to citizens and aliens alike. Recognizing the extraterritorial First Amendment, however, is only the beginning. What are the implications of such recognition? In many instances, an extraterritorial speech right is more than likely to go against legitimate foreign policy interests as crafted by the political branches of government, as well as international law, since First Amendment jurisprudence is less restrictive than global standards on freedom of expression. The last part of this paper looks at an area where this claim would have the greatest impact: government speech abroad.

Two related caveats about the scope of my discussion are appropriate here. First, my focus is on the negative First Amendment—that is, the free speech and press clauses as a constraint on government action beyond U.S. borders. In the following account, the First Amendment is a shield, not a sword. I do not include in my discussion, for example, the exportation of First Amendment norms by citizens claiming its benefit in opposing foreign libel judgments that were obtained under laws that do not approximate First Amendment protections,[22] or by aliens challenging restrictions on foreign contributions in U.S. elections. This should hopefully mitigate understandable concerns about cultural imperialism. The aim of recognizing an extraterritorial First Amendment is precisely to expand the reach of constitutional protections in order to rein in the exercise of U.S. government power, not to facilitate its imposition, and make those constitutional remedies available to both aliens and citizens. And while

21. The classic work is STRANGERS, *supra* note 3; *see also* T. Alexander Aleinikoff, *Citizens, Aliens, Membership and the Constitution*, 7 CONST. COMMENT. 9 (1990); T. Alexander Aleinikoff, *Federal Regulation of Aliens and the Constitution*, 83 AM. J. INT'L L. 862 (1989); Chimène I. Keitner, *Rights Beyond Borders*, 36 YALE J. INT'L L. 55 (2010) (using a comparative analysis of three constitutional systems).

22. *See, e.g.*, Yahoo! Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme, 433 F.3d 1199 (9th Cir. 2006); Desai v. Hersh, 954 F.2d 1408 (7th Cir. 1992).

conflicts with local laws should rightfully be a factor for U.S. courts facing these kinds of claims, those conflicts are factors that go into the application of the right, not its recognition.

Second, my discussion covers primarily the threshold issue of whether the First Amendment exists extraterritorially *at all*. There are many extant issues surrounding an extraterritorial speech right, but the heart of the confusion revolves around whether such a right exists in the first place and what its contours might look like given prevailing doctrines that are in tension with one another. This is the main question that needs clarification.

The Article proceeds as follows: Part II examines the case law on the applicability of constitutional rights abroad leading to the decision in *Boumediene,* as well as the scattered cases in which courts have reluctantly, if not obliquely, addressed the applicability of the First Amendment in an extraterritorial context. It then analyzes the First Amendment within the new jurisprudential milieu established by *Boumediene*. Part III offers theoretical justifications for an extraterritorial First Amendment by looking to the text of the Constitution, the history of its drafting, and the justifications underlying freedom of expression to determine what, if any, insights these sources can offer on this question. Although text and history are not dispositive on their own, taken together, they provide support for the case of an extraterritorial First Amendment. The Article also evaluates existing and proposed rationales for freedom of speech, arguing that they are capacious enough to accommodate and justify the protection of speech that occurs outside U.S. borders. Part IV analyzes the scope of an extraterritorial First Amendment. It argues that citizens should be able to invoke the First Amendment outside the United States, while aliens could also claim its benefit regardless of their location provided that they have been subject to an exercise of U.S. government power and it would not be "impracticable and anomalous" to do so. Lastly, Part V considers the implications of an extraterritorial First Amendment, especially acknowledging the foreign policy interests of the government. This Part compares and contrasts the Court's decisions in *USAID* and *Holder v. Humanitarian Law Project* in light of the differing weights accorded to the government interest. The Conclusion reflects on possible trajectories of the First Amendment abroad.

II. PRECEDENTS

First Amendment jurisprudence and the long history of Supreme Court decisions on the application of the Constitution abroad

have gone along on parallel but distinct tracks. Moreover, the First Amendment has not yet been the subject of an extraterritorial analysis by the Court. Recent developments—doctrinal, social, political, and technological—are pushing the Court's extraterritoriality and speech towards a collision course, however. This Part will examine the pertinent cases under each track and how they might fit with one another.

A. Extending Constitutional Rights Abroad

This Section briefly outlines the development of the Court's extraterritoriality jurisprudence, beginning from the *Insular Cases* in the early twentieth century to *Boumediene* in 2008. The following cases do not involve the First Amendment, but taken together, they establish the general framework against which the extraterritoriality of the various provisions in the Bill of Rights are evaluated.

1. The *Insular Cases*

In a series of cases decided over the early decades of the twentieth century now known as the *Insular Cases,*[23] the Supreme Court sanctioned a constitutionally distinctive regime for newly acquired U.S. colonies. Up until that time, the prevailing rule was that the Bill of Rights, and the rest of the Constitution for that matter, stopped at the water's edge.[24] This rule bore the vestiges of its time, steeped as it was in the strictly territorial Westphalian notion of

23. For a general introduction, see BARTHOLOMEW SPARROW, THE *INSULAR CASES* AND THE EMERGENCE OF THE AMERICAN EMPIRE (2006). On why studying the *Insular Cases* remains important, see Sanford Levinson, *Why the Canon Should Be Expanded to Include the* Insular Cases *and the Saga of American Expansionism*, 17 CONST. COMMENT. 241 (2000). The number of the cases included varies among scholars, but there is a consensus on these fifteen: Balzac v. Porto Rico, 258 U.S. 298 (1922); Ocampo v. United States, 234 U.S. 91 (1914); Dowdell v. United States, 221 U.S. 325 (1911); Rassmussen v. United States, 197 U.S. 516 (1905); Dorr v. United States, 195 U.S. 138 (1904); Kepner v. United States, 195 U.S. 100 (1904); Gonzales v. Williams, 192 U.S. 1 (1904); Hawaii v. Mankichi, 190 U.S. 197 (1903); Fourteen Diamond Rings v. United States, 183 U.S. 176 (1901); Dooley v. United States, 183 U.S. 151 (1901); Huus v. N.Y. & Porto Rico S.S. Co., 182 U.S. 392 (1901); Downes v. Bidwell, 182 U.S. 244 (1901); Armstrong v. United States, 182 U.S. 243 (1901); Goetze v. United States, 182 U.S. 221 (1901); De Lima v. Bidwell, 182 U.S. 1 (1901).

24. Ross v. McIntyre, 140 U.S. 453, 464:

> By the constitution a government is ordained and established "for the United States of America," and not for countries outside of their limits. The guaranties it affords against accusation of capital or infamous crimes, except by indictment or presentment by a grand jury, and for an impartial trial by a jury when thus accused, apply only to citizens and others within the United States, or who are brought there for trial for alleged offenses committed elsewhere, and not to residents or temporary sojourners abroad.

sovereignty. There were glaring exceptions to be sure,[25] but by and large, the reach of laws was deemed congruent with national territory. However, as Professor Kal Raustiala noted, the domain of constitutional liberties has steadily expanded since then.[26] When the Court decided *De Lima v. Bidwell,*[27] the first of the *Insular Cases,* the court not only ruled on whether the tariff laws of the United States extended to Puerto Rico as it would to a foreign country, but it also irreversibly expanded the geographic reach of U.S. law. That the colonies were "foreign in a domestic sense,"[28] as anomalous as that designation sounded, indicated a reluctance to accept the full legal consequences of the acquisition of territories inhabited by an exotic populace the country was loath to count as its own. What is more, it ushered in a cacophony that was to recur and plague the extraterritorial reach of the Constitution for years to come, concomitant with the rise of American geopolitical power.

The *Insular Cases* are generally divided into two lines of cases: the first dealt with tariffs and customs laws while the second involved the right to jury trials in criminal cases. The cases are famous for making the distinction between incorporated and unincorporated territories,[29] holding that only fundamental rights apply within the latter.[30] Jury trials, part of the right to criminal due process under the Sixth Amendment, have been subjected to varying interpretations of whether it was a fundamental right that travels to unincorporated territories.[31]

Although *Downes v. Bidwell,*[32] the most well-known of the *Insular Cases,* dealt with the question of whether the Uniformity Clause applied to Puerto Rico, an unincorporated territory, the splintered decision provided an enduring judicial framework for the extension of constitutional rights outside the United States. The

25. The best example would be the Western extraterritorial courts in the non-Western world during the nineteenth century. *See, e.g.*, Teemu Ruskola, *Colonialism Without Colonies: The Extraterritorial Jurisprudence of the U.S. Court for China*, 71 LAW & CONTEMP. PROBS. 217 (2008).

26. *See* Kal Raustiala, *The Geography of Justice*, 73 FORDHAM L. REV. 2501 (2005).

27. 182 U.S. 1 (1901).

28. *Id.* at 220.

29. *See, e.g.*, Dorr v. United States, 195 U.S. 138 (1904); Downes v. Bidwell, 182 U.S. 244 (1901).

30. Balzac v. Porto Rico, 258 U.S. 298, 310 (1922). *But see* Burnett, *supra* note 3, for a persuasive alternative reading of the cases.

31. *Compare Dorr*, 195 U.S. at 153 (holding the extraterritorial right to trial by jury is not a constitutional necessity in a criminal case but merely a method of procedure), *with* Duncan v. Louisiana, 391 U.S. 145, 150 (1968) (holding the federal right to trial by jury applied against the states because the right was fundamental under the Fourteenth Amendment).

32. 182 U.S. 244.

Downes Court advanced three views. Justice Brown, who wrote the majority opinion, held that the Constitution did not automatically apply to these newly acquired territories, but that "Congress, in legislating for the territories, would be subject to those fundamental limitations . . . [which] would exist rather by inference and the general spirit of the Constitution . . . than by any express and direct application of its provisions."[33] These fundamental limitations, or natural rights referred to those personal rights that are in the Constitution and its amendments, including the "rights to one's own religious opinions and to a public expression of them . . . [and] to freedom of speech and of the press."[34] Justice White, while concurring in the judgment, argued nevertheless that the Constitution was applicable everywhere and at all times.[35] But his concurrence also introduced the now-famous distinction between incorporated and unincorporated territories, whereby only fundamental rights apply to the latter. This distinction was categorically rejected in Justice Harlan's dissent, which stressed that the Constitution applied to all places and peoples subject to the authority of the United States.[36]

2. *Reid v. Covert*

Reid v. Covert[37] involved the case of a woman, a U.S. citizen, charged with murdering her husband who was an Army sergeant at a U.S. military base in Japan. The Court took this occasion to squarely repudiate the archaic view behind *In re Ross* and held that constitutional rights protect individual citizens from the actions of the government whether abroad or at home.[38] In holding that civilian citizens are entitled to a nonmilitary jury trial pursuant to the Sixth Amendment, the plurality opinion in *Reid,* written by Justice Hugo Black, distinguished the *Insular Cases* by pointing to the different

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33. *Id.* at 268.

34. *Id.* at 282.

35. *Id.* at 289 (White, J., concurring). Justice White's concurrence was joined by Justices Shiras and McKenna and adopted later in *Balzac*, 258 U.S. 298.

36. Downes, 182 U.S. at 379–80 (Harlan, J., dissenting):

> In my opinion, Congress has no existence and can exercise no authority outside of the Constitution. Still less is it true that Congress can deal with new territories just as other nations have done or may do with their new territories. This nation is under the control of a written constitution, the supreme law of the land and the only source of the powers which our government, or any branch or officer of it, may exert at any time or at any place.

37. 354 U.S. 1 (1957); *see also* Kinsella v. United States *ex rel.* Singleton, 361 U.S. 234 (1960) (holding a civilian citizen entitled to Fifth and Sixth Amendment protections even for a noncapital murder charge, essentially extending the full Bill of Rights to citizens).

38. *Reid*, 354 U.S. at 7. The Court declined to overrule *Ross* for other reasons.

sources of regulating authority. Congress exercises plenary authority over the colonies, irrespective of the citizenship of its inhabitants.[39] But in *Reid,* citizenship was the controlling factor.[40] Alongside its statement that the government is "entirely a creature of the Constitution," the Court held that it could not selectively choose which constitutional provisions to apply to the Federal Government.[41] This strongly implied that all rights contained in the Bill of Rights are fundamental and that the restrictions always follow wherever government action is exercised, a claim perfectly consistent with Black's own advocacy of total incorporation of the Bill of Rights.

The concurrences of Justice Frankfurter and Harlan distanced themselves somewhat from Black's opinion. First, they held that the *Insular Cases* remain valid, which they understood the plurality to be discarding as an antiquated relic.[42] In addition, Justice Frankfurter also posed the main question as a matter of analogous due process—what was due to the accused, a civilian dependent of a military serviceman overseas who was facing a capital murder charge?[43] He asserted that the other parts of the Constitution must be taken into account in order to decide whether the accused should be subjected to a court-martial.[44] Second, Justice Harlan in particular qualified Justice Black's statement that the Constitution applies to U.S. citizens everywhere the federal government exercises power. The proposition, Harlan stated, was not that the "Constitution 'does not apply' overseas, but that there are provisions in the Constitution which do not necessarily apply in all circumstances in every foreign place."[45] In other words, not all provisions are applicable overseas in cases where it would be difficult to enforce them for a variety of reasons. For example, in *Balzac,* Chief Justice William Howard Taft held the jury system to be inapplicable in Puerto Rico because such a system needed citizens trained in the exercise of responsibilities as jurors.[46] Puerto Ricans, who

39. *Id.* at 14.

40. *Id.*

41. *Id.* at 5–6, 8–9:

> While it has been suggested that only those constitutional rights which are "fundamental" protect Americans abroad, we can find no warrant, in logic or otherwise, for picking and choosing among the remarkable collection of "Thou shalt nots" which were explicitly fastened on all departments and agencies of the Federal Government by the Constitution and its Amendments.

42. *Id.* at 67.

43. *Id.* at 44, 75.

44. *Id.* at 44.

45. *Id.* at 74–75 (Harlan, J., concurring) ("But, for me, the question is which guarantees of the Constitution should apply in view of the particular circumstances, the practical necessities, and the possible alternatives which Congress had before it.").

46. Balzac v. Porto Rico, 258 U.S. 298, 310 (1922).

had a civil law background, did not have the experience to serve as common law jurors.[47] This functionalist test, which made the applicability of constitutional provisions contingent on factual conditions and circumstances, would reappear in slightly varying forms in Justice Kennedy's opinions in *United States v. Verdugo-Urquidez*[48] and *Boumediene*.[49]

3. *U.S. v. Verdugo-Urquidez*

As we will see in detail later,[50] *Verdugo-Urquidez* is more relevant to the distinction between guarantees accorded to aliens and those exclusively available to citizens, but Justice Kennedy's concurrence in that case is worth mentioning at the outset. The case dealt with whether the Fourth Amendment applied to the search and seizure by U.S. Drug Enforcement Agency ("DEA") agents of the person and property of a nonresident alien residing in Mexico.[51] Affirming the *Reid* ruling that "Government may only act as the Constitution authorizes, whether the actions in question are foreign or domestic,"[52] Justice Kennedy concluded in any case that the application of the Warrant Clause would have been "impracticable and anomalous" because of the difficulty of locating available judges or magistrates to issue the necessary warrants and the perhaps unascertainable, if not downright different, conceptions of reasonableness and privacy in Mexico.[53] This "impracticable and anomalous" standard took center stage in *Boumediene*, the most recent decision that dealt with the extraterritorial application of a constitutional right (the Suspension Clause). In that case, Justice Kennedy delivered the majority opinion.

Verdugo-Urquidez also stands for the proposition that constitutional rights do not extend to those who are not considered members of "the people."[54] Chief Justice Rehnquist, writing for the majority, construed the text of the Fourth Amendment and its use of the term "people," unlike the Fifth and Sixth Amendments, as referring

47. *Id.*

48. *See* 494 U.S. 259, 291 (1990).

49. *See* Boumediene v. Bush, 553 U.S. 723, 758–59 (2008).

50. *See infra* Part IV.A.

51. *See Verdugo-Urquidez*, 494 U.S. at 291.

52. *Id.* at 277 (Kennedy, J., concurring).

53. *Id.* at 277–78. For a different holding on the application of the Fourth Amendment abroad, see also United States v. Stokes, 726 F.3d 880 (7th Cir. 2013) and *In re* Terrorist Bombings of U.S. Embassies in E. Afr., 552 F.3d 157 (2d Cir. 2008), which held that the Warrant Clause of the Fourth Amendment does not have extraterritorial application, only the reasonableness requirement.

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

only "to a class of persons who are part of the national community or otherwise have developed sufficient connection with this country to be considered part of that community."[55] He also invoked the authority of the *Insular Cases*, which held that not all constitutional provisions necessarily apply in all places where the U.S. exercises sovereign power. One of the justifications for this interpretation was a slippery slope concern that applying the Constitution to aliens extraterritorially would produce deleterious and disruptive consequences for U.S. military and law enforcement operations abroad as they would be besieged by aliens' claims for damages.[56] Hence, the Court concluded, any remedy should properly be within the province of the political branches, not the courts.

4. *Boumediene v. Bush*

Justice Kennedy's concurrence in *Verdugo-Urquidez* found its way into his majority opinion in *Boumediene,* which elevated the "impracticable and anomalous" standard as the prevailing rule on extending rights abroad. There is ongoing scholarly debate on what this standard actually means and how it might apply in practice.[57] This is especially significant as the analysis in *Boumediene* largely turned on whether the standard would allow for the application of the Suspension Clause to the alien detainees held at the Guantanamo Bay prison.[58] Significantly, *Boumediene* did not directly address the citizenship of the petitioner-detainees, which the dissent and the critics of the decision pointed out. Even its discussion of *Johnson v. Eisentrager,* was focused on the practical circumstances of providing access to habeas to German citizens detained at Landsberg Prison in Allied-occupied postwar Germany.[59]

Instead, Justice Kennedy identified the degree of control the U.S. government exercised over the base, the costs of holding habeas

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55. *Id.*

56. *Id.* at 273–74.

57. For a comprehensive take on the question, including an overview of the debates, see Jesse Merriam, *A Clarification of the Constitution's Application Abroad*: *Making the "Impracticable and Anomalous" Standard More Practicable and Less Anomalous*, 21 WM. & MARY BILL RTS J. 171 (2012).

58. This was the main complaint of Eric Posner, who argues that, pursuant to *Eisentrager*, citizenship should have controlled the analysis. *See* Eric Posner, Boumediene *and the Uncertain March of Judicial Cosmopolitanism*, 2007–2008 CATO SUPREME CT. REV. 23, *available at* http://www.law.uchicago.edu/files/files/pl228.pdf, *archived at* http://perma.cc/M9YN-FJRA (criticizing the decision as an instance of judicial cosmopolitanism, an emerging view that interests of nonresident aliens deserve constitutional protection secured by judicial oversight).

59. Boumediene v. Bush, 553 U.S 723, 762 (2008).

proceedings, and the potential for diplomatic friction with the Cuban government as the main practical factors in determining whether to ultimately give full effect to the Suspension Clause.[60] Legal scholars such as Gerald Neuman argue that *Boumediene* represents an entirely new functionalist approach in determining the extent of the Constitution's reach beyond national borders, characterizing it as a "global due process" approach.[61] Indeed, the majority opinion's recitation of precedents from the *Insular Cases* to *Eisentrager*[62] and then *Reid* all the way to *Verdugo-Urquidez* clearly pointed to the unifying thread animating the opinion and, by extension, the current state of the extraterritoriality doctrine: whether constitutional rules would actually travel and *apply*, even accepting the proposition that they remain a priori operative everywhere the U.S. government acts,[63] depends on practical considerations.

B. The First Amendment Beyond Borders

Although the Court has never directly considered the question of whether the First Amendment has extraterritorial application, the Court has vaguely considered the possibility in a few cases. Short of providing doctrinal rules, the following cases nonetheless form fertile ground for a future reconsideration of freedom of speech as an extraterritorial claim.

1. *Haig v. Agee*

In 1974, Philip Agee, a disillusioned former employee of the Central Intelligence Agency, who was residing in West Germany, divulged the identities of undercover CIA agents, employees, and sources located around the world as part of his "campaign to fight the CIA wherever it is operating."[64] The Secretary of State later revoked his passport on the ground that his activities were causing serious damage to U.S. foreign policy and national security.[65] The resulting legal tussle

60. *Id.* at 760–62. In addition to practical factors, the others are status of the detainees and nature of their location.

61. Gerald L. Neuman, *Understanding Global Due Process*, 23 GEO. IMMIGR. L.J. 365 (2008).

62. *See infra* notes 198, 202–04 and accompanying text.

63. *Cf.* Burnett, *supra* note 3 (arguing for a two-tiered inquiry: whether a constitutional guarantee applies and, only after that question, how an applicable guarantee might be enforced).

64. Haig v. Agee, 453 U.S. 280, 283 (1981). *See generally* PHILIP AGEE, INSIDE THE COMPANY: CIA DIARY (1975) (containing "Who's Where" sections listing the names of alleged CIA employees on a country-by-country basis and "Who's Who" sections containing detailed biographical information on all such persons).

65. *Haig*, 453 U.S. at 311.

went all the way to the Supreme Court, ending with *Haig v. Agee,*[66] where the Court held that the passport revocation was constitutional. Agee argued that the Secretary of State's revocation of his passport undermined both his Fifth Amendment liberty interest to travel as well as his First Amendment right to criticize government policies.[67] In his view, the revocation was an unconstitutional penalty for speaking out against the government.[68] The majority embarked on a two-tiered analysis. First, it distinguished Agee's case from previous decisions since it was not only his beliefs and speech that were being curtailed but also his conduct or action. The majority recognized that the government has a legitimate interest in safeguarding national security. In this case, Agee's conduct, which included traveling to different countries and working with his collaborators there in order to expose agents operating in the country, endangered such security and the government's diplomatic relations with other nations.[69] Hence, restricting his foreign travel was the "only avenue open to the Government to limit these activities."[70] But second, and more significant for present purposes, the Court also gave a hedged view of whether the First Amendment applies beyond borders, stating that "[a]ssuming, arguendo, that First Amendment protections reach beyond our national boundaries, Agee's First Amendment claim has no foundation."[71] Again, the reason offered by the *Agee* Court is that the revocation was due mainly to his conduct, not his speech. The majority did acknowledge that Agee would have been free to criticize the U.S. government as he was when he held a passport.[72]

2. *DKT Memorial Fund Ltd. v. Agency for International Development*

In *DKT Memorial Fund Ltd. v. Agency for International Development,*[73] an early precursor of the *USAID* case, the D.C. Circuit addressed a First Amendment challenge lodged by domestic and foreign NGOs against the government's refusal, under the Foreign Assistance Act, to fund groups that engage in activities promoting or implementing

66. *Id.* at 309.
67. *Id.* at 287.
68. *Id.* at 306.
69. *Id.* at 308.
70. *Id.*
71. *Id.*
72. *Id.* at 309. *But see id.* at 318 (Brennan, J., joined by Marshall, J., dissenting) (taking as a given that Agee's speech abroad was constitutionally protected and arguing that there should have been an express delegation made by Congress to the Secretary of State to revoke passports for national security reasons).
73. 887 F.2d 275 (D.C. Cir. 1989).

abortion abroad. Pursuant to the Mexico City Policy, all private organizations receiving federal funding are prohibited from performing or promoting abortion services in other countries even with non-U.S.-government funds.[74] This policy has been in effect intermittently since 1984. All Republican administrations have adopted the rule, but the rule has been rescinded every time a Democratic president is elected.[75]

The appellate court dismissed the claims of the foreign NGOs on standing grounds, holding that nonresident aliens acting extraterritorially did not fall within the "zone of interests" protected by the First Amendment.[76] In doing so, it implicitly recognized that domestic NGOs have an extraterritorial speech right abroad.[77] That speech right, however, did not encompass an unfettered freedom to associate with the foreign NGOs. The domestic entity in question, DKT International, asserted that the restrictions on foreign NGOs were an unconstitutional burden on its own right to associate with these foreign entities. The court's rejection of this argument rested on two related reasons. First, it upheld the prerogative of the government to engage in viewpoint discrimination in subsidizing activities consistent with its foreign policy choices.[78] Therefore, the government communicates a chosen message abroad not only through its expressed means but also through "its choice of foreign entities with whom it will associate."[79] Second, pursuant to *Kleindienst v. Mandel*[80] and *Palestine Information*

74. Other constitutional challenges to the Mexico City Policy similarly failed. *See, e.g.*, Ctr. for Reprod. Law & Policy v. Bush, 304 F.3d 183, 197–98 (2d Cir. 2002) (holding that the Mexico City Policy did not violate the NGO's equal protection rights); Planned Parenthood Fed'n of Am., Inc. v. Agency for Int'l Dev., 915 F.2d 59, 65 (2d Cir. 1990) (holding that the policy did not violate Planned Parenthood's freedom of speech). For domestic organizations, the prohibition only covers government funds, not their own. *See DKT*, 887 F.2d at 277.

75. The rule was rescinded on January 23, 2009, two days after Barack Obama took office as President. It had been reinstated during the administration of George W. Bush on January 22, 2001, also two days after he took office. *See* Mexico City Policy and Assistance for Voluntary Population Planning, 74 Fed. Reg. 4903 (Jan. 28, 2009), *available at* http://www.gpo.gov/fdsys/pkg/FR-2009-01-28/pdf/E9-1923.pdf, *archived at* http://perma.cc/BMG2-BDBE.

76. *DKT*, 887 F.2d at 283–85.

77. *Id.* at 291 ("A recognition of a right, whether or not constitutionally based, for American entities to pursue certain goals with their own funds while receiving largess from the government for other pursuits does not in any way mandate that the same treatment must be afforded foreign entities.").

78. *Id.* at 289.

79. *Id.* at 291. This was also the gist of Justice Scalia's dissent in *USAID*, although he did not explicitly frame it using the government speech category. *See* USAID, 133 S. Ct. 2321, 2332–33 (Scalia, J., dissenting) ("The program is valid only if the Government is entitled to disfavor the opposing view (here, advocacy of or toleration of prostitution). And if the program can disfavor it, so can the selection of those who are to administer the program.").

80. 408 U.S. 753 (1972) (upholding the exclusion of Mandel, a nonresident alien and academic, from the United States to speak before U.S. citizens).

Office v. Shultz,[81] the right of expressive association is not without limits. DKT, in other words, would be free to associate with its foreign partners but without the use of federal funds.[82] Further, the court rejected the notion that an organization could expressively associate with another association, noting that Supreme Court precedents only protected such a right for individuals.[83]

The dissent of then-Judge Ruth Bader Ginsburg directly spoke to the extraterritorial speech rights of U.S. citizens and entities. Starting with the premise that DKT's claims rests on "the freedom to communicate, to receive communications, and to maintain associations, *at home and abroad*, that United States residents enjoy vis-à-vis the United States government,"[84] she then proceeded to criticize the decision as essentially a roundabout way of curtailing the constitutional freedoms of DKT by penalizing its foreign partners.[85] Her analysis focused on the speech rights of DKT abroad involving its private funds, which would necessarily entail, absent any compelling cause, freedom to access "audience, adherents, and associates among foreign NGOs."[86]

3. *U.S. v. Al Bahlul*

The ongoing Global War on Terror provides another salient dimension to the question of extraterritorial speech. In *United States v. Al Bahlul,*[87] Ali al Bahlul, a Yemeni national, was convicted under the Military Commissions Act for providing material support and resources to al Qaeda, among others.[88] Al Bahlul argued that his conviction was inappropriately based on political speech otherwise protected by the First Amendment, specifically his production and dissemination of the video entitled "The Destruction of the American Destroyer U.S.S. *Cole*." The prosecutors averred that the video was used as a propaganda and recruitment tool by al Qaeda in Afghanistan.[89] There was no discussion

81. 853 F. 2d 932 (D.C. Cir. 1988) (using the *O'Brien* test to uphold the State Department's closure of the Palestine Information Office).

82. *See DKT*, 887 F.2d at 293 (distinguishing between interference with the exercise of a right and the refusal to subsidize a right).

83. *Id.* at 294.

84. *Id.* at 303 (Ginsburg, J., dissenting) (emphasis added).

85. *Id.* at 308 ("[T]he government recognizes that cutting off domestic NGOs from all AID funds if they deal with foreign NGOs that offer abortion-related services would amount to punishing domestic NGOs 'for exercising their constitutional rights of free speech and free association in conjunction with foreign NGO[s].' ").

86. *Id.* at 307.

87. 820 F. Supp. 2d 1141 (U.S.C.M.C.R. 2011).

88. *Id.* at 1156.

89. *Id.* at 1161.

of whether, as a noncitizen, al Bahlul could even invoke the First Amendment. The court, oddly enough, proceeded to consider the facts of the case under both a theory where the First Amendment did and did not apply. In the former case, it nevertheless concluded after a strict scrutiny analysis that the video fell outside the protections of the First Amendment as it was "aimed at inciting viewers to join al Qaeda, kill Americans, and cause destruction."[90] Invoking the *Brandenburg* test, which forbids advocacy directed to inciting imminent lawless action,[91] the court held that the subjects of the proscribed advocacy or threat need not even be specific individuals, but it suffices that there were identified targets.[92] In this case, al Bahlul's video, which was intended to incite people to kill Americans, was regulable under *Brandenburg*.[93] It also deemed the prohibition of terrorism, even if it affected and curtailed speech, a compelling congressional interest.[94]

4. *Holder v. Humanitarian Law Project*/*USAID v. Alliance for Open Society*

More recently, the Supreme Court reiterated in *Holder v. Humanitarian Law Project* the limits on the right to expressive association. In *Holder*, the Court upheld statutory provisions that prohibited the provision of material support or resources to certain foreign organizations designated as engaging in terrorist activity.[95] The petitioner, Humanitarian Law Project ("HLP"), claimed that it only sought to provide legal training and political advocacy to two groups: the Kurdistan Workers' Party ("PKK") and the Liberation Tigers of Tamil Eelam ("LTTE")—both designated terrorist organizations by the State Department.[96] The Court rejected the expressive association claim of HLP because the penalty is not on the mere fact of association but on the accompanying provision of material support.[97] Justice Breyer, joined by Justices Ginsburg and Sotomayor, dissented and held

90. *Id.* at 1249.

91. Brandenburg v. Ohio, 395 U.S. 444, 447–48 (1969):

> [T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.

92. *Al Bahlul*, 820 F. Supp. 2d at 1249.

93. *Id.*

94. *Id.*

95. Holder v. Humanitarian Law Project, 561 U.S. 1, 7 (2010). The provision in question is 18 U.S.C. § 2339B(a)(1) (2012), which makes it a federal crime to "knowingly provide[ ] material support or resources to a foreign terrorist organization."

96. *Holder*, at 10.

97. *Id.* at 18.

that it is this very sort of speech and association that the First Amendment ordinarily offers its strongest protection.[98] The recognition of the extraterritorial locale of the speech right here is implicit. The coordinated speech and training between HLP and the foreign groups could have easily been in New York, Europe, or Asia, all places where international organizations such as U.N. agencies are located. Or it could also have been conducted within the United States. The Court's reasoning seemingly assumed this when it acknowledged HLP's First Amendment claim, only to deem it outweighed by the government's interest in combating international terrorism.

In *USAID,* a seemingly contemporary incarnation of the 1989 *DKT* case, the funding restriction that covered both government and private funds, which previously had only applied to foreign NGOs, now applied to domestic NGOs. But this restriction on private funds and speech came in a novel form: organizations must sign a pledge ex ante in which they manifest a position opposing prostitution as part of their award document from USAID.[99] Such speech opposing prostitution must be uttered not only at the moment of signing the pledge but also, as the complaints of the NGOs illustrated, at all times when the NGO is abroad and working with U.S. government funds. Put another way, the restriction suppressed what they could have constitutionally uttered as private speech when using private funds on their other projects. During oral arguments for the case, the Government pointed out that it was the foreign location of these activities that made the pledge necessary for ensuring that government objectives were met.[100] The organizations were going to be perceived as messengers and speakers of U.S. policy priorities.[101] The NGOs, all U.S.-registered entities, challenged the restriction as unconstitutionally compelled speech, which the Court eventually upheld.[102] Although the text of the decision did not mention the foreign setting of the speech interests of both the U.S. government and the domestic NGOs, the Court recognized their First Amendment interests are as present abroad as they are here at home in its ensuing compelled speech analysis.

98. *Id.* at 42–43.

99. USAID, 133 S. Ct. 2321, 2325 (2013).

100. Transcript of Oral Arguments, *supra* note 20, at 27.

101. *Id.* at 55–56.

102. *USAID*, 133 S. Ct. at 2332.

C. Resolving the Tension in Favor of an Extraterritorial First Amendment

The foregoing cases illustrate a judicial landscape marked by ambiguity and tension insofar as an extraterritorial First Amendment is concerned. On the one hand, *Boumediene* and its army of precedents tells us that the Bill of Rights in its entirety only applies under certain circumstances abroad, subject to functionalist considerations and whether U.S. citizens are involved. In addition, the case did not justify its extension of habeas to the petitioner-detainees in *Boumediene*, who were all non-U.S. citizens, leaving open the normative inquiry on the kinds of claims aliens can or cannot make under the U.S. constitutional scheme. On the other hand, the Court's reluctance to even recognize that the First Amendment *might* cover, though not necessarily protect,[103] speech made abroad is in tension with the ready acknowledgement that the First Amendment, at least for U.S. citizens, already does cover such speech, as the Court held in *USAID* and as then-Judge Ginsburg's argued in her dissent in *DKT*. In addition, the court's First Amendment analysis with respect to al Bahlul's political speech appears to give the impression that aliens could avail themselves of First Amendment protections outside the United States, even though his speech ultimately failed the *Brandenburg* standard.

One factor that contributes to this confusion, and perhaps also the key to its resolution, is the dual character of the First Amendment—and the rest of the Bill of Rights for that matter—as both an individual right and a structural limitation. Both the text ("Congress shall make no law. . . .") and history arguably supports such an interpretation.[104] As a structural limitation, it uncontroversially travels wherever the government acts. But as an individual right, it is enmeshed in the aforementioned doctrinal quagmire. Indeed, even the underlying justifications for freedom of expression have personal (individual flourishing) and structural (self-governance) aspects. But if it was only a structural limitation, then the beneficiaries need not be limited to

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103. The distinction between coverage and protection in First Amendment jurisprudence is well known. *See* Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765 (2004). This Article's proposal of an extraterritorial First Amendment refers to coverage, and not necessarily protection, as there might be legitimate competing government interests that would trump its application.

104. *See* Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131 (1991); Stephen I. Vladeck, *The Suspension Clause as a Structural Right*, 62 U. MIAMI L. REV. 275 (2008); Jessica Powley Hayden, Note, *Mullahs on a Bus: The Establishment Clause and U.S. Foreign Aid*, 95 GEO. L.J. 171 (2006). There are specific difficulties associated with viewing the Establishment Clause as only structural, however, which is not the case with the Speech and Press Clauses, because the Court has never interpreted the Establishment Clause in such a manner.

citizens. It is hard to see any member of the Court accepting the full import of that view. Consider the following scenario: An official California trade mission in Shanghai discriminates in hiring only Chinese workers of Han ethnic descent. Could any non-Han Chinese, residing in China, claim an Equal Protection Clause violation against the State of California? The intuitive answer would be an uneasy no, although a structural view of the Bill of Rights supports otherwise. As Justice Kennedy stressed in *Verdugo-Urquidez,* the Constitution does not create any juridical relation between the United States and a "limitless class of noncitizens" located outside national borders.[105] It also falls squarely under the concern of opening the litigation floodgates to a deluge of potentially disruptive constitutional claims.

How to delineate a limit to the class of noncitizens able to invoke the Constitution extraterritorially is a question appropriate to the discussion of the coverage of the extraterritorial First Amendment. For now, the example is salient for another reason. Why should we allow both the citizens and noncitizens in a satellite campus of a public university located in the Middle East to invoke the First Amendment against such a speech code but not the noncitizens in China to make an Equal Protection claim against the State of California for discriminatory hiring?

The answer is in the nature of the right being invoked. Professor Jules Lobel has recently argued that this structural-individual rights distinction is ultimately illusory and indefensible for many reasons.[106] Using *Boumediene,* Lobel shows how the Court had correctly treated the right to habeas as protecting separation of powers concerns, thus upholding rule of law values, inasmuch as it confers a constitutional right in favor of the petitioner-detainees.[107] *Boumediene,* however, did not explain the disconnect between the two conceptions of habeas. Lobel thus proposes resolving this disconnect by resorting to a fundamental-norms analysis—that is, whether a constitutional principle would apply outside the United States depends on its character as a fundamental norm crucial to a democratic order.[108]

Such analysis supports the extraterritoriality of the First Amendment. In fact, this concern suffuses the extraterritoriality cases. The common denominator underlying the three divergent views in *Downes* was the focus on fundamental rights. No doubt freedom of

105. United States v. Verdugo-Urquidez, 494 U.S. 259, 276 (1990) (Kennedy, J., concurring).

106. Jules Lobel, *Separation of Powers, Individual Rights, and the Constitution Abroad*, 98 IOWA L. REV. 1629 (2013) (arguing that the distinction is illusory for purposes of determining whether a provision should apply abroad).

107. *Id.* at 1650–51.

108. *Id.* at 1634.

speech is of such character. Even for Justice White, who argued that the application of the Constitution is contingent on whether the territory was incorporated or not, fundamental rights nevertheless apply even to unincorporated areas.[109] And the majority, through Justice Brown, explicitly cited freedom of religion and of speech as among these natural rights and fundamental limitations on government action.[110] The same concern over fundamental rights undergirded *Reid*, where the main question revolved around whether the right to jury trial is of such a character.[111] Moreover, although *Verdugo-Urquidez* did not apply the Fourth Amendment abroad, the case has been interpreted by lower courts insofar as citizens are concerned to apply only to the Warrant Clause, a procedural requirement, rather than its reasonableness requirement for the search, which is a substantive concern.[112] Lastly, while *Boumediene* collapses the fundamentality of the Suspension Clause as a mechanism to monitor and maintain the separation of powers essential to the U.S. political tradition,[113] with its character as an individual right, the clause nonetheless provides solid ground for an extraterritorial First Amendment to anchor itself. It is erroneous to state, therefore, as the *Agee* court surmised,[114] that the First Amendment does not even go beyond national boundaries. At best, *Boumediene* limits that conclusion in cases where the practical considerations would make it difficult to uphold the constitutional claim in full.[115] At the same time, it affirms the underlying assumption in *Holder* and *USAID* that citizens, at the least, could invoke the First Amendment abroad.

III. JUSTIFICATIONS

But why recognize an extraterritorial First Amendment? Constitutional text, history, and the prevailing philosophical justifications that continue to inform contemporary free speech jurisprudence support this conception. In this Part, I also include the international legal commitments of the United States to support my

109. Downes v. Bidwell, 182 U.S 244, 291 (1901) (White, J., concurring).

110. *Id.* at 252.

111. Reid v. Covert, 354 U.S. 1, 52–53 (1957) (Frankfurter, J., concurring).

112. *In re* Terrorist Bombings of U.S. Embassies in E. Afr., 552 F.3d 157, 159 (2d Cir. 2008).

113. Boumediene v. Bush, 553 U.S. 723, 833 (2008) (Scalia, J., dissenting).

114. Haig v. Agee, 453 U.S. 280, 308 (1981).

115. In the Texas A&M example at the beginning of this Article, one practical consideration is that Islam is the established religion in Qatar, and if the full protection of the First Amendment is invoked to protect what could be deemed blasphemous speech, it might conflict with the dominant religious and political culture of the country.

argument. Taken individually, these factors are hardly dispositive. But evaluated as a whole, they provide considerable support that such a right exists outside U.S. borders.

A. Text and History: A Location-Neutral First Amendment

The subject of what the First Amendment protects is clear: it protects the freedom of speech.[116] What is less clear is whether the reach of that protection extends beyond the traditional borders of the United States. The constitutional text also does not identify any limitations on the identities of the speakers on whom that protection is bestowed. The First Amendment simply defines the entity it restrains: Congress.[117] Thus, it is difficult to dispute the assertion that the text itself suggests that the First Amendment is not limited in its application within a particular territory. Most probably, the Framers simply never considered it in any geographic milieu in light of the origins of the Bill of Rights as primarily a practical device to win over skeptics into ratifying the Constitution—a "parchment barrier" as James Madison famously put it.[118]

Given that the text of the First Amendment is location neutral, the question then turns to its intended beneficiary. Unlike other amendments, its text does not mention citizen,[119] state,[120] or people.[121] In fact, this ambiguity had led courts, including the Supreme Court, to apply it to corporate personalities as well as governmental entities.[122]

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116. U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech . . . .").

117. The First Amendment has been interpreted to apply to the federal government as a whole and, since 1925, against states as well. *See* Gitlow v. New York, 268 U.S. 652, 666 (1925).

118. THE FEDERALIST NO. 48 (James Madison), NO. 84 (Alexander Hamilton) (arguing against the inclusion of a bill of rights in the Constitution). *See generally* PAULINE MAIER, RATIFICATION: THE PEOPLE DEBATE THE CONSTITUTION 1787–88 (2011) (describing the role of the Bill of Rights in the ratification debate). The Constitution, however, is another matter where foreign affairs occupied center stage. *See* David M. Golove & Daniel J. Hulsebosch, *A Civilized Nation: The Early American Constitution, the Law of Nations, and the Pursuit of International Recognition*, 85 N.Y.U. L. REV. 932 (2010) (arguing that the core purpose of the Federal Constitution was for the United States to be recognized as a member of the European civilized community).

119. *See* U.S. CONST. amends. XI, XIV, XV, XIX, XXIV, and XXVI.

120. U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

121. *Id.* Note however that the Assembly and Petition Clause of the First Amendment does refer to people, but the Speech, Religion and Press Clauses do not. Even so, the First Amendment has never been interpreted under a strictly compact or membership approach.

122. U.S. CONST. amend. I (relating to right to peaceably assemble); *id.* amends. IV, IX.

For instance, in *Citizens United v. FEC,*[123] the Court held the identity of the speaker as immaterial for purposes of determining what kind of speech merits protection. On the locus of speech, nothing definitive exists from the historical record during the period of the framing.[124] However, I offer two historical episodes that can give us further guidance on both the scope of First Amendment protection—i.e., whether it covers only citizens or whether it extends to aliens at home and abroad. The first scenario involves the debates surrounding the Alien and Sedition Acts of 1798, during which the meaning of the First Amendment was fully elaborated; the second episode involves examples from the period of U.S. territorial expansion, primarily in the colonies acquired from Spain pursuant to the Treaty of Paris of 1898. During this period, the First Amendment was applied to and availed of by people in territories which had not yet been or would never be admitted into statehood.

It might surprise many that there was not much said of freedom of speech during the framing period. Madison, the drafter of the Bill of Rights, simply held the view that the national government could not put any restriction on speech. Unlike its counterpart clause on religion, which had been explicated in many writings at the state level prior to the ratification of the Constitution,[125] the meaning of the Speech and Press Clauses were not made clear until the constitutional crisis of 1798. Enacted in 1798 against the backdrop of an undeclared war against France that had produced rampant nativism, the Alien Acts, two separate statutes, subjected aliens, whether or not they were citizens or nationals of enemies of the United States in a declared war, to expulsion upon mere order of the President, without any procedural guarantees.[126] The Sedition Act, on the other hand, criminalized any

123. 558 U.S. 310 (2010). Foreign corporations cannot make political contributions, but U.S. subsidiaries of foreign corporations can.

124. Freedom of speech was elevated as a constitutional right for the first time in the Pennsylvania Constitution of 1776, *reprinted in* LEONARD LEVY, LEGACY OF SUPPRESSION: FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY 183 (1963) ("That the people have a right to freedom of speech, and of writing, and publishing their sentiments; therefore the freedom of the press ought not to be restrained." (citation omitted)). But there is no record of Madison's views at that time except for his drafts. Legislative debates during the period of the framing of the First Amendment in 1791 also did not exist.

125. The drafting of the Religion Clauses was shaped substantively by state-level debates and writings, most especially James Madison's *Memorial and Remonstrance Against Religious Assessments*, a pamphlet addressed to the Virginia General Assembly in 1785. For a brief drafting history, see Noah Feldman, *The Intellectual Origins of the Establishment Clause*, 77 N.Y.U. L. REV. 346 (2002).

126. The Alien Enemies Act, ch. 66, 1 Stat. 577 (1798), *repealed by* Act of Apr. 14, 1802, ch. 28, 2 Stat. 153; Alien Friends Act, ch. 58, 1 Stat. 570 (1798) (expired June 25, 1800). For a complete

utterance, whether spoken or written, critical of the government with a punishment of imprisonment and fines.[127] It must be noted that these acts were symptomatic of a bitter political struggle on many fronts that had erupted between the Federalists, led by the likes of Alexander Hamilton and John Adams, and the Democratic-Republicans, with Thomas Jefferson and James Madison. One has to look at the picture in this wider frame in order to truly appreciate the import of these acts.[128]

For purposes of our present inquiry, however, the importance of this crisis lies in the insights it produced regarding the meaning of freedom of speech and, more broadly, to whom the Constitution bestows the protections it contains. The Republicans had condemned the Sedition Act as a violation of the First Amendment, a charge that the Federalists denied.[129] They pointed out that the First Amendment incorporated the understanding as explained in William Blackstone's *Commentaries*, the most illustrious legal treatise in England at the time.[130] Under that view, free speech was nothing more than the liberty to write and speak, with an accompanying accountability to a potential injured party. The Blackstonian understanding of free speech, however, certainly did not intend to do away with the crime of seditious libel, and a free press meant only freedom from prior restraints. It did not take long for the battle to spill over to the states. Kentucky and Virginia issued Resolutions, secretly authored by Thomas Jefferson and James Madison respectively, denounced both the Alien and Sedition Acts as unconstitutional.[131] In what many consider a precursor to secessionist sentiments that would reach their peak in the Civil War,[132] the Resolutions essentially argued that the states had the right and duty to declare unconstitutional any acts of Congress not authorized by the Constitution.

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history of the Acts, see JAMES MORTON SMITH, FREEDOM'S FETTERS: THE ALIEN AND SEDITION ACTS AND AMERICAN CIVIL LIBERTIES (1956).

127. The Sedition Act of 1798, ch. 74, 1 Stat. 596 (expired Mar. 3, 1801).

128. *See generally* GEOFFREY R. STONE, PERILOUS TIMES: FREE SPEECH IN WARTIME FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM (2005) (providing an account of the political background against which The Sedition Act of 1798, as well as other legislation that has since been judged to have abridged civil liberties, was enacted).

129. *Id.* at 36–41.

130. SMITH, *supra* note 126, at 421.

131. STONE, *supra* note 128, at 45.

132. The resolutions were indeed cited as precedents for the Nullification Crisis of 1832 and the secession of the Southern states at the start of the Civil War. *See generally* FORREST MCDONALD, STATES' RIGHTS AND THE UNION: *IMPERIUM IN IMPERIO*, 1776–1876 (2002) (surveying varying attitudes toward states' rights in the first century of the United States).

None of the other states went along with the Resolutions. In fact, they criticized them as a recipe for disunion.[133] As a response, the Virginia General Assembly adopted the celebrated Report of 1800, written by James Madison, which affirmed the principles of the Resolutions though declaring them to be without legal effect.[134] Given Madison's stature, the Report carried an uncommon authority. In characteristically brilliant fashion, Madison laid down one by one the principles that would underlie the modern First Amendment and republicanism, most notably the libertarian and absolutist view of freedom of speech. The Sedition Act flipped the American notion that "[t]he people, not the government, possess the absolute sovereignty."[135] Thus, the freedom guaranteed by the First Amendment was absolute insofar as the federal government was concerned. Significantly, he also expounded an early view of a structural approach to constitutional limits when it came to the treatment of aliens. Rejecting a strict social contract approach, Madison wrote that even though aliens were not parties to the Constitution in the same way that citizens were, it did not mean that they could not avail of its protection so long as they owe it their temporary obedience.[136] Nonetheless, both Acts were never invalidated by the Supreme Court, and several Republicans were eventually arrested under the Sedition Act.[137]

If the early years of the young republic tested the original meanings of the lofty ideals set forth in the federal constitution, its coming-of-age stretched its ideals' geographic reach. The First Amendment was no exception to this. As the United States substantially expanded its territory during the long nineteenth century, the question of whether constitutional limitations attached to territories, and by what means it did, became the focus of legal attention. Could the Constitution be considered to have applied *ex proprio vigore*—that is, by its own force, in the territories throughout the nineteenth century—or did it only extend by congressional grace? It was never clear whether the acquisition of territories was made pursuant to the Territory Clause[138] or through some rather nebulous

133. For the responses of the other states, see Frank Maloy Anderson, *Contemporary Opinion of the Virginia and Kentucky Resolutions*, 5 AM. HIST. REV. 45 (1899).

134. JAMES MADISON, THE VIRGINIA REPORT OF 1799–1800: TOUCHING THE ALIEN AND SEDITION LAWS (1850).

135. *Id.* at 220.

136. *Id.* at 205.

137. STONE, *supra* note 128, at 63, 73.

138. U.S. CONST. art. IV, § 3, cl. 2 ("The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States . . . .").

concept of general sovereignty.[139] At any rate, Congress exercised plenary powers over all territories.[140] Pursuant to this, Congress passed organic acts that established territorial governments and appointed its personnel.[141] Furthermore, the Bill of Rights, as we all know, did not apply to the states until after the Fourteenth Amendment was adopted in 1868. States were governed by their respective constitutions. And yet, despite this arrangement, the Supreme Court held the First Amendment, specifically the Religion Clauses, to apply to the Territory of Utah in the landmark decision of *Reynolds v. United States.*[142] While the case is more well-known for holding that the Mormon practice of polygamy was not constitutionally protected by the Free Exercise Clause, it was also the earliest instance of extending the First Amendment to a territory.[143]

In other words, if it is possible to claim that the Bill of Rights was applied extraterritorially in the territories, an analogous claim could also be made that a similar state of affairs existed vis-à-vis the colonies acquired from Spain as a result of the 1898 Treaty of Paris.[144] Similar to the organic acts of the incorporated territories, Congress, in

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139. United States v. Kagama, 118 U.S. 375, 380 (1886):

> But this power of congress to organize territorial governments, and make laws for their inhabitants, arises, not so much from the clause in the constitution in regard to disposing of and making rules and regulations concerning the territory and other property of the United States, as from the ownership of the country in which the territories are, and the right of exclusive sovereignty which must exist in the national government . . . .

140. Nat'l Bank v. Cnty. of Yankton, 101 U.S. 129, 133 (1879):

> All territory within the jurisdiction of the United States not included in any State must necessarily be governed by or under the authority of Congress. The Territories are but political subdivisions of the outlying dominion of the United States. . . . The organic law of a Territory takes the place of a constitution as the fundamental law of the local government. It is obligatory on and binds the territorial authorities; but Congress is supreme, and for the purposes of this department of its governmental authority has all the powers of the people of the United States . . . .

141. The first such enactment was the Northwest Ordinance. *See* An Act to Provide for the Government of the Territory North-west of the River Ohio, 1 Stat. 50, 51 n.(a) (1789). An explanation is in *Yankton*, 101 U.S. at 129 ("All territory within the jurisdiction of the United States not included in any State must necessarily be governed by or under the authority of Congress.").

142. 98 U.S. 145 (1878).

143. *Id.* at 162 ("The first amendment to the Constitution expressly forbids such legislation. Religious freedom is guaranteed everywhere throughout the United States, so far as congressional interference is concerned."). For a fuller account of how Congress exercised its plenary powers over the Territory of Utah, see SARAH BARRINGER GORDON, THE MORMON QUESTION: POLYGAMY AND CONSTITUTIONAL CONFLICT IN NINETEENTH-CENTURY AMERICA (2001).

144. *See* Christina Duffy Burnett, *Untied States: American Expansion and Territorial Deannexation*, 72 U. CHI. L. REV. 797 (2005). I embrace her argument that the distinction between incorporated and unincorporated territories did not equate to places where the Constitution applied in full and places where only its fundamental provisions applied. The conflicting opinions throughout the *Insular Cases*, however, preclude a dispositive view.

the exercise of its plenary powers, also enacted the Cooper Act (Philippines) and the Foraker Act (Puerto Rico) to govern the new territories.[145] The distinguishing feature between the two is that the Cooper Act contained a litany of provisions which included a word-for-word copy of the Bill of Rights save for the rights to bear arms and to a jury trial,[146] whereas the Foraker Act did not. This legal framework nonetheless provided a similar setting to one that existed between the federal government and the territories. No doubt, ideological and racial considerations complicated the picture.[147] Arguably, if one could extend the First Amendment or any other Bill of Rights provisions in that setting between the federal government and the territories, a similar situation also exists between the federal government and its overseas colonies.

In *Kepner v. United States*,[148] a double jeopardy case on appeal from the Philippine Supreme Court, the U.S. Supreme Court alluded to this question when it held that "[i]t is not necessary to determine in this case whether the jeopardy provision in the Bill of Rights would have become part of the law of the islands without congressional legislation."[149] Unlike Puerto Rico, however, two years before the Cooper Act, President McKinley issued his Instructions to the Second Philippine Commission,[150] pursuant to his Article I powers as commander in chief. McKinley's Instructions established a civil government for the Philippine Islands and incorporated the Bill of Rights, save for the two rights excepted in the Cooper Act. In fact, the Cooper Act was a mere reproduction of the Instructions.[151] But what difference did the Instructions or the Cooper Act make insofar as the application of the Bill of Rights was concerned in the unincorporated Philippines Territory? The answer, as was the case in the incorporated territories prior to 1898, was unclear. Kepner, though it was not clear

145. Cooper Act, ch. 1369, 32 Stat. 691 (1902); Foraker Act, Pub. L. No. 56-191, 31 Stat. 77 (1900).

146. Cooper Act § 5.

147. For a sampling of these considerations that affected U.S. views towards its new colonies, see SUSAN K. HARRIS, GOD'S ARBITERS: AMERICANS AND THE PHILIPPINES, 1898–1902 (2011); KRISTIN L. HOGANSON, FIGHTING FOR AMERICAN MANHOOD: HOW GENDER POLITICS PROVOKED THE SPANISH-AMERICAN AND PHILIPPINE-AMERICAN WARS (2000); MATTHEW FRYE JACOBSON, BARBARIAN VIRTUES: THE UNITED STATES ENCOUNTERS FOREIGN PEOPLES AT HOME AND ABROAD, 1876–1917 (2003); PAUL KRAMER, THE BLOOD OF GOVERNMENT: RACE, EMPIRE, THE UNITED STATES, AND THE PHILIPPINES (2006).

148. 195 U.S. 100 (1904).

149. *Id.* at 124.

150. WILLIAM MCKINLEY, INSTRUCTIONS TO THE SECOND PHILIPPINE COMMISSION, *reprinted in* REPORTS OF THE PHILIPPINE COMMISSION 1 (1904), *available at* https://archive.org/stream/reportsofphilipp00unit#page/n19/mode/2up, *archived at* http://perma.cc/9RMZ-JP6L.

151. *See* Cooper Act §§ 1–87.

from the record whether he was a U.S. citizen,[152] availed himself of these rights through the Cooper Act; this put him in a position arguably no different than that of George Reynolds in 1878.

I do not want to belabor this historical point any further. My only claim is that a plausible, analogous state existed between the territories and the colonies vis-à-vis the Bill of Rights. While it is true that the Court had flatly stated in 1891 that the Constitution can never operate in another country,[153] a fine line nevertheless existed insofar as states and territories were concerned. Strictly speaking, the Bill of Rights has already been applied and availed of extraterritorially outside the states. And even if the record is not conclusive, it does not foreclose such an argument either.

B. First Amendment Theory

This Section is concerned with extending the justifications and purposes behind the First Amendment in support of an extraterritorial First Amendment by simply recognizing that these purposes are themselves location neutral. A clear recognition that such a right exists outside the United States lessens the chilling effect that a state of ambiguity might engender. After all, free speech violations are not only about restraints but also about self-censorship. Those who say nothing because of an ex ante fear of lacking any protections are as unconstitutionally silenced as those who face subsequent punishment for their utterances. This was certainly one of the central concerns of the Court in its landmark decision *New York Times Co. v. Sullivan.*[154]

Since the emergence of modern First Amendment jurisprudence in the early twentieth century, several justifications have been laid down to undergird an American understanding of freedom of expression. These various justifications revolve around three main purposes: First, as elaborated in Justice Oliver Wendell Holmes's celebrated dissent in *Abrams v. United States,*[155] free speech protects the "marketplace of ideas," which serves an important truth-seeking role. The idea is that, if enough voices speak out freely enough, the ultimate result would be our collective arrival at the truth. This truth-seeking enterprise thus justifies freedom even for speech that people

152. Even if he was a Philippine citizen under the protection of the United States, pursuant to the terms of the Treaty of Paris, such category was not considered "alien" under prevailing American laws at the time.

153. Ross v. McIntyre, 140 U.S. 453, 464 (1891). The petitioner was aboard an American ship docked in a Japanese harbor.

154. 376 U.S. 254, 279 (1964).

155. 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

might find distasteful or abhorrent. Second, free speech is essential to individual flourishing and autonomy. Under this view, speech that expresses one's innermost self is generally entitled to constitutional protection. The sentiment behind this purpose is best captured in Justice Harlan's opinion in *Cohen v. California,* where he poetically waxed that "one man's vulgarity is another's lyric."[156] The speech need not be purposive in any other sense that is not connected to self-realization. But Cohen's infamous "Fuck the Draft" message on his jacket as an antiwar message was obviously a political message as well. And this brings us to the third main purpose behind the Speech Clause: enhancing the democratic process. Speech as a mechanism for self-governance, first elaborated on by legal theorist Alexander Meiklejohn and elevated as constitutional law by the Court in *New York Times Co. v. Sullivan,*[157] focuses on the processes by which the people collectively deliberate and decide on matters of public concern. In *New York Times,* the Court, drawing from the Alien and Sedition Acts episode, held that the central purpose of the First Amendment is to allow for democracy to function properly, and criticism of official conduct must therefore enjoy a strong constitutional shield.[158] The structural function of the First Amendment as a means to facilitate self-governance has since been teased out by scholars in many forms, especially its function as a check against government power.[159] It is also important to note that these purposes often overlap in many speech cases.

The basic starting point of this discussion is, again, geography. The strictly territorial frame with which we view the traditional speech marketplace is woefully outdated.[160] The staggering amount of communications conducted over the Internet alone, which transcends boundaries by its very nature, is a strong argument in favor of such proposal. What is more, sticking close to these purposes and justifications underlying the First Amendment is even more important once we expand our view of the speech marketplace to encompass the international stage as it would render intelligible certain problems that are bound to come up in view of its yet-uncertain, but ever-expanding,

156. 403 U.S. 15, 25 (1971).

157. 376 U.S. 254; *see* ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948).

158. 376 U.S. at 273.

159. Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521.

160. For an elaboration of this view, see *The First Amendment in Trans-Border Perspective, supra* note 9.

contours.[161] To be sure, expression that contributes to internal democratic self-governance cannot be confined within the arbitrary borders of sovereignty even if we concede that the First Amendment is not meant to facilitate the flourishing of the entire world.[162] Similarly, the value of counterspeech in the search of truth that the marketplace metaphor protects is not limited by territory.

Consider a few examples illustrating how American speech abroad serves these purposes. The now-iconic Black Power salute at the 1968 Olympics, made by American sprinters Tommie Smith and John Carlos as they accepted their track medals to protest the abysmal state of civil rights inside the United States, was made all the more powerful *because* it was made on an international stage.[163] For a more contemporary example, we can look at an organization called American Citizens Abroad, a private nonprofit organization that represents the interests of U.S. citizens living outside the territorial United States[164] and works mainly on issues such as absentee voting procedures and taxation. They also conduct lobbying efforts to reform social security and citizenship laws.[165] These examples demonstrate that upholding American ideals abroad clearly furthers self-governance ends.

More complicated is extraterritorial citizen speech that implicates national security. As mentioned earlier, Philip Agee asserted his First Amendment right to criticize the government as he divulged the secret identities of fellow CIA agents stationed throughout Europe and Latin America.[166] The Court held the speech-conduct distinction to be crucial in striking down his challenge to the revocation of his passport.[167] Current headlines also provide fodder. The controversial

161. *But see* Jack M. Balkin, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79 N.Y.U. L. REV. 1 (2004) (arguing for a focus on promoting democratic culture, rather than the theory of Meiklejohnian democratic deliberation is appropriate for the Internet age).

162. Robert D. Kamenshine, *Embargoes on Exports of Ideas: First Amendment Issues*, 26 WM. & MARY L. REV. 863, 868 (1985) ("Assisting foreign nationals to find truth, however, is not a first amendment goal."). Nor is assisting foreign nationals to find truth a goal of the Constitution in general for that matter. *See generally* J. Andrew Kent, *A Textual and Historical Case Against a Global Constitution,* 95 GEO. L.J. 463 (2007) (arguing against conferring constitutional protections to aliens outside the United States).

163. Both athletes were expelled from the Games, but the image became one of the most graphic icons of black protest in U.S. history. For background, see Gary Younge, *The Man Who Raised a Black Power Salute at the 1968 Olympic Games*, THE GUARDIAN (Mar. 30, 2012), http://www.guardian.co.uk/world/2012/mar/30/black-power-salute-1968-olympics, *archived at* http://perma.cc/K8XA-US26.

164. *The Mission of ACA, Inc.*, AMERICAN CITIZENS ABROAD, http://americansabroad.org/about/mission-statement/ (last updated Mar. 16, 2014), *archived at* http://perma.cc/TXK2-FG2H.

165. *Id.*

166. Haig v. Agee, 453 U.S. 280, 287 (1981).

167. *Id.* at 305.

whistleblower Edward Snowden could possibly invoke the First Amendment if he chooses to challenge the broad provisions of the Espionage Act, under which he would be tried if he sets foot on U.S. soil.[168] The journalist Glenn Greenwald, who first broke the Snowden revelations and who resides in Brazil, should also be able to do just that.[169] The claim, however, is not that recognizing that First Amendment protections go beyond national borders would automatically trump any competing government interest, but that it is a requisite first step nonetheless.

An extraterritorial First Amendment serves all these rationales behind freedom of expression. The extraterritorial aspect is present with regard to the First Amendment interests of both speakers and listeners. In other words, it concerns not only citizens wanting to speak abroad but arguably includes their right to receive information from abroad as well. This is part and parcel of what is essential for the formation of a well-informed citizenry. In *Lamont v. Postmaster General,*[170] the Supreme Court invalidated a statutory provision that required the Postmaster General to detain and deliver only upon an affirmative request from the addressee unsealed materials of "communist political propaganda" arriving from abroad. Writing for the majority, Justice Douglas held that the act was an unconstitutional restriction on the unfettered exercise of the addressee's right to free speech, an unconscionable attack on the "uninhibited, robust and wide-open debate and discussion that are contemplated by the First Amendment."[171] A similar ground was also behind the Court's ruling in *Reno v. ACLU,*[172] where the Court struck down the anti-indecency provisions of the Communications Decency Act of 1996 because the provision also suppressed protected speech. The decision, the first that dealt with the changed social conditions of communication brought about by the advent of Internet technologies, recognized the governmental interest in protecting children and minors from harmful materials but concluded that the restrictions unduly burdened the right

168. *See, e.g.*, Christina Wells, *Edward Snowden, the Espionage Act and First Amendment Concerns*, JURIST (July 29, 2013), http://jurist.org/forum/2013/07/christina-wells-snowden-espionage.php, *archived at* http://perma.cc/NY53-CFV8.

169. Timothy B. Lee, *Could Glenn Greenwald Go to Jail? The Law Is Alarmingly Murky*, WASH. POST (June 26, 2013), http://www.washingtonpost.com/blogs/wonkblog/wp/2013/06/26/could-glenn-greenwald-go-to-jail-the-law-is-alarmingly-murky/, *archived at* http://perma.cc/8BRD-E4C4.

170. 381 U.S. 301 (1965).

171. *Id.* at 307.

172. 521 U.S. 844 (1997).

of adults to receive information and address one another in this novel medium.[173]

The Court has not treated both speaker and listener dimensions of the First Amendment equally, however. Ideological exclusions through visa denials illustrate the shaky foundations of a listener-oriented approach.[174] Under current doctrine, the denial of a visa to an alien invited by citizens to speak on a matter of public concern was not a violation of the First Amendment rights of those who had invited him since the admission of aliens is an instance of the plenary power of Congress, which the Court deems itself incompetent to adjudicate.[175]

In addition to the three existing rationales that have been exclusively developed in a domestic environment, it might be the case that, as Professor Timothy Zick argues, a new theoretical justification has to be found and accordingly underlie an extraterritorial First Amendment.[176] Perhaps we need another justification why citizens should have a strong First Amendment interest to associate with foreign speakers and audiences, especially outside the United States, and why foreign speakers should have access to the First Amendment when they have been subjected to the exercise of U.S. government power. Jack Balkin, for instance, argues that the Meiklejohnian self-governance rationale is inadequate in view of the changed social conditions of the modern information society.[177] But his proposed "democratic culture" justification, with its emphasis on the participatory nature of freedom of expression in the age of the Internet, is too tethered to speech uttered within its technological infrastructure.[178] As I have shown above, too much speech today still occurs outside the Internet for the self-governance rationale to be

173. *Id.* at 875.

174. *See* Am. Acad. of Religion v. Napolitano, 573 F.3d 115 (2d Cir. 2009) (upholding the denial of a visa to an individual who endorsed and espoused terrorist activity); *see also* Nusrat Choudhury, *Banned from America for Political Views?*, ACLU BLOG (Nov. 19, 2013), https://www.aclu.org/blog/free-speech/banned-america-political-views, *archived at* http://perma.cc/Q5VQ-YY6G (detailing the U.S. State Department's nineteen-month delay in granting a visa to Kerim Yildiz, an London-based advocate of Kurdish human rights). In addition, previous high-profile personalities initially denied visas included academics Adam Habib and Tariq Ramadan. In 2010, former Secretary of State Hillary Clinton lifted the visa restrictions on Habib and Ramadan.

175. Kleindienst v. Mandel, 408 U.S. 753, 769–70 (1972).

176. *The First Amendment in Trans-Border Perspective*, *supra* note 9, at 945 ("Those justifications do not expressly contemplate a world in which speech and associations frequently transcend territorial borders."); *id.* at 998–1023 (describing what a cosmopolitan view of the First Amendment would look like).

177. Balkin, *supra* note 161.

178. *Id.* at 3.

discarded. It is probably the case that we need self-governance *in addition to*, rather than in place of, any of the existing justifications.

Zick's cosmopolitan approach, on the other hand, though not a justification in itself, serves as a reminder of the First Amendment's cosmopolitan origins and, as a normative matter, its future trajectory. This approach looks outward and adopts a more global perspective with regard to expressive freedoms consistent with U.S. obligations and core First Amendment values.[179] Zick observes that "[n]o one has yet endeavored to develop a theory or justification that applies specifically to trans-border First Amendment liberties."[180]

In my view, however, the existing individual flourishing, self-governance, and search for truth concerns are general enough to accommodate speech that occurs beyond U.S. borders. As Zick himself notes, these rationales are already susceptible to a cosmopolitan interpretation.[181] The underlying problem Zick identifies is not that these values are inadequate but that they are interpreted in a consistently provincial manner. But even under a view of the First Amendment that strictly focuses on its domestic benefits,[182] any interaction between citizens and aliens, in both its listener-oriented and speaker-oriented models, would always come up with a redounding benefit to the American speech marketplace. The question turns on the degree of protection we should accord to the citizen's right to be the speaker and listener and whether one is more protected than the other whenever alien speakers or foreign audiences are involved.

IV. COVERAGE

A. Aliens and Citizens

Given that the First Amendment can be invoked outside U.S. borders, who can claim it? Notwithstanding globalization's relentless assault on the nation-state and century-old predictions of the latter's inevitable demise,[183] ours still remain very much a state-centered

179. *The First Amendment in Trans-Border Perspective*, *supra* note 9, at 996.

180. *Id.*

181. *Id.* at 1000.

182. Kamenshine, *supra* note 162; *see also* Kermit Roosevelt III, *Guantanamo and the Conflict of Laws:* Rasul *and Beyond*, 153 U. PA. L. REV. 2017, 2067 n.237 (2005) ("I believe that, as the Preamble suggests, the Constitution is concerned with America and Americans, and the extension of rights to foreigners (wherever they are located) must therefore be justified by some domestic consequence.").

183. One can start with IMMANUEL KANT, PERPETUAL PEACE: A PHILOSOPHICAL SKETCH (1795). For a taste of contemporary literature on the topic, see, for example, Peter F. Drucker, *The Global Economy and the Nation-State*, 76 FOREIGN AFF. 159 (1997); Masao Miyoshi, *A Borderless*

international system. Consequently, distinctions among rights-bearing persons as citizens and aliens within a particular sovereign territory retain their legal, political, and moral purchase. Alien claims within a land not their own are balanced, even negotiated, on a "terrain flanked by human rights on the one hand and sovereignty assertions, on the other."[184] Within the U.S. constitutional system, the long history of that shifting terrain dates back to the 1798 crisis over the Alien and Sedition Acts. As previously discussed, rampant nativism owing to fears that French saboteurs were lurking to destroy the fledgling republic from within had produced the two statutes relating to alien friends and enemies.[185] What Madison's 1800 Report made clear is that resident aliens, insofar as they owe temporary allegiance to the state (and are not nationals of a state in a declared war with the United States), should be entitled to the protections and advantages offered by the Constitution. This does not seem to be a controversial claim. The question is at which point do these protections and advantages attach, and how strong are they compared to those available to citizens?

As we have seen in *Kleindienst v. Mandel*,[186] Congress exercises plenary powers with regard to the admission of aliens prior to their arrival on U.S. soil.[187] Thus, in that case, no constitutional rights existed either for Mandel, a Belgian-Marxist academic and nonresident alien who was invited to speak at various U.S. universities, or for the U.S. citizens who have invited him.[188] But once aliens have been admitted into the country, either as temporary sojourners or permanent residents, generally speaking, they enjoy First Amendment protections.[189] Hence, a permanent resident in the United States who was once affiliated with the Communist Party of the United States could not be summarily deported without due process.[190] In this instance, the Bill of Rights operates precisely to countervail even

World? From Colonialism to Transnationalism and the Decline of the Nation-State, 19 CRITICAL INQUIRY 726 (1993); Dani Rodrik, *Who Needs the Nation State?*, 89 ECON. GEOGRAPHY 1 (2013).

184. SEYLA BENHABIB, THE RIGHTS OF OTHERS: ALIENS, RESIDENTS, AND CITIZENS 47 (2004).

185. STONE, *supra* note 128, at 28-29.

186. 408 U.S. 753 (1972).

187. U. S. CONST. art. I, § 8, cl. 4; United States *ex rel.* Turner v. Williams, 194 U.S. 279 (1904) (holding that aliens cannot challenge their own exclusion on First Amendment grounds because they do not belong as citizens); Fong Yue Ting v. United States, 149 U.S. 698 (1893) (holding that the power to exclude aliens is to be exercised exclusively by the political branches of government because it is inherent in sovereignty, necessary for maintaining normal international relations, and vital to defending the country against foreign encroachments and dangers).

188. *Kleindienst*, 408 U.S. at 765.

189. Al-Aqeel v. Paulson, 568 F. Supp. 2d 64, 69–70 (D.D.C. 2008).

190. Bridges v. Wixon, 326 U.S. 135 (1945) ("Freedom of speech and of press is accorded aliens residing in this country.").

Congress's plenary powers, including that of deportation. However, this does not mean that the First Amendment prevents the expulsion of aliens in cases where it is proven, for example, that he had knowingly joined an organization dedicated to the violent overthrow of the U.S. government.[191] But at the least, it guarantees them access to courts as well as the privilege of litigation. The extent of constitutional protections for resident aliens was recently questioned in *Reno v. American-Arab Anti-Discrimination Committee* ("*AADC*").[192] *AADC* involved a complaint about selective deportation owing to aliens, both legal and illegal, with affiliations with politically unpopular foreign groups such as the Popular Front for the Liberation of Palestine.[193] Although the gist of the decision was on a jurisdictional issue, Justice Scalia also took the occasion to state that "[w]hen an alien's continuing presence in this country is in violation of the immigration laws, the Government does not offend the Constitution by deporting him for the additional reason that it believes him to be a member of an organization that supports terrorist activity."[194] The Court's language did not distinguish between legal and illegal aliens, even though both were subject to deportation proceedings in that particular case. Critics of the decision drew attention to the decision's chilling effects vis-à-vis aliens residing lawfully within the United States, who would now be reluctant to exercise their First Amendment freedoms for fear of possible expulsion.[195]

Suffice it to say, the spectrum of rights theoretically available to both citizens and aliens within the United States is an entire debate by itself. From the previous Section, we have established that an extraterritorial First Amendment more than plausibly exists with regard to U.S. citizens. The more difficult question, however, and the focus of this Section, revolves around the First Amendment claims of *nonresident* aliens *outside* the United States. Antiglobalist literature on the broader topic often begins with an invocation of the Preamble, "We the People of the United States . . . ," to cabin the reach of the Constitution's protections to the people within the national community.[196] In *Verdugo-Urquidez,* for instance, Chief Justice

191. Harisiades v. Shaughnessy, 342 U.S. 580 (1952).

192. 525 U.S. 471 (1999).

193. *Id.* at 473.

194. *Id.* at 491–92.

195. *See, e.g.*, David Cole, *Damage Control? A Comment on Professor Neuman's Reading of* Reno v. AADC, 14 GEO. IMMIGR. L.J. 347 (1999); Maryam Kamali Miyamoto, *The First Amendment After* Reno v. American-Arab Anti-Discrimination Committee*: A Different Bill of Rights for Aliens?*, 35 HARV. C.R.-C.L. L. REV. 183 (2000).

196. *See, e.g.*, Kent*, supra* note 162.

Rehnquist defined those who were deemed covered by the Fourth Amendment (while also mentioning the First and Second Amendments) as "a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community."[197] Invoking the earlier precedent of *Johnson v. Eisentrager,*[198] where the Court also rejected any application of Fifth Amendment protections to aliens held in a German prison, the *Verdugo-Urquidez* majority noted that "[t]he practice of every modern government is opposed to it."[199]

What could be the reasons for such opposition? If the freedom of expression is a fundamental norm crucial to all democratic societies, why not extend the First Amendment even to nonresident aliens? As Professor Gerald Neuman wrote, various normative visions underlie prevailing rules.[200] And these normative visions characterize the interpretive choices, though mostly in accord with existing precedent, which court decisions have taken. Commentators have generally enumerated these visions as follows: universalism, membership, mutuality of obligations, and functional approach.[201] The American constitutional tradition, from the cases thus far discussed, has largely oscillated among the last three. Both *Verdugo-Urquidez* and *Eisentrager* represent the membership approach, in that rights were extended only to the people considered belonging to the polity. This could refer to both citizens and aliens, provided the latter exhibit sufficient connections.[202] The *Eisentrager* Court in particular put the government's obligation to protect as corresponding with the allegiance of the citizen.[203] Noting that aliens' presence within a territory is the significant factor in triggering the Court's power to act,[204] the implication is that aliens outside the territory, by definition, are

197. United States v. Verdugo-Urquidez, 494 U.S. 259, 264 (1990).

198. 339 U.S. 763 (1950).

199. *Verdugo-Urquidez*, 494 U.S. at 269.

200. Gerald L. Neuman, *Whose Constitution?*, 100 YALE L.J. 909, 913, 976. ("The question of scope must be resolved primarily by deliberative choice among alternative approaches on the basis of their normative characteristics and their coherence with less unsettled constitutional practices.")

201. For a fuller account of each in such lists (and their overlap), see STRANGERS, *supra* note 3; THE COSMOPOLITAN FIRST AMENDMENT, *supra* note 9; José A. Cabranes, *Our Imperial Criminal Procedure: Problems in the Extraterritorial Application of U.S. Constitutional Law,* 118 YALE L.J. 1660, 1664–70 (2009); Keitner, *supra* note 21; Roosevelt, *supra* note 182, at 2042–59.

202. Johnson v. Eisentrager, 339 U.S. 763, 770 (1950);

203. *Id.*

204. *Id.* at 771.

without judicial recourse.[205] It should be noted that Eisentrager was categorized as an enemy, and the extent to which the enemy status matters for claiming First Amendment protections will be discussed later in the context of War on Terror detainees held in Guantanamo Bay prison.

Justice Brennan's dissent in *Verdugo-Urquidez,* on the other hand, encapsulates what Neuman has termed as a "mutuality of obligations" approach.[206] Brennan questioned the majority assertion that aliens should have sufficient connections with the United States in order to come within the purview of the Constitution.[207] Concluding that constitutional restraints and corresponding individual rights should travel with the government's insistence on compliance with U.S. laws, "[m]utuality is essential to ensure the fundamental fairness that underlies our Bill of Rights," he reasoned.[208] In fact, his view of constitutional rights as a structural restraint on government action specifically invoked the centuries-old notion of mutuality present in Madison's 1800 Report. In addition, Justice Brennan regarded the mutuality approach as essential for both principled and pragmatic reasons: ignoring the Constitution whenever aliens are concerned disregards that "[o]ur national interest is defined by those values,"[209] and that, "lawlessness breeds lawlessness" and exposes U.S. citizens to the same kind of treatment from other sovereign nations. In *DKT,* then-Judge Ruth Bader Ginsburg also asserted the same rationale for extending constitutional protection to the claims of foreign NGOs.[210]

Indeed, in a number of cases, courts have recognized extraterritorial constitutional claims of aliens when it involved the seizure of property located inside the United States. For instance, in

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205. This theory also underlies other cases although they all involve aliens not yet admitted into the U.S. *See, e.g.*, Kwong Hai Chew v. Colding, 344 U.S. 590 (holding that the Bill of Rights is a futile authority for alien seeking admission).

206. *Extraterritorial Constitution*, *supra* note 3.

207. United States v. Verdugo-Urquidez, 494 U.S. 259, 284 (Brennan J., dissenting).

208. *Id.*

209. *Id.* at 285–86 ("For over 200 years, our country has considered itself the world's foremost protector of liberties. The privacy and sanctity of the home have been primary tenets of our moral, philosophical, and judicial beliefs.").

210. DKT Mem'l Fund Ltd. v. Agency for Int'l Dev., 887 F.2d 275, 307–08. (Ginsburg, J., dissenting):

> If our land is one "of freedom, of equal opportunity, of religious tolerance, and of good will for other peoples who share our aspirations," it is in no small measure so because our Constitution restrains all officialdom from infringing on fundamental human rights; just as our flag "carries its message . . . both at home and abroad," so does our Constitution and the values it expresses.

(quoting Texas v. Johnson, 491 U.S. 397, 437 (1989)).

United States v. Demanett,[211] the Third Circuit recognized that both American citizens and Colombian nationals were entitled to Fourth Amendment protections when their shipping vessel was seized off the coast of Delaware.[212] At the very least, in some circumstances, nonresident aliens are also accorded Article III standing to challenge government actions in court.[213] One can also view *U.S. v. Tiede* along these lines. [214] The case involved an alien accused of hijacking a Polish aircraft and stood trial in a U.S. court for violating German law. The Berlin court, created by the U.S. government to serve the American sector of West Berlin, held that the U.S. Constitution applied to the proceedings, and, therefore, the defendants before the court were entitled to constitutional rights, including the right to a jury trial.[215] In all these cases, the view of constitutional rights takes on the character of a restraint on the exercise of government power.

And there lies the precise novelty of *Boumediene.* This case is the middle-way proposition that, although aliens do not have any presence or even property within the United States, they might nonetheless be entitled to claim constitutional protections.[216] While the Court repudiated *Verdugo-Urquidez* in holding that aliens do not have any rights claims outside the United States, it did not swing the pendulum back all the way to the position of the dissent either. Instead, Justice Kennedy's functionalist concurrence in *Verdugo-Urquidez* became the new law. In a nutshell, the current regime appears to be as follows: Citizens can invoke their constitutional rights outside the United States, subject to the caveat in the Harlan/Frankfurter concurrence in *Reid* and reiterated in *Boumediene* that practical considerations would allow such exercise. Aliens, on the other hand, can

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211. 629 F.2d 862, 866 (3d Cir. 1980) (citing United States v. Cadena, 585 F.2d 1252, 1262 (5th Cir. 1978); *see also* United States v. Toscanino, 500 F.2d 267, 280 (2d Cir. 1974); Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 109 (1987) (holding nonresident aliens are protected by Due Process Clause with regard to actions taken against their property rights).

212. *Demanett*, 629 F.2d at 864.

213. Cardenas v. Smith, 733 F.2d 909 (D.C. Cir. 1984) (holding that Article III permits foreign plaintiffs to sue in U.S. courts under some circumstances). *But see DKT*, 887 F.2d at 285 ("We will not, however, hold as the government urges, that an alien beyond the bounds of the United States never has standing to assert a constitutional claim.").

214. 86 F.R.D. 227 (U.S. Ct. Berlin 1979).

215. *Id*. at 243–44.

216. For various complaints, see, for example, Andrew Kent, *Boumediene, Munaf and the Court's Misreading of the Insular Cases,* 97 IOWA L. REV. 101, 104–15, 124–32 (2011); Kent, *supra* note 162, at 505–38 (arguing that constitutional protections were not intended to protect noncitizens outside of the United States); Posner, *supra* note 58, at 8–18. Even supporters of the decision in *Boumediene* were surprised. *See* David Cole, *Rights Over Borders: Transnational Constitutionalism and Guantanamo*, 2008 CATO SUP. CT. REV. 47, 49 ("[T]he Government had precedent on its side.").

claim the benefits of these constitutional rights, regardless of their location, provided they have been subject to an exercise of U.S. government power, the situation involves a fundamental right, and finally, it would not be "impracticable and anomalous" to do so. The privileged position occupied by practicality in the application of the Constitution abroad insofar as aliens are concerned seems to be the clear message from the *Boumediene* majority opinion.[217]

The prevailing framework on extraterritorial rights currently embodies the three theoretical approaches previously mentioned. But notwithstanding the appearance of parity with regard to the extraterritorial rights of citizens and aliens, the latter's rights concededly stand on shakier ground than those of citizens. And those who subscribe to the membership approach believe that this is as it should be. The starting point of any analysis for citizens is the fact of their citizenship. Aliens' claims, on the other hand, begin with practicality. And as the dissents in *Boumediene* noted,[218] considerations of practicality are hardly of assistance to government officials in determining whether constitutional limitations should attach. Further, one can also argue that *Boumediene* should be limited to cases involving the Suspension Clause, given the extraordinary circumstances surrounding the setup of post-9/11 Guantanamo Bay as an offshore detention center.[219] But the text of the decision did not give any hint in favor of such a limited application.

Nonetheless, ambiguities still remain. I should note the distinction between, in 1798-esque terms, alien friends and alien enemies and the distinction that *Boumediene* makes, if any. For example, *Boumediene* does not answer the question whether other rights, such as the First Amendment, would attach to friendly aliens not in custody of the U.S. government. The *Insular Cases* remain a place to start. Even if one accepts the conventional view that it created a

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217. This view has been followed by lower courts. *See, e.g.*, Al Maqaleh v. Gates, 604 F. Supp. 2d 205, 228 (D.C. Circ. 2009) (denying same treatment to those detained in Bagram Air Force base is in Afghanistan because it was an active war zone), *order rev'd*, 605 F.3d 84 (D.C. Cir. 2010).

218. *See* Boumediene v. Bush, 553 U.S. 723, 839–40 (2008) (Scalia, J., dissenting).

219. For example, there is language in *Eisentrager* that distinguished among rights. *See* Johnson v. Eisentrager, 339 U.S. 763, 784 (1950):

> If the Fifth Amendment confers its rights on all the world, except Americans engaged in defending it, the same must be true of the companion civil-rights Amendments for none of them is limited by its express terms, territorially or as to persons. Such a construction would mean that during military occupation irreconcilable enemy elements, guerrilla fighters and werewolves could require the American judiciary to assure them freedoms of speech and press and assembly as in the First Amendment, right to bear arms as in the Second, security against "unreasonable" searches and seizures as in the Fourth, as well as rights to jury trial as in the Fifth and Sixth Amendments.

distinction between incorporated and unincorporated territories to the extent that only fundamental rights apply to the latter, that bifurcation still acknowledges that some rights apply nevertheless to noncitizens who are outside traditional U.S. borders. These noncitizens are clearly nonenemy aliens. But that only speaks to territories that have been or are still, in some form or another, linked to the United States and whose inhabitants have been or are accorded status as citizens or noncitizen nationals. What about fully extraterritorial claims of friendly aliens? At this point, it is helpful to bring the First Amendment cases previously discussed in dialogue with the foregoing extraterritoriality cases.

An extraterritorial First Amendment right has generally been recognized by courts in the past, either explicitly or implicitly, in favor of citizens, although it is often subject to national security requirements or foreign affairs considerations. This comports with the Frankfurter/Harlan concurrences in *Reid*, which hold that "there are provisions in the Constitution which do not necessarily apply in all circumstances in every foreign place."[220] One can see this principle at work in the *DKT* case, in which the majority opinion proceeded to analyze the merits of the claim of DKT even though it was subsequently struck down. Even the dissent of then-Judge Ginsburg focused on the indirect curtailment of the extraterritorial rights of the affected domestic entity rather than the extraterritorial free speech claims of the foreign NGOs even though the USAID rules directly regulated their speech, not speech of the domestic NGOs'. More recently, in *Al Haramain Islamic Foundation v. Department of the Treasury,* a case involving facts very similar to that in *Holder,* the Ninth Circuit nonetheless upheld the First Amendment claim of Al Haramain Islamic Foundation because the latter was a domestic entity, albeit a branch of a larger international organization.[221]

Aliens, on the other hand, have not been granted any extraterritorial First Amendment rights. Prior to *Boumediene,* the only cases that allowed friendly aliens to invoke constitutional protections were those involving property that was located either in the U.S. or abroad and had been affected or seized through acts of the U.S. government. In a way, *Boumediene* can be cast continuously in this vein as well. Instead of the detainees' property, their own persons have been seized, and this action gave them the necessary opening to invoke the Constitution despite their status as enemy aliens. One additional explanation for this state of affairs is that Justice Kennedy's opinion

220. Reid v. Covert, 354 U.S. 1, 76 (1957) (Harlan, J., concurring); *see also id.* at 41 (Frankfurter, J., concurring).

221. 660 F.3d 1019, 1048–51 (9th Cir. 2011).

made the application of the Suspension Clause to the detainees not simply a matter of individual rights but a crucial component in maintaining the separation of powers underlying the American system of government.[222] However, free speech is a core American value that is, as noted, about more than self-expression. It is more fundamentally about self-governance. Free speech, therefore, possesses the same importance as a right to habeas, though there are different dynamics involved.

Insofar as extraterritorial First Amendment claims of enemy aliens is concerned, it appears that the door is clearly shut, and there are few reasons available to keep it open for political reasons. That is why it was odd that the court in *al Bahlul* had to engage in a hedged analysis of whether the First Amendment applies. At best, al Bahlul could be given the same treatment as the *Boumediene* detainees insofar as access to a judicial forum is concerned, and this was what he already got through the hearings before the Court of Military Commission Review.

In order to invoke the First Amendment, friendly aliens should be able to reach an analogous threshold, either in the form of some type of presence in a U.S.-governed territory or through some act of the government. In Neuman's article about the broader implications of *Boumediene,* he addressed this First Amendment scenario head-on and gave the example of the U.S. government subsidizing a pro-American political party in a foreign election.[223] He is right to conclude that such situation alone would not give rise to any colorable speech claim by an alien. In fact, the Obama Administration has made the promotion of freedom of expression abroad, in both offline and online forms, one of the important cornerstones of its foreign policy.[224] If, for one reason or another, aliens do not like what the U.S. government is doing in their own countries, it is highly unlikely that they can challenge those policies by invoking the First Amendment. Hence, one can, at best, simply caution the U.S. government to be more sensitive to foreign cultures. Suppose a friendly alien (in the sense that he or she has not been designated as an enemy combatant) who is a vocal critic of U.S.

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222. *Boumediene*, 553 U.S. 723 at 765–66.

223. *Extraterritorial Constitution, supra* note 3, at 287.

224. James Glanz and John Markoff, *U.S. Underwrites Internet Detour Around Censors*, N.Y. TIMES (June 12, 2011), http://www.nytimes.com/2011/06/12/world/12internet.html?pagewanted=all&_r=0, *archived at* http://perma.cc/S699-6ULN; Suzanne Nossel, *Freedom Begins at Home*, *archived at* http://perma.cc/V74K-5MJS; Hilary Rodham Clinton, Sec'y of State, Remarks on Internet Freedom at the Newseum, Freedom (Jan. 21, 2010), *available at* http://www.state.gov/secretary/20092013clinton/rm/2010/01/ 135519.htm, *archived at* http://perma.cc/FH7V-6DLP.

foreign policy—say, Julian Assange of Wikileaks—was somehow arrested by U.S. authorities for leaking classified material. Assange and his organization, Wikileaks, were not located in the United States when the high-profile 2010 leaks involving the "Collateral Murder" video, was released. And yet it could not be disputed that the First Amendment was implicated and could be invoked by Assange and other relevant individuals.[225] A less dramatic example might be a Pakistani national protesting U.S. drone policy outside the U.S. embassy in Islamabad. In such cases, he or she should be able to invoke the First Amendment in case he is arrested by American security officers.[226] In both scenarios, as with the foregoing cases discussed, to say that the First Amendment could be invoked does not foreclose any appropriate legal proceeding, nor does it automatically trump any competing interest of the government.

B. Zones of Application

The twenty-five-year-old Third Restatement of Foreign Relations Law states that the Constitution generally controls U.S. government conduct in its foreign relations and generally limits its authority whether it is exercised in the U.S. or abroad.[227] But as the reporters' note also states,[228] the Constitution does not speak about the rights of aliens in places not within the de jure sovereignty of the United States. A structural view of constitutional rights as restraints that travel alongside the exercise of government power, much less one that can be claimed by even noncitizens, is a recent innovation. As Professor David Cole wrote, *Boumediene* "fits quite comfortably within an important transnational trend of recent years in which courts of last resort have played an increasingly aggressive role in reviewing (and

225. What is contested is whether Assange himself qualifies for First Amendment protection as a journalist and whether he was merely the recipient of such leaked information or complicit in the leak, in which case he would be liable for conspiracy charges. For a more detailed analysis of the Wikileaks case, see Yochai Benkler, *A Free Irresponsible Press: Wikileaks and the Battle over the Soul of the Networked Fourth Estate,* 46 HARV. C.R.-C.L. REV. 311 (2011).

226. There are complicating factors in this scenario, such as the jurisdiction of local law enforcement and the fact that he might be subjected to local laws in which case the First Amendment is not available.

227. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 721 (1987):

> The provisions of the United States Constitution safeguarding individual rights generally control the United States government in the conduct of its foreign relations as well as in domestic matters, and generally limit governmental authority whether it is exercised in the United States or abroad, and whether such authority is exercised unilaterally or by international agreement.

228. *See id.* § 722, reporters' note 16.

invalidating) security measures that trench on individual rights."[229] If the contemporaneous wrangling over the *Insular Cases* was any indication, even at the height of the U.S. experiment with formal empire at the turn of century, extraterritoriality of laws (which includes the Constitution) was, for a long time, the exception, not the norm.

The dissenters in *Boumediene* castigated the majority opinion as an instance of inappropriate judicial activism, but they did not address one of the crucial factors in the majority's analysis: the character of the Guantanamo Bay base itself.[230] There were good reasons why constitutional rights have been traditionally restricted in terms of geography. Sovereignty is one of such reasons. The Westphalian system served an important purpose of preserving peace and order in an otherwise anarchic international system. An extraterritorial reach of one state's laws necessarily results in an encroachment of another state's domain. In addition, until recently, individuals were, for the most part, not considered subjects of any international protection outside their own nation-states. However, even with our contemporary state-centric international system, our notion of sovereignty has changed dramatically in the last twenty years alone.[231] National borders are more permeable, and international human rights law has made incursions into what were deemed to be issues of traditional state prerogative.

Notwithstanding this changed context, the character of a territory still matters for purposes of determining the application of extraterritorial constitutional rules including the First Amendment. Thus, for example, we now have a seemingly anomalous situation of a U.S. citizen guaranteed a right to jury trial in Japan, a foreign country but not in Puerto Rico, an unincorporated territory of the United States.[232] This is also the key factor in the functionalist approach of *Boumediene,* which is encapsulated in the "impracticable and

229. Cole, *supra* note 216, at 51; *see, e.g.*, *In re* Iraq & Afg. Detainees Litig., 479 F. Supp. 2d 85 (D.D.C. 2007).

230. For a general history of the base, see JONATHAN M. HANSEN, GUANTÁNAMO: AN AMERICAN HISTORY (2011).

231. *See generally* SAMUEL MOYN, THE LAST UTOPIA: HUMAN RIGHTS IN HISTORY (2010) (describing the role of recent developments in international law in protecting individual human rights).

232. However, the jury trial in *Reid* was conducted inside an American military base located in Japan. *Cf.* Consejo de Salud Playa de Ponce v. Rullan, 586 F. Supp. 2d 22, 43–44, (D.P.R. 2008) (holding that the Bill of Rights applies in full within Puerto Rico). Note this was after *Boumediene.* None of the appellate courts have yet affirmed this district court decision. *See also* King v. Andrus, 452 F. Supp. 11, 16–17 (D.D.C. 1977) (holding that the right to jury trial applies in American Samoa, a similarly unincorporated territory).

anomalous" standard. The standard,[233] whether taken conjunctively or disjunctively, refers to two different things. "Impracticable" is sometimes used interchangeably in lower courts and even by the Supreme Court itself with the term "impractical."[234] This word connotes difficulty of implementation or such a substantial degree of inconvenience that it makes the likelihood of success in realizing such a right very low. In *Boumediene,* Justice Kennedy emphasized this when he concluded that "there are few practical barriers to the running of the writ."[235] Under this prong, one should also count the relevant foreign policy and diplomatic interests of the U.S. government. In deciding the constitutionality of a restriction that limits land purchases to the indigenous inhabitants of Northern Marianas, the Ninth Circuit pointed out that the absence of such a restriction would "hamper the United States' ability to form political alliances and acquire necessary military outposts."[236] "Anomalous," on the other hand, connotes incongruity, a wrong fit between the right and the culture of the place where it is sought to be claimed. In *In re Guantanamo Detainees,*[237] the D.C. District Court held that there would be nothing impracticable and anomalous in

> recognizing that the detainees at Guantanamo Bay have the fundamental right to due process of law under the Fifth Amendment. American authorities are in full control at Guantanamo Bay, their activities are immune from Cuban law, and there are few or no significant remnants of native Cuban culture or tradition remaining that can interfere with the implementation of an American system of justice.[238]

A concern for the preservation of, or noninterference with, local culture is the main reason why this particular prong is also usually highlighted in cases involving the application of constitutional rights in various U.S. unincorporated territories such as Guam, American Samoa, and the Mariana Islands.[239]

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233. For a detailed exegesis of the standard, see Merriam, *supra* note 57, at 204–37.

234. *See, e.g.*, Boumediene v. Bush, 553 U.S. 723, 793 (2008) ("In cases involving foreign citizens detained abroad by the Executive, it likely would be both an impractical and unprecedented extension of judicial power to assume that habeas corpus would be available at the moment the prisoner is taken into custody.").

235. *Id.* at 770.

236. Wabol v. Villacrusis, 958 F.2d 1450, 1462 (9th Cir. 1990) (holding that the Equal Protection clause did not apply to Northern Mariana Islands).

237. 355 F. Supp. 2d 443 (D.D.C. 2005) *order vacated,* Al Odah v. U.S., 559 F.3d 539 (D.C. Cir. 2009).

238. *Id.* at 463.

239. *See, e.g.*, *Wabol*, 958 F.2d at 1462 (9th Cir. 1990):

> It would truly be anomalous to construe the equal protection clause to force the United States to break its pledge to preserve and protect NMI culture and property . . . the Bill of Rights was not . . . intended to operate as a genocide pact for diverse native cultures.

To be sure, the origins of the standard were admittedly colonial in nature. For example, the U.S. colonial government did not apply the right to jury trial in the Philippines and Puerto Rico because the Filipinos and Puerto Ricans were deemed to be racially unfit and incapable of fulfilling the responsibilities that the right entailed.[240] But as its appearance in the various Guantanamo cases in the past decade show, its application is no longer confined to unincorporated territories. And even insofar as these unincorporated territories are concerned, a uniform application of the Constitution could indeed be a recipe for cultural decimation.[241] Further, the walls of state sovereignty might be permeable now, but they still stand nonetheless. An extraterritorial application of constitutional rights thus cannot be indiscriminately rigid without due regard for the facts on the ground, including encroachment on the sovereignty of another country. This very flexibility, though, is both an advantage and a source of concern. Scholars such as Neuman and Christina Duffy Ponsa criticize the standard for its indeterminacy.[242] However courts decide to implement this standard, the analysis would have to begin with the place and the pertinent facts surrounding the location. This was certainly the key factor in *Eisentrager* (Allied prison in postwar Germany) as well as *Boumediene* (prison in Guantanamo Bay under de facto U.S. authority despite Cuban *de jure* sovereignty).[243]

Those pertinent facts are also related to the right sought to be claimed. As Neuman observed, the exercise of a negative First Amendment right is different from the positive right to a jury trial or suspension of the writ of habeas.[244] The former is largely an act of governmental restraint while the latter rights involve affirmative duties and concrete practical obligations on the part of the government,

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Northern Mariana Islands v. Atalig, 723 F.2d 682, 690–91 (9th Cir. 1984) (holding that the right of jury trial did not extend to the Mariana Islands).

240. LAWRENCE FRIEDMAN, AMERICAN LAW IN THE TWENTIETH CENTURY 136 (2004).

241. *See, e.g.*, Stanley K. Laughlin, Jr., *Cultural Preservation in Pacific Islands: Still a Good Idea—and Constitutional*, 27 U. HAW. L. REV. 331, 332 (2005).

242. *See* Burnett, *supra* note 3, at 981–82, 1026 (noting that the standard asks the wrong questions and should be abandoned); Merriam, *supra* note 57, at 173–74 (proposing a comparative constitutional guide to interpret the standard); Neuman, *supra* note 61, at 365 (proposing that international human rights law be used as a guide in the standard's application).

243. Boumediene v. Bush, 553 U.S. 723, 763 (2008):

> But there are critical differences between Landsberg Prison, circa 1950, and the United States Naval Station at Guantanamo Bay in 2008. Unlike its present control over the naval station, the United States' control over the prison in Germany was neither absolute nor indefinite. Like all parts of occupied Germany, the prison was under the jurisdiction of the combined Allied Forces.

244. *Extraterritorial Constitution*, *supra* note 3, at 287–88 (providing a brief reflection on how the functional approach would impact the First Amendment).

such as providing for the logistics of conducting habeas proceedings, even though both may have similar foreign affairs implications. For instance, in *Boumediene,* Justice Kennedy gave three relevant factors in determining the reach of the Suspension Clause: (1) the citizenship and status of the detainee; (2) the nature of the sites where apprehension and detention took place; and (3) the practical obstacles inherent in resolving the prisoner's entitlement to the writ.[245]

An analogous set of criteria also applies with respect to an extraterritorial First Amendment, including the citizenship or status of the speaker, the place where the speech was uttered, the intended audience of the speech, and the location of the person's detention and trial, if applicable. The place of the speech could be an unincorporated U.S. territory or a foreign nation-state. In either case, the functionalist evaluation would definitively include the probable impact on the local culture as well as the relevant foreign policy or diplomatic interest of the U.S. government. Such interest is probably more significant in degree when the location at issue is an independent foreign country because of the international implications. But this balancing or contextualization is not unusual in First Amendment jurisprudence; there are already varying treatments of speech in different contexts even within the United States. For instance, there is a considerably lower degree of free speech rights in schools or within government institutions.[246] Hence, the analysis would be slightly different if Assange were arrested in the United Kingdom instead of Puerto Rico. U.S. NGOs who want to provide legal training and human rights orientation for members of, say, the Moro Islamic Liberation Front in the Philippines, an organization not included on the State Department's Foreign Terrorist Organization ("FTO") list, should be able to do so in Manila or in Guam. If a First Amendment claim were to arise, the court should be able to consider these locational differences accordingly.

The distinct characteristics of the place in which speech is uttered is a factor in that the "impracticable and anomalous" standard plays a most significant role even as existing First Amendment doctrines are transposed to the extraterritorial realm. And that makes a difference, especially if one is an alien claiming U.S. constitutional protections. As I previously argued, the practicality of enforcing the right is the most important factor with regard to alien claims. It matters for citizens too, since constitutional provisions are not always applicable

245. 553 U.S. at 766.

246. *See* Morse v. Frederick, 551 U.S. 393, 410 (2007) (holding that the First Amendment does not prevent educators from suppressing student speech in school-supervised events); Garcetti v. Ceballos, 547 U.S. 410, 426 (2006) (holding that government employee speech is subject to regulation if made pursuant to their duties).

everywhere pursuant to *Reid* and *Boumediene*. Oddly enough, this is also the most overlooked factor in recent cases where an extraterritorial First Amendment has been implicitly recognized (e.g., *Holder* and *USAID*); this is the very gap this Article seeks to bring to judicial and academic attention.

V. IMPLICATIONS

Now that we have a plausible case that an extraterritorial First Amendment should exist, what are the broader implications of recognizing this? Thus far, what seems to be consistent from the foregoing discussion is that a First Amendment claim, more so extraterritorially than not, is always balanced against other considerations. In the extraterritorial context, the primary competing factor is the government's foreign affairs or diplomatic concerns. The Cold War era cases on expressive travel and association are the best examples to highlight this primordial clash of interests, although the specter of terrorism has now taken the place of Communism as the prime evil that the U.S. government guards against. Within this foreign affairs sphere, the government, particularly the executive branch, enjoys the highest degree of flexibility and deference from other branches of government. Courts in particular recognize this special competence through the political question and act of state doctrines.[247] Recognizing an extraterritorial First Amendment, both for citizens and, under some circumstances, aliens, necessarily makes an incursion into this area, and in most cases, resolving these questions could only be achieved through appropriate balancing. In this last Part, I compare and contrast the Supreme Court's analyses in its *Holder* and *USAID* decisions in light of the extraterritorial nature of the speech claims raised by the U.S. NGOs involved in these cases. Specifically, I analyze the weight given to the foreign policy consideration of the government in each case.

A. Holder v. Humanitarian Law Project

Holder was the culmination of a tortuous litigation spanning a twelve-year procedural history. In 1996, in the aftermath of the

247. The political question and act of state doctrines are judicially developed doctrines that allow courts to decline judgment of a foreign sovereign's acts, thus decreasing possible conflicts with the political branches of government. The former focuses on the character of the controversy while that latter is contingent on its location. For the earliest enunciations of the political question doctrine and act of state doctrine, respectively, see Baker v. Carr, 369 U.S. 186 (1962) and Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964).

Oklahoma bombings, Congress enacted the Antiterrorism and Effective Death Penalty Act ("AEDPA").[248] Section 2339B of AEDPA[249] prohibits the provision of material support to FTOs as designated by the Secretary of State. It also included a finding, which the Court would rely on in its decision, that "foreign organizations that engage in terrorist activity are so tainted by their criminal conduct that any contribution to such an organization facilitates that conduct."[250] The material support statute was intended to address the problem of terrorist groups raising money under the cover of humanitarian aid. Notably, it did not include any requirement that the support be linked to a violent act of the group in question.

Two U.S. citizens and six domestic NGOs challenged the statute in 1998 on First Amendment grounds, stating that it violated their freedoms of speech and association since it did not require the government to prove that they had a "specific intent to further the unlawful ends of those organizations."[251] After 9/11, the PATRIOT Act added the term "expert advice or assistance" as covered by the term "material support."[252] HLP had been working with the PKK and the LTTE, both FTOs, even before the enactment of AEDPA. Specifically, it was encouraging the PKK to resolve its dispute with the Turkish government through peaceful and lawful means.[253] In particular, it was training PKK members to file human rights complaints before the United Nations, to inform the Kurds of their international human rights and remedies, and to advise them on peaceful conflict resolution.[254] It also assisted the LTTE, which was defeated by the Sri Lankan government in 2009, in peacefully advocating for the rights of Tamils within Sri Lanka outside the country.

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248. Pub. L. No. 104-132, 110 Stat. 1214 (1996).

249. 18 U.S.C. § 2339B(a)(1) (2012):

> Whoever knowingly provides material support or resources to a foreign terrorist organization, or attempts or conspires to do so, shall be fined under this title or imprisoned not more than 15 years, or both, and, if the death of any person results, shall be imprisoned for any term of years or for life. To violate this paragraph, a person must have knowledge that the organization is a designated terrorist organization (as defined in subsection (g)(6)), that the organization has engaged or engages in terrorist activity (as defined in section 212(a)(3)(B) of the Immigration and Nationality Act), or that the organization has engaged or engages in terrorism (as defined in section 140(d)(2) of the Foreign Relations Authorization Act, Fiscal Years 1988 and 1989).

250. § 301(a)(7); *see* Holder v. Humanitarian Law Project, 561 U.S. 1, 7 (2010).

251. *Holder*, 561 U.S. at 11.

252. *Id.*

253. *Id.* at 13.

254. Transcript of Oral Argument at 4, Holder v. Humanitarian Law Project, 561 U.S. 1 (2010) (No. 09-89).

The Court upheld the constitutionality of the material support statute.[255] Doctrinally and practically speaking, the decision does not seem to make much sense. Distinguishing between independent and coordinated advocacy, it held that the prohibition only applies to the latter.[256] Thus, the NGOs are still as free to do the exact same activities they have been doing, except that they cannot do so in coordination with foreign groups that they know to be FTOs. However, as Justice Breyer argued in his vigorous dissent that, if the government's main concern was that coordinated activity would confer legitimacy to these organizations and consequently enable them to raise funds, recruit members, and so forth, independent advocacy would do a much better job at achieving those goals.[257] Moreover, the decision also turned First Amendment doctrine on its head. *Holder* upheld the criminalization of a type of political speech, long thought to be the most protected kind of speech. And even assuming the speech could be deemed an "express advocacy of crime," it would still have to meet the *Brandenburg* threshold[258] that the speech was intended and likely to produce "imminent lawless" action. Lastly, while the majority sided with the plaintiffs that the statute is essentially a content-based regulation of speech,[259] which would have normally necessitated a strict scrutiny review,[260] the majority employed a "demanding standard." But the standard as applied was far from demanding. Indeed, this was the most common complaint about the case amongst academic commentators. With the exception of a declaration submitted by Kenneth R. McKune, an associate coordinator for counterterrorism in the State Department cited in the opinion, the Court largely deferred to the judgment of the political branches of government as to the essential means necessary for combating terrorism and protecting national security.[261] The Court readily accepted the assertion that the support provided by these NGOs was fungible in character and inevitably freed up the resources of the

255. *Holder*, 561 U.S. at 8.

256. *Id.* at 4.

257. *Id.* at 51–52 (Breyer, J., dissenting).

258. Brandenburg v. Ohio, 395 U.S. 444 (1969).

259. *Holder*, 561 U.S. at 27 (distinguishing the facts of the case from those in *O'Brien v. United States* which only triggered intermediate scrutiny).

260. In a nutshell, strict scrutiny review allows regulation where none would ordinarily be permitted due to the presence of compelling state interests, and provided that the regulation in question is narrowly tailored and is the least restrictive available. For examples involving the Speech Clause, see Citizens United v. FEC, 558 U.S. 310, 340 (2010); Brown v. Entm't Merch. Ass'n, 131 S. Ct. 2729, 2738 (2011); Boos v. Barry, 485 U.S. 312, 318–21 (1988).

261. David Cole, *The First Amendment's Borders: The Place of* Holder v. Humanitarian Law Project *in First Amendment Doctrine*, 6 HARV. L. & POL'Y REV. 147, 148 (2012) (criticizing the deferential review used by the Court and saying it was not even demanding).

FTOs to engage in illegal activity. It also reiterated that such type of speech would only undermine "cooperative efforts between nations to prevent terrorist attacks."[262] Even those who were supportive of the decision do not dispute the cursory method by which the Court disposed of the issue.[263]

Inasmuch as "the phrase war power cannot be invoked as a talismanic incantation to support any exercise of congressional power which can be brought within its ambit,"[264] "not even the serious and deadly problem of international terrorism can require automatic forfeiture of First Amendment rights."[265] The ease with which the abovementioned quotations could be juxtaposed with each other illustrates the cyclical inclination of government to overreach during periods of insecurity; the former pertained to the anti-Communist hysteria of the Cold War years while the latter is against the specter of transnational terrorism that still lingers with us today. There is no doubt that national security is a paramount countervailing interest of the government. This has been the case for the past half century. And yet even in *Scales v. United States,*[266] a case which upheld the conviction of a U.S. citizen under the Smith Act for his membership in the U.S. Communist Party, the Court still recognized that one should manifestly share the intent to accomplish the unlawful ends of the organization in order to be held liable.[267] Today, under § 2339B, which *Holder* upheld, mere knowledge of an FTO's designation by a U.S. organization that is providing specialized training and coordinated advocacy suffices for a conviction.[268]

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262. *Holder*, 561 U.S. at 31–33 (giving the example of Turkey, a NATO ally and its hostile relations with the PKK).

263. *See* Robert Chesney, *The Supreme Court, Material Support and the Lasting Impact of* Holder, 1 WAKE FOREST L. REV. ONLINE 13, 15 (2011), *available at* http://wakeforestlawreview.com/the-supreme-court-material-support-and-the-lasting-impact-of-holder-v-humanitarian-law-project-2, *archived at* http://perma.cc/3NMP-CSCL (noting that the decision was limited to the facts rather than an open-ended review of the material support statute); Peter Margulies, *Accountable Altruism: The Impact of the Federal Material Support Statute on Humanitarian Aid*, 34 SUFFOLK TRANSNAT'L L. REV. 539, 540 (2011) (arguing that the decision provides a capacious safe harbor nonetheless).

264. United States v. Robel, 389 U.S. 258 (1967) (internal quotation marks omitted).

265. *Holder*, 561 U.S. at 44 (Breyer, J., dissenting) (internal quotation marks omitted).

266. 367 U.S. 203 (1961).

267. *Id.* at 229 ("There must be clear proof that a defendant 'specifically intend(s) to accomplish (the aims of the organization) by resort to violence.' " (quoting Noto v. United States, 367 U.S. 290, 299 (1961)).

268. *Holder*, 561 U.S. at 1.

B. USAID v. Alliance for Open Society International

While *Holder* was a case involving content-based regulation of speech, *USAID* involved viewpoint discrimination, a similarly problematic instance in First Amendment jurisprudence.[269] *USAID* presented a different foreign policy interest of the U.S. government. And the fact that it was not about national security, at least not overtly,[270] probably explained why the foreign policy interests of the government were not even mentioned in the text of the decision. In 2003, Congress enacted the U.S. Leadership against HIV/AIDS, Tuberculosis and Malaria Act,[271] which, among other things, authorized the appropriation of federal funds for activities geared towards the reduction and eventual eradication of these diseases. The statute was enacted with a policy of opposing prostitution and sex trafficking because these were deemed to contribute to the spread of such diseases.[272]

Pursuant to this policy, the Act imposed two related conditions on the funding: First, no funds appropriated through the Act could be used to promote or advocate the legalization or practice of prostitution or sex trafficking.[273] Second, only organizations with an explicit policy opposing prostitution and sex trafficking ("Policy Requirement") could receive funds under the Act.[274] Two U.S. NGOs challenged the second

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269. *See* R.A.V. v. City of St. Paul., 505 U.S. 377, 430 (1992) ("Viewpoint discrimination is censorship in its purest form . . . ." (quoting Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 62 (1983) (internal quotation marks omitted)); Police Dept. of Chi. v. Mosley, 408 U.S. 92, 95 (1972) ("[G]overnment has no power to restrict expression because of its message, its ideas, its subject matter or its content."). The exception to this rule is government speech. *See* Pleasant Grove City v. Summum, 555 U.S. 460, 479 (2009); Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 553 (2005); Rust v. Sullivan, 500 U.S. 173, 192–95 (1991).

270. For an emphatic example of the view of foreign aid as a component of national security, see President Barrack Obama, Speech at the National Defense University (May 23, 2013), *available at* http://www.nytimes.com/2013/05/24/us/politics/transcript-of-obamas-speech-on-drone-policy.html?pagewanted=all&_r=0, *archived at* http://perma.cc/6P7Q-KZ6Q ("[F]oreign assistance cannot be viewed as charity. It is fundamental to our security.").

271. Pub. L. No. 108-25, 117 Stat. 711 (codified as amended at 22 U.S.C. § 7601 (2012)).

272. 22 U.S.C. § 101(a)(4), 117 Stat. at 718 (noting that under the Act, the President shall establish a five-year strategy that shall:

> provide that the reduction of HIV/AIDS behavioral risks shall be a priority of all prevention efforts in terms of funding, educational messages, and activities by promoting abstinence from sexual activity and substance abuse, encouraging monogamy and faithfulness, promoting the effective use of condoms, and eradicating prostitution, the sex trade, rape, sexual assault and sexual exploitation of women and children.

available at http://www.gpo.gov/fdsys/pkg/PLAW-108publ25/pdf/PLAW-108publ25.pdf, *archived at* http://perma.cc/X9Q9-34SH.

273. 22 U.S.C § 7631(e).

274. USAID, 133 S. Ct. 2321, 2324–25 (2013).

condition on First Amendment grounds as compelled speech.[275] In the interim, the Department of Human and Health Services ("HHS") and USAID, as the implementing agencies, issued new guidelines that allowed recipients of funds through the Act to work with organizations not bound by the Policy Requirement. The NGO recipients should "retain objective integrity and independence from any affiliated organization," for example, by keeping separate accounting records and separate personnel and facilities.[276]

To frame the question, however, as simply a conflict between the power of Congress under the Spending Clause to choose appropriate partners to carry out federal programs, on the one hand, and the right of private U.S. groups and individuals not to espouse views contrary to their own beliefs, on the other, is incomplete. Chief Justice Roberts's majority opinion in *USAID* emphasized that the Policy Requirement unconstitutionally regulated conduct outside the program since the condition was also placed on the recipient rather than the funds alone.[277] Further, the Court held that the HHS/USAID guidelines, which allowed for the creation of affiliates, did not remedy the violation because its very separateness meant that the recipient could not express its own beliefs.[278] The Court also rejected the assertion made by the government that, citing *Holder,* money is fungible, and without such condition, the recipient NGO could use its private funds, the very funds that a federal grant would have freed up, to undermine the government's message on prostitution.[279] The difference, Chief Justice Roberts wrote, was that there was evidence in that context for the claim that support for FTOs' nonviolent operations was ultimately funneled to their violent, unlawful activities,[280] and there was none in *USAID.* But as previously noted, those findings in *Holder* were conclusions, rather than evidence. And true enough, even in his dissent, Justice Scalia wrote that this issue of fungibility need not even be established by evidence because the same risk exists here.[281]

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275. *Id.* at 2326.

276. *Id.*

277. *Id.* at 2330–31. *Compare* Rust v. Sullivan, 500 U.S. 173, 192–200 (1991) (holding HHS's prohibition of certain projects from engaging in abortion counseling or in activities advocating abortion did not violate First Amendment), *with* Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 549 (2001) (holding restriction preventing Legal Services Corporation from providing funding to any organization representing clients in order to amend or challenge welfare laws violated First Amendment).

278. *USAID*, 133 S. Ct. at 2331.

279. *Id.*

280. *Id.*

281. *Id.* at 2334 (Scalia, J., dissenting).

It is significant that the briefs and transcript for the oral arguments on the case are peppered with references to the foreign locales of both the government and citizen speech at issue. The government emphasized that the program is primarily conducted in "foreign territory" and "distant lands,"[282] hence the need for the Policy Requirement to function as an ex ante commitment. The NGOs declared that their projects include "preventing mother to child transmission in Tanzania, caring for orphans of AIDS victims in Kenya, and providing HIV/AIDS support services in places like Vietnam."[283] The instance of compelled speech, if indeed that was what it was, would not only be at the moment of signing of the award agreement with USAID but during each and every instance of the NGOs going about their activities in different places abroad. Even the Court itself joined this extraterritorial discussion during oral arguments when Justice Ginsburg expressed skepticism about the efficacy of the HHS/USAID guidelines on separate affiliates, stating "there is a difference in this international setting."[284] Justice Kennedy also noted that this was a case in which the foreign affairs sphere is implicated, a sphere where the executive branch generally enjoys deference.[285] And yet Justice Scalia's dissent only addressed this tangentially when he stressed the all-too-valid need for the government to enlist the assistance of those who would carry its goals to fruition.[286] Nothing of such sort appeared in the majority opinion either. Instead, it proceeded with a traditional First Amendment analysis using government speech and compelled speech precedents.

C. Whither the Extraterritorial First Amendment?

The unfortunate omissions made in these recent cases only exacerbate the existing state of ambiguity. As we have already seen, territory can and does impact constitutional doctrine. Territory shapes the arguments that lawyers make even though it does so without recognition of its centrality, and it also influences the analysis of courts.

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282. Transcript of Oral Argument, *supra* note 20, at 15.

283. *Id.* at 36.

284. *Id.* at 18 ("[G]etting an NGO, a new NGO, recognized in dozens of foreign countries is no simple thing to accomplish.").

285. *See id.* at 27.

286. *USAID*, 133 S. Ct. at 2332–33 (Scalia, J., dissenting):

> The program is valid only if the Government is entitled to disfavor the opposing view (here, advocacy of or toleration of prostitution). And if the program can disfavor it, so can the selection of those who are to administer the program. There is no risk that this principle will enable the Government to discriminate arbitrarily against positions it disfavors.

As an instance of an extraterritorial First Amendment, then, how can we best explain *Holder's* departure from existing First Amendment precedent and *USAID's* adherence to it? It should be noted that these two cases are the first free speech cases with foreign affairs implications decided in the post-9/11 era, a period when national security considerations are at an all-time high, perhaps comparable to that of the Cold War at its peak.

Determining the location of the speech is only the first step. The next step is to evaluate the government interest that inevitably clashes with such private speech. Not unlike its domestic counterpart, an extraterritorial First Amendment does not trump all other competing interests, especially in the foreign affairs realm when "the Executive receives its greatest deference and in which we [courts] must recognize the necessity for the nation to speak with a single voice."[287] Not all foreign affairs interests are created equal, however, or at least not perceived in the same way by implementing officials. After all, not one State Department or USAID official filed an affidavit indicating the foreign policy aspect of the program, even though that program was part of the broader foreign aid effort of the U.S. government. Judging from the *USAID* Court's decision, this was a nonfactor. As Justice Scalia described in his dissent, it was a "minor federal program."[288] In contrast, national security concerns loomed large from the outset of the *Holder* litigation. And the international nature of the FTOs was emphasized forcefully by all sides. In fact, one can easily deduct this from among the safe harbors provided in the decision: the restriction only applies to coordination with FTOs, not domestic organizations. As Professor David Cole has argued, it is easier to control and monitor the conduct of domestic organizations, and they are generally subject to the full panoply of local laws and regulations.[289] But that is not because the "ability to associate and speak with foreign organizations is . . . less essential,"[290] he stated. The same self-governance concerns underlying

287. DKT Memorial Fund Ltd. v. Agency for Int'l Dev., 887 F.2d 275, 291 (D.C. Cir. 1989); Palestine Info. Office v. Schultz, 853 F.2d 932, 937 (D.C. Cir. 1988).

288. *USAID*, 133 S. Ct. at 2333 (Scalia, J. dissenting) ("I am frankly dubious that a condition for eligibility to participate in a minor federal program such as this one . . . ."). But this is not to say the program is unimportant. The United States provides almost sixty percent of the global funds, about $4.5 billion out of a total of $7.6 billion, allotted to fight the global AIDS epidemic. Cutting off this funding, especially in low-income countries, would be catastrophic. *See* BENJAMIN GOBET ET AL., THE KAISER FAMILY FOUNDATION & UNAIDS, FINANCING THE RESPONSE TO AIDS IN LOW- AND MIDDLE-INCOME COUNTRIES(2012), *available at* http://kaiserfamilyfoundation.files.wordpress.com/2013/01/7347-08.pdf, *archived at* http://perma.cc/9G5S-7HAR.

289. Cole, *supra* note 261, at 173–74.

290. *Id.* at 173.

pure domestic interactions could be at the core of these international communications too. Instead, there is the reality that the political branches of government have a broader interest in matters implicating foreign affairs for which we do not yet have any alternative at the moment but to recognize in view of the current international order.

No doubt national security is a capacious concept. Even though *Holder* can arguably be cabined to specific, specialized speech coordinated with FTOs for national security purposes, *Holder*'s chilling effect could be such that it would render an extraterritorial speech right illusory.[291] Hence, one proposed solution is to go the legislative route and ask Congress to narrow the scope of the material support laws and require some proof of connection between the skills and training provided by U.S. groups to certain foreign groups and the latter's unlawful activities.[292]

Beyond the material support context, however, the issue of extraterritorial speech is only going to become more salient in the coming years and may start to involve foreign conversation partners. Thus, we have yet to see if existing doctrines developed within an exclusively domestic milieu can be exported as is or will be appropriately tailored to an extraterritorial setting. Any such tailoring would not be an extraordinary step, as this also happens within the domestic context. At the very least, such recognition would be a salutary reminder that government powers abroad are not unconstrained even by invoking the mantra of foreign affairs.

VI. CONCLUSION

In his dissent in *Boumediene,* Justice Scalia warned that the decision "clears a wide path for the Court to traverse in the years to come."[293] That path presumably pertains not only to the general idea that even aliens, under some circumstances, could be entitled to make constitutional claims against the U.S. government but also to the notion that constitutional rights in general are not necessarily limited in its

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291. For a more optimistic account of the effects of these kinds of cases, see, for example, Mark Tushnet, *Defending* Korematsu*?: Reflections on Civil Liberties in Wartime*, 2003 WIS. L. REV. 273, 283–284 (2003):

> Knowing that government officials in the past have in fact exaggerated threats to national security or have taken actions that were ineffective with respect to the threats that actually were present, we have become increasingly skeptical about contemporary claims regarding those threats, with the effect that the scope of proposed government responses to threats has decreased.

292. *See, e.g.*, *Shouting Fire in a Global Theater*, *supra* note 9, at 162–163.

293. Boumediene v. Bush, 553 U.S. 723, 843 (2008) (Scalia, J., dissenting).

application to the domestic setting. It is a development to be welcomed, not shunned.

This Article has argued the case for an extraterritorial First Amendment, relying on historical analogies, theoretical justifications, the international legal commitments of the United States, and existing (though ambiguous) judicial precedents. In fact, this argument is already implicit in many court decisions—most recently and notably in the first two free speech cases with foreign affairs implications decided by the Supreme Court in the post-9/11 period: *Holder* and *USAID*. The Court has shown a history and method of recognizing extraterritorial First Amendment interests that have been otherwise obscured in free speech doctrine while situating them within the broader context of extraterritoriality cases. Thus, like other provisions of the Bill of Rights that have been the subject of an extraterritorial analysis, the First Amendment right to free speech could be claimed by U.S. citizens wherever (though not always applicable necessarily), while aliens could also do so when they have been subjected to government actions. Recognizing an extraterritorial First Amendment does not preclude such interest, however, from being balanced against competing interests of the government in matters involving national security and foreign affairs. Recognizing this right helps the courts to be right where the Constitution is: safeguarding rights even beyond the water's edge.