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Zoya's Standing Problem, or, When Should the Constitution Follow the Flag?

Jeffrey D. Kahn

Southern Methodist University, Dedman School of Law

Author ORCID Identifier:

 <https://orcid.org/0000-0002-8857-5647>

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ZOYA'S STANDING PROBLEM, OR, WHEN SHOULD THE CONSTITUTION FOLLOW THE FLAG?

Jeffrey Kahn*

Some federal courts have devised a new test of prudential standing that they use to dismiss suits filed by foreign plaintiffs alleging unlawful conduct by American officials abroad, even when these cases involve matters that may have nothing to do with foreign affairs, national security, or terrorism. Rather than decide the case on its merits or dismiss it on any number of legitimate grounds, the complaint is dismissed because the plaintiff lacks a "prior substantial connection" to the United States.

*I identify and critique this strange but proliferating test of standing. First, it is inconsistent with any theoretical view of the Constitution's extraterritorial application, including the functional one recently advanced in *Boumediene v. Bush*, the U.S. Supreme Court's landmark habeas corpus decision. Second, it advances none of the policy interests that prudential standing was created to promote. The test has been wrenched from its origins as an approach to decide the merits of a constitutional question; it is now used to decide jurisdiction. This impedes the development of an important area of case law while abdicating the judicial role in defining the limits of state power.*

The Article begins with an in-depth case study (based on interviews and primary sources) of a takings claim that would have been unexceptional but for its foreign location and rather shocking allegations against the United States. I repeatedly reference this case while examining the theoretical and practical inconsistencies of dismissing "Zoya's case" not because the courts found fault with her claim, but because she lacked a prior substantial connection to the United States.

* Assistant Professor of Law, Southern Methodist University Dedman School of Law. I thank Lackland M. Bloom Jr., Michaela Cashen, Anthony J. Colangelo, Nathan Cortez, William V. Dorsaneo III, Jeffrey Gaba, Aaron Lacy, Hans A. Linde, Gerald Neuman, Christopher M. Ryan, Elizabeth Thornburg, Rose Cuison Villazor, and Jessica Dixon Weaver for their helpful advice and comments on drafts of this Article. The John P. Hall Endowment is gratefully acknowledged for its financial support.

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"The Constitution begins with 'We, the People.' Where does it end?"

—Gerald L. Neuman¹

INTRODUCTION

Should foreign plaintiffs in faraway lands at peace with the United States have standing in federal court to pursue constitutional claims against American officials abroad? Consider a concrete example:

Zoya, a citizen of Uzbekistan, owned a café next to the U.S. Embassy in that country. She alleges that American officials conspired with Uzbek authorities to knock down her café and build a security checkpoint in its place. Zoya sues the United States in its Court of Federal Claims seeking compensation for the destruction of her property.

What should the court hold with respect to whether Zoya has a valid legal claim? This straightforward claim, alleging a violation of the Fifth Amendment's Takings Clause, turns out to be a Rorschach test for how one views the extraterritorial reach of the Constitution.

1. Gerald L. Neuman, *Whose Constitution?*, 100 YALE L.J. 909, 910 (1991).

It is easy to conjure alternative holdings based on different views of the Constitution. Where one believes the Constitution “ends” is a function of where one believes the discussion about its limits should start. Some judges, viewing the Constitution as a limit on government power wherever exercised, would permit discovery and decide the factual merits of Zoya’s claim. Other judges, believing that the Constitution governs only a certain territory, or establishes a social compact among a particular people, would dismiss Zoya’s claim on the pleadings for failure to state a claim upon which relief can be granted (a dismissal on the legal merits). Such judges might be said to ascribe to a territorialist or social compact theory of the Constitution. Some might believe that whether the matter interferes with the foreign affairs interests of the United States is the determinative question on which dismissal rests. Still others, whose constitutional vision we might call functionalist, would ask whether the extension of this part of the Constitution beyond the people within our nation’s borders would be impracticable or anomalous. Maybe Zoya’s case would survive that inquiry, and maybe not. But regardless of which starting point one selects, they all share a common virtue: each judicial action is consistent with its judge’s particular constitutional philosophy.

It is equally easy to identify numerous nonconstitutional grounds for dismissal of the suit. Statutory grounds might have been raised to argue that the court lacked jurisdiction to decide the case.² Perhaps the Government could have persuaded the court that Zoya had not alleged sufficient facts to suggest that her allegations were plausible.³ Or the United States could have moved to dismiss on the grounds that, although plausible, the allegations presented a political question that implicated the delicate conduct of the nation’s foreign affairs.⁴ Alternatively, the government might have submitted an affidavit from an appropriate high-level official asserting that the complaint must be dismissed to prevent the disclosure of state secrets about the country’s diplomatic or military affairs.⁵

None of that happened. Instead, four federal judges on two courts granted the Government’s motion to dismiss Zoya’s complaint on the ground that she lacked prudential standing to sue.⁶ The judges asked: Does Zoya have a prior substantial connection to the United States? Since Zoya’s

2. Jurisdiction of the Court of Federal Claims is provided by the Tucker Act, 28 U.S.C. § 1491(a)(1) (2006). Foreign litigants may sue the United States in this court only if their own governments accord a reciprocal right to U.S. citizens. 28 U.S.C. § 2502(a) (2006).

3. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007).

4. *See, e.g., El-Shifa Pharm. Indus. Co. v. United States*, 378 F.3d 1346, 1362 (Fed. Cir. 2004) (holding that the president’s order to destroy an alleged chemical weapons factory in Sudan, a nation at peace with the United States, presented a nonjusticiable political question).

5. *See, e.g., El-Masri v. Tenet*, 437 F. Supp. 2d 530, 535–36 (E.D. Va. 2006) (applying state-secrets doctrine to dismiss constitutional claims of noncitizen arising from alleged extraordinary rendition abroad).

6. *Atamirzayeva v. United States*, 77 Fed. Cl. 378, 387 (2007), *aff’d*, 524 F.3d 1320 (Fed. Cir. 2008), *reh’g en banc denied*, 314 F. App’x 298 (Fed. Cir. 2008), *cert. denied*, 129 S. Ct. 1315 (2009).

only connection to the United States was as the victim of this allegedly unconstitutional action, her complaint was dismissed for lack of prudential standing and no inquiry was made into the legality of the action itself.⁷ These judges simply concluded that it would not be prudent to allow this particular plaintiff access to court. The ultimate question in Zoya's case goes unanswered *not* because courts are unable or unauthorized to answer it, but because, like Bartleby the Scrivener, judges simply prefer not to.⁸

This decision is (1) inconsistent with *any* coherent constitutional philosophy and (2) a misapplication of the doctrine of prudential standing. The "prior substantial-connections" test is an example of doctrinal metamorphosis at its worst. The case that created it, *United States v. Verdugo-Urquidez*,⁹ rejected on the merits a criminal defendant's claim that the Fourth Amendment required exclusion of incriminating evidence obtained by American officials acting abroad without a warrant. In less than twenty years that holding has "slipped the surly bonds" of constitutional criminal procedure.¹⁰ In Zoya's case, and increasingly in many others, the test has been transformed into a jurisdictional inquiry into a plaintiff's civil litigation. A starker legal transplant in such a short span of time—or one as dangerous to our system of justice—is hard to find.

This Article criticizes the use of a prior substantial-connections test to deny prudential standing on two separate grounds, one theoretical and one quite practical. First, this standing inquiry is inconsistent with *any* theoretical view of the Constitution's extraterritoriality. Consider again the range of viewpoints. A true territorialist would not care how substantial a connection Zoya had to the United States if Zoya were not *in* the United States as those physical boundaries have been variously defined. An advocate of a limited government theory would be equally hard pressed to explain the accordion-like expansion and contraction of *de facto* government authority that results when standing to sue is based on judgments about the substantiality of a foreign plaintiff's connection to the United States. As to functionalists, reasonable minds may differ about the result to which a judgment of impracticality and anomaly would lead. Where the foreign affairs inquiry would lead is equally uncertain. But those questions cannot be answered by a limited inquiry into the degree of connection that the plaintiff possesses to the United States. Even advocates of a social compact theory of the Constitution ultimately concede that there exists a class of government conduct

7. The courts did not hold that this was a case of *damnum absque injuria*, that an injury of this kind is not a legal injury redressable by an action for damages. Of course it is. Nor did the judges struggle to discern the extraterritorial limits of the Constitution, which would have resolved the legal merits of Zoya's claim. Finally, these judges did not conclude that they lacked jurisdiction under the Constitution to adjudicate Zoya's complaint. Zoya's complaint alleges all of the elements required for *constitutional* standing: a concrete injury in fact fairly traceable to the defendant and redressable through an award of money damages. See *infra* Section II.B.1.

8. HERMAN MELVILLE, *BARTLEBY, THE SCRIVENER: A STORY OF WALL-STREET* (1853).

9. 494 U.S. 259 (1990).

10. JOHN G. MAGEE, JR., *HIGH FLIGHT* (1941) ("Oh! I have slipped the surly bonds of Earth / And danced the skies on laughter-silvered wings . . .").

that the Constitution forbids and that the courts must remedy, no matter where it occurs and no matter who is the victim.

My second criticism is that this theoretical inconsistency has practical consequences. Because the prior substantial-connections test lacks any firm constitutional foundation as part of a standing inquiry, it promotes none of the values that this facet of prudential standing (called zone-of-interests analysis) is supposed to serve. These are not cases in which we would doubt the plaintiff's interest or ability to zealously pursue her case. Zoya, for example, was represented pro bono by the respected international law firm of Shearman and Sterling. Nor do these cases lead to suspicion that the claimants seek to use the courts to make an end run around the democratic process, for these claimants have no political access or interests. That is what makes them so vulnerable to this form of judicial discretion in the first place. Nor does reluctance to determine the rights of conventional, but foreign, litigants who allege unlawful government action further principles of judicial restraint. Rather, it imprudently abdicates an important judicial role in policing the limits of government power.¹¹ When such discretion is inflicted on litigants so poorly placed to seek redress from the political branches either for their alleged injuries or for access to a judicial remedy, this application of "prudence" is a license to ration justice.

As I illustrate below, the substantial-connections test of prudential standing—"Zoya's problem"—is spreading like kudzu. It can be found in a wide variety of takings claims, *Bivens* actions, and in more and more briefs and opinions concerning the constitutional rights of foreign litigants swept up in the so-called War on Terror.¹² As this new prudential-standing test proliferates, it has a pernicious effect on policymakers and the lawyers who advise and defend them. There is a danger that such officials may interpret the inability of aggrieved parties to challenge state action as *carte blanche* to act abroad without fear of suit by putative victims who otherwise would have a litigable cause of action.

This Article argues that the gates of American justice should not be barred by this recent innovation. Without taking a position on the merits of Zoya's claim, this Article argues that, absent some collateral ground for dismissal, a court should reach the issue of extraterritoriality that Zoya's claim presents.¹³ Since prudential standing is a judge-made rule, Congress can and should eliminate this permutation of it. Removing this ill-conceived, judicially imposed filter will neither open the floodgates to foreign litigation nor deny the executive branch constitutional tools for the conduct of the

11. Jack B. Weinstein, *The Role of Judges in a Government Of, By, and For the People: Notes for the Fifty-Eighth Cardozo Lecture*, 30 CARDOZO L. REV. 1, 72 (2008) ("One result of cloaking merits-based decisions as standing-based rulings is obfuscation of the laws controlling government action. The judiciary is able to avoid 'say[ing] what the law is' by preventing plaintiffs from petitioning for relief" (internal citations omitted)).

12. See *infra* Section I.B.

13. If, for example, the litigation would raise a nonjusticiable question reserved to the political branches, or expose state secrets, dismissal may be appropriate. Reasonable minds may differ on these issues, but they do not turn on the extraterritorial application of the Constitution.

nation's foreign affairs and the protection of our national security. To the contrary, it will help to remove a pall over American justice at a time when many have forgotten that "[t]he courts of the United States have traditionally been open to nonresident aliens."¹⁴ Removing an unnecessary impediment to decisions on the merits will also free courts to discern the extraterritorial limits of the Constitution, limits that this strange new standing test keeps obscured in the shadows of nondecision.

Of course, not every extraterritorial constitutional claim should be heard.¹⁵ I conclude by distinguishing what I term "unexceptional" civil litigation like Zoya's case, which does not implicate foreign policy or national security, from "exceptional" civil litigation that does. Zoya's case is easy to misconceive as inextricably intertwined with foreign policy or military necessity. In an era of accelerating globalization, the United States often asserts its power abroad in rather ordinary ways that have little to do with military force, covert action, or foreign policy. Were those considerations genuinely present, there would be no need to rest on the clay foundations of the substantial-connections test to dismiss her lawsuit. When those considerations truly are not present, I argue that such cases should be allowed to proceed at least to a decision of their legal merits.

The Article is in three parts. Part I sets forth the details of Zoya's case. It is a fascinating and concrete example to which reference is repeatedly directed in the more theoretical portions of this Article. In Part II, I detail the development of the substantial-connections test and its perverse new linkage with the zone-of-interests facet of prudential standing. Here I explain how badly these two different ideas interact. Reports of the demise of the substantial-connections test have repeatedly been met by its resurrection and expansion.¹⁶ Even the apparent ascendance of Justice Kennedy's extraterrito-

14. *Rasul v. Bush*, 542 U.S. 466, 484 (2004) (citing *Disconto Gesellschaft v. Umbreit*, 208 U.S. 570, 578 (1908)).

15. In light of the supremacy given to federal law under Article VI of the Constitution, one might ask why the reasoning in this Article should not extend to statutory claims as well as constitutional ones. This question, though worthwhile, is outside the scope of this Article. Suffice it to say that statutory causes of action, by virtue of their source, are less susceptible to the conceptual difficulties that this Article identifies in constitutional litigation. Similarly, one might ask whether the arguments presented here should be the same for foreign corporations and other legal persons as they are for individuals like Zoya. This question is obviously important, too, but seems to present issues that might better be considered separately and after consideration of the more straightforward issue concerning human plaintiffs. My thanks to the Honorable Hans A. Linde, Distinguished Scholar in Residence at Willamette College of Law, for identifying these possible extensions.

16. This proliferation must seem strange to scholars, such as Gerald Neuman, who have argued that the substantial-connections test is dead, and that the Supreme Court's recent case extending habeas rights to detainees at Guantánamo Bay, Cuba, *Boumediene v. Bush*, 128 S. Ct. 2229 (2008), killed it. See Gerald L. Neuman, *The Extraterritorial Constitution after Boumediene v. Bush*, 82 S. CAL. L. REV. 259, 272 (2009). Professor Neuman argues that the functional test propounded by Justice Kennedy in his concurrence in *Verdugo-Urquidez* was clearly reaffirmed by him in his opinion for the Court in *Boumediene* and is now in ascendance. I disagree with Professor Neuman that Justice Kennedy's functionalism will replace the substantial-connections test because I do not share his view that *Boumediene* has provided an unambiguous rejection of the substantial-connections test in all of its dangerous permutations. In Zoya's case for example, the Court of Appeals for the Federal Circuit denied en banc review of an opinion relying on this test almost two months after *Boumediene* was decided, thus prompting a petition for certiorari to the Supreme Court

rial functionalism may not be enough to foreclose continued reliance on the test in its prudential-standing incarnation. Part III provides a concise analytical history of different theories of the extraterritorial reach of the Constitution. With this history as background, I examine the inconsistency of the new substantial-connections standing test with *any* view of the Constitution's extraterritorial reach.

I. ZOYA'S STANDING PROBLEM

A. Zoya Atamirzayeva and the Feruza Café

In November 2005, Zoya Atamirzayeva, a citizen of Uzbekistan (a U.S. ally in Central Asia), sued the United States on a takings claim.¹⁷ The case wound its way through the United States Court of Federal Claims to the Court of Appeals for the Federal Circuit, where en banc review of an adverse ruling was denied weeks after the Supreme Court's landmark decision in *Boumediene v. Bush*.¹⁸ On February 23, 2009, the Supreme Court denied a petition for a writ of certiorari.¹⁹ The facts of her case are these.²⁰

that named conflict with *Boumediene* as the very first reason to grant the petition. *See infra* note 38. The week before the Supreme Court denied this petition, the Court of Appeals for the District of Columbia Circuit reversed a lower court order to release ethnic Uighurs unlawfully held at Guantánamo Bay into the United States. Judge Randolph, writing for the court, cited *Verdugo-Urgidez* among other cases for the proposition that "the due process clause does not apply to aliens without property or presence in the sovereign territory of the United States." *Kiyemba v. Obama*, 555 F.3d 1022, 1026 (D.C. Cir. 2009), *cert. granted* 130 S. Ct. 458 (Oct. 20, 2009). The court did not cite *Boumediene* except to acknowledge the court's habeas jurisdiction, *id.* at 1028, and express its view that *Boumediene*'s holding was limited to the Suspension Clause, *id.* at 1032. Judge Rogers concurred in the judgment only, going so far as to say, "I cannot join the court's analysis because it is not faithful to *Boumediene*." *Id.* at 1033 (Rogers, J., concurring). I am concerned that the misuse of prudential standing that I describe will continue, if not expand, in a globalized world in which the United States remains the dominant world power.

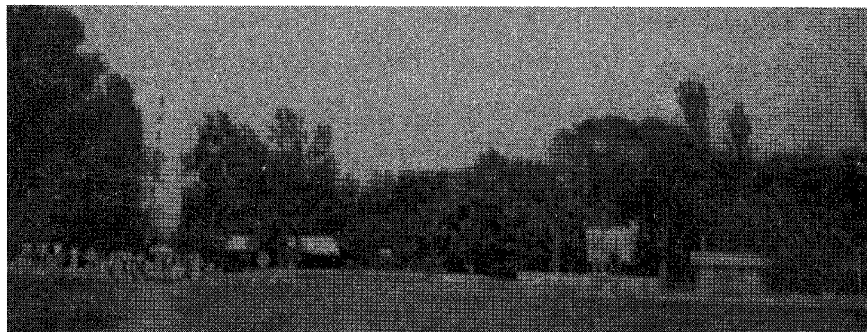
17. Complaint, *Atamirzayeva v. United States*, 77 Fed. Cl. 378 (2007) (No. 05-1245 L) [hereinafter *Compl.*]. The complaint was well drafted and seemed to anticipate many of the nonconstitutional grounds for dismissal described *supra*, text accompanying notes 2 to 5. It cited Uzbek law to establish reciprocal rights of U.S. citizens to sue in Uzbek courts. *Id.* at ¶ 2. The pleadings clearly satisfied the requirements of Federal Rule of Civil Procedure 8, and would have done so even under the heightened *Twombly* plausibility standard. *See id.* at ¶¶ 15–17 (alleging that the Embassy made an "express verbal demand" that Uzbek officials destroy the café, that embassy officials "were physically present at and oversaw" its demolition, and that the security checkpoint was "constructed in part from the remains of" the café).

18. In *Boumediene*, the Court held that habeas corpus jurisdiction extended to detainees at Guantánamo Bay, Cuba, and concluded that the Military Commissions Act had worked an unconstitutional suspension of the writ. 128 S. Ct. 2229. The *Boumediene* decision was handed down on June 12, 2008. *Id.* The Court of Appeals for the Federal Circuit denied en banc review to Atamirzayeva on August 5, 2008. *See supra* note 6.

19. *See supra* note 6.

20. The locus of these events and the involvement of Uzbek officials naturally leads one to ask why Zoya did not pursue remedies under Uzbek law in Uzbek courts. Her son, Sobir Atamirzayev, offered several reasons why the family did not bother. First, "to appeal to local civil court you have to pay 10% of the claimed sum. . . . We don't have such a financial means." Letter from Sobir Atamirzayev to Jeffrey Kahn and Christopher M. Ryan (Mar. 27, 2009) (on file with author). Second, Sobir noted several "recent big infamous cases when some institutions declared about taking civil actions in Uzbek court of law," but ultimately did not, leading the family to conclude that it

The Feruza Café used to sit near the United States Embassy in Tashkent, the capital of the Republic of Uzbekistan.²¹ The café employed roughly twenty people and consisted of several buildings and a drinks stand. Situated as it was in a city park on the banks of a small lake, its customers largely consisted of park visitors and embassy employees. Here is a picture, taken from a boat on the lake, showing the café in the foreground and one of the large embassy buildings rising above the tree line on the left.²²



Since 1994, Zoya had been the sole owner of the café, which supported her large family (with an apartment above the café providing additional income).²³ Here is a picture of Zoya standing with her son, Sobir, whose efforts to save the family business ultimately led to a violent exchange with Uzbek authorities that landed him in a local hospital:²⁴

would be futile to file their relatively much smaller claim in courts “notorious for their corruption.” *Id.* Among those Sobir identified were a large Uzbek telecommunications company, an American mining company, and the April 2004 closure by the Uzbek Ministry of Justice of the Open Society Institute Assistance Foundation—Uzbekistan, an organization run by George Soros that distributed millions of dollars in private and U.S.-funded aid.

21. The facts described here are taken primarily from the complaint. *See* Compl., *supra* note 17, at ¶ 2. “Feruza” is a common female name as well as the word for “turquoise.” Letter from Sobir Atamirzayev, *supra* note 20.

22. Photograph of the Feruza Café and surrounding environs provided by and used with the permission of Christopher M. Ryan, Esq., Shearman & Sterling LLP, Washington, D.C.

23. Atamirzayeva alleged that she was the sole owner of the buildings that comprised the Feruza Café, but that the Republic of Uzbekistan owned the land. *See* Compl., *supra* note 17, at ¶ 5. The United States alleged that the café was located in a public park owned by the Republic of Uzbekistan. *See* Answer at ¶ 5, *Atamirzayeva v. United States*, 77 Fed. Cl. 378 (2007) (No. 05-01245 L.) [hereinafter Answer]. Therefore, the takings claim did not concern any title to land in a foreign country, only the physical structures themselves.

24. Photograph provided by and used with the permission of Christopher M. Ryan, Esq., Shearman & Sterling LLP, Washington, D.C. According to Sobir Atamirzayev, “I was beaten by an Uzbek Khokimiat (Tashkent mayor’s office) . . . I was asking for all the documents his office was holding related to café Feruza. There were no serious injuries. My stay in the hospital was of few hours.” Letter from Sobir Atamirzayev, *supra* note 20. Quite literally adding insult to injury, Atamirzayev’s efforts ultimately led him to be fined approximately \$10 for disturbing the peace. Atamirzayev appealed the sentence, but “the court never responded to the appeal and in my turn I never paid the fine.” *Id.*



In her complaint, Zoya alleged that shortly before Christmas 1999, Uzbek government authorities in Tashkent “forcibly expelled” her from the Feruza Café, seized the property she had there, and destroyed it.²⁵ A security checkpoint for the Embassy was installed where her café once stood, “constructed in part from the remains of Feruza.”²⁶

The parties sharply disagreed about how these facts implicated the United States. Zoya alleged that U.S. Embassy officials were responsible for these acts, using the United States’ “pervasive influence” over Uzbekistan to successfully demand the destruction of the café “for the sake of the security of the US Embassy.”²⁷ She therefore alleged a sort of principal-agent relationship between the American and Uzbek authorities and sought compensation from the United States for taking her property. The United States asserted that although “some members of the United States Embassy staff physically observed some of the activities related to the removal of the Feruza Café, only after being notified of the removal by officials of the City of Tashkent,” no U.S. official oversaw or otherwise participated in the seizure and demolition itself.²⁸ The Embassy refused to compensate Zoya because “the United States did not request or demand that the Uzbek authorities remove the Feruza Café, and the United States did not play a role in the removal of the Feruza Café by Uzbek authorities.”²⁹

The parties also disagreed about the law. Zoya and her lawyers clearly ascribed to a constitutional theory under which, if they could prove her

25. See Compl., *supra* note 17, at ¶ 16. In its Answer, the United States asserted that it lacked sufficient information to admit or deny this allegation. See Answer, *supra* note 23, at ¶ 16.

26. Compl., *supra* note 17, at ¶ 17. The United States denied the allegations about the security checkpoint. Answer, *supra* note 23, at ¶ 17.

27. Atamirzayeva alleged that “Officials from the U.S. Embassy were physically present at and oversaw the demolition of Feruza.” Compl., *supra* note 17, at ¶ 16.

28. Answer, *supra* note 23, at ¶¶ 15–16.

29. *Id.* at ¶ 23.

factual allegations, U.S. officials could not take Zoya's private property without just compensation, regardless of where the property was located or by whom it was owned. The United States took a much narrower view of the Fifth Amendment. Even if the facts that Zoya alleged were true, it argued that she could not seek compensation under the Takings Clause because she was a foreigner in a foreign land. The United States moved under Rules 12(b)(6) and 12(c) of the Court of Federal Claims (identical to the corresponding Federal Rule of Civil Procedure) for judgment on the pleadings. Although the Government argued that the plaintiff had failed to state a claim upon which relief could be granted, it was not the *claim* that the Government considered deficient but the *litigant*: the Government argued that Zoya lacked standing to sue.³⁰ The United States read two Supreme Court opinions, *United States v. Verdugo-Urquidez* and *Johnson v. Eisentrager*, to establish the "rule" that a foreign citizen without a substantial connection to the United States lacked standing to allege a constitutional injury.³¹ Since Zoya Atamirzayeva lacked any such connection beyond her alleged injury, the United States urged the court not to hear her claim.

Plaintiff's counsel did not challenge the propriety of adopting this novel standing test, but rather set itself the task of distinguishing these cases and offering alternatives. This choice is understandable. The case law of the Court of Federal Claims was in conflict with itself, containing cases that ignored, adopted, and repudiated this test for standing.³² Plaintiff identified *Turney v. United States* as the strongest precedent in her favor, a keystone-kops sort of case in which sensitive military equipment was accidentally sold to a foreign company and then seized by the United States after the mistake was realized.³³ The clawback was held to be a compensable taking.

30. United States' Motion for Judgment on the Pleadings and Supporting Memorandum at 1, *Atamirzayeva v. United States*, 77 Fed. Cl. 378 (2007) (No. 05-01245 L) [hereinafter U.S. Mot.]. The federal courts are confused, to put it mildly, over whether dismissal should be for failure to state a claim (Rule 12(b)(6)) or for lack of subject matter jurisdiction (Rule 12(b)(1)). See, e.g., *Ashkir v. United States*, 46 Fed. Cl. 438, 439 n.2 (2000). The Government's argument fit neither rubric.

31. U.S. Mot., *supra* note 30, at 6. These opinions are described in more depth *infra* Sections II.A and II.B.3. *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990), held that the Fourth Amendment did not apply to the search and seizure of a nonresident alien's foreign property by U.S. officials. In *Johnson v. Eisentrager*, 339 U.S. 763 (1950), the Court declined to extend the writ of habeas corpus to German nationals convicted by an American military commission located in China and detained in postwar Germany by the U.S. Army.

32. *Turney v. United States*, 115 F. Supp. 457 (Ct. Cl. 1953) (holding that the Takings Clause extends to foreign-owned property outside United States); *Ashkir*, 46 Fed. Cl. 438 (citing *Verdugo-Urquidez* to hold that alien without substantial connection to the United States lacked standing to bring Takings Clause claim); *El-Shifa Pharm. Indus. Co. v. United States*, 55 Fed. Cl. 751 (2003) (criticizing the *Ashkir* court for importing substantial-connections test in conflict with existing circuit precedent in *Turney* extending Takings Clause to foreign property owned by nonresident aliens), *aff'd* 378 F.3d 1346, 1352 (Fed. Cir. 2004) (declining invitation to overrule *Turney* in light of *Verdugo-Urquidez* and dismissing case on alternative ground). Plaintiff's counsel also cited several cases concerning the Pacific Islands Trust Territories.

33. *Turney*, 115 F. Supp. 457, concerned property sold by the United States to two American businessmen who then transferred it to the foreign company. Edward Turney was the liquidating trustee later appointed to wind down the company's affairs, and he sued the United States in that

Counsel may well have gambled that the court could be persuaded to follow the *Turney* precedent.

Plaintiff's counsel lost that bet. The court concluded that Atamirzayeva "lacks standing to invoke the Takings Clause . . . because she has failed to demonstrate any substantial connections to the United States."³⁴ As to plaintiff's reliance on *Turney*, the court held that "even though the *Turney* court did not identify the need for substantial connections between the [plaintiffs] and the United States, the corporation in *Turney* would have satisfied this test, whereas Ms. Atamirzayeva decidedly would not."³⁵

Zoya appealed to the Court of Appeals for the Federal Circuit. That court's opinion framed the "sole question presented on appeal" as "whether a foreign citizen with no connection to the United States has a right to just compensation under the Fifth Amendment for a taking of property that occurs in a foreign country."³⁶ This formulation appeared to focus on the substantive question of the extraterritorial reach of the Takings Clause, not the jurisdictional question of standing. Nevertheless, the appellate court affirmed the lower court's decision, including its reading of *Turney*. Plaintiff's petition for rehearing en banc was denied without a written opinion.³⁷

Zoya's counsel filed a petition for a writ of certiorari to the Supreme Court on November 3, 2008. In their petition, Zoya's counsel first correctly described the trial court's inquiry into Zoya's standing, but then confused the court's jurisdictional holding with one on the merits, stating that the court "concluded that . . . [Zoya] has no constitutional right to just compensation."³⁸ Citing the intervening *Boumediene* decision, Zoya's counsel argued that this recent case mandated a more flexible, functional test instead of the "arbitrary rule" of the substantial-connections test.³⁹

The brief for the United States in opposition to the petition (among the last filings in the Supreme Court by the Department of Justice under the

capacity. The corporation was identified in an unrelated opinion by the Court of Claims as an "alien corporation," presumably Filipino. *Seery v. United States*, 127 F. Supp. 601, 603 (Ct. Cl. 1955). The citizenship of none of the participants was identified in the opinion, although *Turney* and the former airmen were apparently identified in briefs as U.S. citizens. *Atamirzayeva v. United States*, 77 Fed. Cl. 378, 380 nn.5–6 (2007).

34. *Atamirzayeva*, 77 Fed. Cl. at 387.

35. *Id.* This distinction is explored more fully *infra* Section II.B.3.

36. *Atamirzayeva v. United States*, 524 F.3d 1320, 1322 (2008). The appellate court characterized the lower court as having held "that Ms. Atamirzayeva did not have a right to relief under the Fifth Amendment because she did not plead any connection to the United States." *Id.* at 1326. This is emphatically *not* what the lower court held.

37. *Atamirzayeva v. United States*, 314 F. App'x 298 (Fed. Cir. 2008).

38. Petition for Writ of Certiorari at 9, *Atamirzayeva v. United States*, 129 S. Ct. 1315 (2009) (No. 08-600). Actually, the court held that Zoya "does not have standing to invoke the protection of the just compensation clause of the Fifth Amendment for an alleged taking by the United States." *Atamirzayeva*, 77 Fed. Cl. at 387. Zoya's counsel did better restating the Federal Circuit's holding to be that "she was not *entitled to pursue* a Takings Clause action for the taking of her property." Petition for Writ of Certiorari, *supra*, at 9 (emphasis added). Although "entitled" confused the distinction between constitutional and prudential standing, it did make clear that the matter was one of pursuance, not success on the merits.

39. Petition for Writ of Certiorari, *supra* note 38, at 9.

outgoing administration of President George W. Bush) was extraordinary if for no other reason than that it did not even contain the word “standing” within its pages. The Government’s cited cases, none of which concerned the Takings Clause,⁴⁰ each addressed the merits of a due process claim brought in a criminal, immigration, or military context.⁴¹ This broad brush treatment was followed by a much more finely wrought effort to distinguish *Boumediene* as resting on the “unique status” of Guantánamo Bay and the narrow issue of the Suspension Clause.⁴² The brief concluded by raising the specter of terrorism, suggesting that the “severe terrorist risks to U.S. interests” that the Embassy faced in Uzbekistan would have rendered extraterritorial application of the Takings Clause “particularly inappropriate,” again citing *Boumediene*.⁴³

On February 23, 2009, the Supreme Court issued an order list on which it denied the petition for a writ of certiorari without comment, thus ending the litigation.⁴⁴

B. From the Feruza Café to the War on Terror

The substantial-connections test of prudential standing—“Zoya’s problem”—is spreading. This development has extraordinary implications for Executive Branch operations overseas for it amounts to judicial abdication of supervision over the peacetime conduct by government officials against the “right” kind of foreigner, whether her claim is for an alleged taking, or extraordinary rendition, or worse. Many foreign plaintiffs with varied claims have suffered the same fate as Zoya.

For example, the claims of Holocaust survivors seeking just compensation for property seized by American soldiers after World War II were also foreclosed by the application of the test.⁴⁵ The property in question was alleged to have been carried in the famous “Gold Train,” which was intended to transport the looted property of Hungarian Jews for delivery by a pro-Nazi Hungarian government to Nazi Germany in 1945.⁴⁶ American soldiers intercepted and seized possession of the Gold Train en route, closely guarding the jewelry, artwork, and other assets in warehouses in occupied Austria.⁴⁷ Many years later, the plaintiffs filed a class action alleging that the

40. Brief for the United States in Opposition at 4–5, *Atamirzayeva*, 129 S. Ct. 1315 (No. 08-600).

41. *Id.* (citing *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001); *United States v. Verdugo-Urquidez*, 494 U.S. 259, 269 (1990); *Johnson v. Eisentrager*, 339 U.S. 763, 783 (1950)).

42. *Id.* at 5–6.

43. *Id.* at 8.

44. *Atamirzayeva*, 129 S. Ct. 1315 (mem.).

45. *Rosner v. United States*, 231 F. Supp. 2d 1202 (S.D. Fla. 2002).

46. *Id.* at 1204.

47. *Id.* The plaintiffs alleged that “the actual taking of the Gold Train property occurred after hostilities had ceased and peace was formally declared.” *Id.* at 1212 n.14.

U.S. Government could have returned the property to its surviving owners or descendants, but instead sold or distributed the property to others.⁴⁸

The plaintiffs alleged, *inter alia*, that the United States had taken their property without just compensation in violation of the Fifth Amendment. The court dismissed the claim, adopting the Government's argument that because the alleged taking occurred outside the United States at a time when the plaintiffs were not U.S. citizens, the plaintiffs failed to state a claim upon which relief could be granted: they lacked a "substantial connection" to the United States.⁴⁹ The court expressed its anxiety that "[t]o hold otherwise would be to invite constitutional claims against the United States government from all over the world, and hence, start a path down a very slippery slope."⁵⁰

Outside of takings, the test has been used to deny aliens access to court on a variety of constitutional claims. Such was the fate, for example, of foreign nationals who alleged that their designation as narcotics traffickers and subsequent blocking of their assets by the Office of Foreign Assets Control violated the Ex Post Facto and Attainder Clauses of the Constitution.⁵¹ Citing *Verdugo-Urquidez*, the court held that as foreign nationals without a substantial connection to the United States, plaintiffs "lack[ed] standing to bring a challenge under Article I, Section 9, clause 3 of the Constitution."⁵²

48. *Id.* at 1205.

49. *Id.* at 1212. The Government cited *Ashkir v. United States*, 46 Fed. Cl. 438 (2000), *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990), and *Johnson v. Eisentrager*, 339 U.S. 763 (1950) in support of its argument. *Id.* The United States argued that "[w]ithout such a connection, there is no basis on which to infer a social compact between a plaintiff and the United States through which the plaintiff consented to be governed in exchange for the protections of the Constitution." Memorandum of Points and Authorities in Support of Defendant's Motion to Dismiss Under Fed. R. Civ. P. 12(b)(1) and 12(b)(6) at 14, *Rosner*, 231 F. Supp. 2d 1202 (No. 01-1859-CIV-SEITZ).

50. *Rosner*, 231 F. Supp. 2d at 1214. The court evaded direct reference to the plaintiffs' standing, but that is hardly uncommon in the confused world of standing, "a word game played by secret rules." *Flast v. Cohen*, 392 U.S. 83, 129 (1968) (Harlan, J., dissenting). But its reference to the *Ashkir* case as "particularly instructive" gave the game away. *Rosner*, 231 F. Supp. 2d at 1213. *Ashkir* held that the plaintiff lacked standing to assert his takings claim because he lacked substantial connections to the United States. *Ashkir*, 46 Fed. Cl. at 444.

Cases abound in which what the district court does *sub silentio* the appellate court labels dismissal for want of standing. *See, e.g., Cardenas v. Smith*, 555 F. Supp. 539, 540 (D.D.C. 1982) (dismissing for failure to state a claim upon which relief can be granted a nonresident alien's action against Attorney General for alleged involvement in freeze of bank assets by Swiss authorities, holding that the court "has no basis for attempting to apply constitutional standards on behalf of a nonresident alien with respect to a res which is not subject to the Court's control"), *rev'd in part*, 733 F.2d 909, 912 (D.C. Cir. 1984) (noting dismissal is "the proper result if a plaintiff lacks standing" and "read[ing] the court's opinion as holding that the plaintiff lacked standing to raise the tendered constitutional claims").

51. Appellant's Brief and Appendix on Behalf of Carolina Rodriguez Arbelaez, et al. at 4, 6, *Arbelaez v. Newcomb*, 1 F. App'x 1 (D.C. Cir. 2001) (No. 00-5217).

52. *Arbelaez*, 1 F. App'x at 1. Interestingly enough, although the Court of Appeals concluded that plaintiffs lacked standing, the order of district court Judge Oberdorfer that the appellate court affirmed had granted the defendant summary judgment on the grounds that plaintiffs' connections (two modest bank accounts) were not substantial enough to raise an issue of material fact. *Arbelaez v. Newcomb*, No. 98-2813-LFO (D.D.C. filed May 16, 2000). As will be seen *infra* Section II.B., this conflation of jurisdictional and merits questions is common when the issue of standing is raised.

The test has also been applied to civil rights claims by aliens alleging physical abuse by American border guards.⁵³ Maria Martinez-Aguero was a Mexican citizen living in Mexico who assisted her aunt in crossing the U.S. border at El Paso each month to collect a check at the Social Security office there.⁵⁴ During one such trip, Martinez-Aguero alleged that a U.S. border patrol agent violently assaulted her and arrested her on false charges in retaliation for questioning his authority.⁵⁵ The United States sought to dismiss her *Bivens* claims, relying on *Verdugo-Urquidez* and *Eisentrager* to contend that she had no constitutional rights because she lacked a “substantial connection” to the United States.⁵⁶ The Court applied the test to determine whether the plaintiff “has standing under the Fourth Amendment to challenge unlawful arrest and the excessive use of force” and concluded that her lawful monthly visits constituted “substantial connections” that satisfied the test.⁵⁷

Courts may well be using this test more at the urging of government attorneys who appear before them. The test appears with increasing frequency in legal briefs concerning foreigners captured in the so-called War on Terror. Respondents and several amici filed briefs in *Boumediene v. Bush*, the Supreme Court’s most recent case concerning detainees at Guantánamo Bay, in which they urged the application of the substantial-connections test or vigorously fought to discourage its anticipated use.⁵⁸ Justice Kennedy’s opinion states: “Because the Constitution’s separation-of-powers structure, like the substantive guarantees of the Fifth and Fourteenth Amendments, . . . protects persons as well as citizens, foreign nationals who have the privilege of litigating in our courts can seek to enforce separation-of-powers principles

53. *Martinez-Aguero v. Gonzalez*, 459 F.3d 618, 625 (5th Cir. 2006).

54. *Id.* at 620.

55. *Id.* at 620–21.

56. Brief of Appellant at 7–11, *Martinez-Aguero*, 459 F.3d 618 (No. 05-50472). It is unclear, but probable, that the United States intended the substantial-connections test to decide the legal merits of plaintiff’s legal claims. That said, the United States asserted in its brief both that plaintiff “had no constitutional rights” and that aliens like plaintiff must establish a substantial connection “in order to invoke constitutional rights.” *Id.* at 7–8 (emphasis added).

57. *Martinez-Aguero*, 459 F.3d at 624–25. Whether the court truly thought of itself as evaluating plaintiff’s standing or the legal merits is unclear. The court initially described its task as determining whether “Martinez-Aguero is entitled to the protection of these constitutional guarantees,” *id.* at 622, but subsequently announced “[w]e turn now to whether she has standing under the Fourth Amendment,” *id.* at 624.

58. Brief for the Respondents at 20, *Boumediene v. Bush*, 128 S. Ct. 2229 (2008) (No. 06-1195) (“Instead, this Court has declared, aliens ‘receive constitutional protections when they have come within the territory of the United States and developed substantial connections with this country.’” (quoting *United States v. Verdugo-Urquidez*, 494 U.S. 259, 271 (1990))); Brief Amici Curiae of the Foundation for Defense of Democracies et al. in Support of Respondents at 8, *Boumediene*, 128 S. Ct. 2229 (No. 06-1195) (“Under this standard, no constitutional rights appertain to Petitioners, who have never ‘developed substantial connections’ with the United States.” (quoting *Verdugo-Urquidez*, 494 U.S. at 271)); Brief Amicus Curiae of the American Civil Liberties Union and Public Justice in Support of Petitioners at 13 n. 9, *Boumediene*, 128 S. Ct. 2229 (No. 06-1195) (criticizing and distinguishing substantial-connections test).

...".⁵⁹ But which foreign nationals have the privilege of litigating in our courts, and is this a determination made as a jurisdictional matter or as a conclusion on the merits about the reach of the Constitution abroad?⁶⁰

Cases after *Boumediene* have confirmed continued interest in this version of the substantial-connections test. In *Rasul v. Rumsfeld*, former detainees at Guantánamo Bay alleged constitutional and statutory injuries during their confinement, namely torture and infringement of their religious liberties.⁶¹ Prior to *Boumediene*, the District Court reserved judgment about whether the detainees had any constitutional rights at all but, assuming arguing that they did, held that the government defendants had qualified immunity because these rights were not clearly established at the time because (citing *Verdugo-Urquidez*) plaintiffs lacked a substantial connection to the United States.⁶² The Court of Appeals affirmed.⁶³ Arguing against the plaintiffs' petition for a writ of certiorari after *Boumediene* was decided, the United States urged that "*Boumediene* did not overturn the Court's prior rulings that the individual-rights provisions of the Constitution run only to aliens who have a substantial connection to our country and not to enemy combatants who are detained abroad."⁶⁴ The Supreme Court granted the petition only to simultaneously vacate the lower court judgment and remand the case back to the Court of Appeals for the District of Columbia Circuit for further consideration in light of *Boumediene*.⁶⁵

Courts hearing cases alleging extraordinary rendition have also found the substantial-connections test to be an irresistible doctrinal temptation. In *Arar v. Ashcroft*, the Second Circuit considered claims stemming from the

59. *Boumediene*, 128 S. Ct. at 2246 (citations omitted).

60. Dissenting in *Boumediene*, Justice Scalia (who had joined Chief Justice Rehnquist's plurality in *Verdugo-Urquidez*), joined by Chief Justice Roberts and Justices Thomas and Alito, quoted the language of Kennedy's *Verdugo-Urquidez* concurrence back to him, language (as I explore in detail below) that is hardly a repudiation of the substantial-connections test. *Id.* at 2306 (Scalia, J., dissenting) (noting the "undoubted proposition that the Constitution does not create, nor do general principles of law create, any juridical relation between our country and some undefined, limitless class of noncitizens who are beyond our territory." (internal quotation marks omitted) (quoting *Verdugo-Urquidez*, 494 U.S. at 275 (Kennedy, J., concurring))).

61. *Rasul v. Rumsfeld*, 414 F. Supp. 2d 26, 27 (D.D.C. 2006).

62. *Id.* at 44.

63. *Rasul v. Myers*, 512 F.3d 644 (D.C. Cir. 2008).

64. Brief for the Respondents in Opposition at 18, *Rasul v. Myers*, 129 S. Ct. 763 (2008) (No. 08-235).

65. *Rasul*, 129 S. Ct. 763 (mem.). Likewise, even though the plaintiff in *al-Marri v. Pucciarelli* was seized as an enemy combatant *within* the United States, four judges of a splintered en banc panel of the Fourth Circuit felt it necessary to repeatedly reference the substantial-connections test, citing *Verdugo-Urquidez*. *Al-Marri v. Pucciarelli*, 534 F.3d 213, 222 (4th Cir. 2008) (Motz, J., concurring, joined by Michael, King & Gregory, JJ.). The Supreme Court granted certiorari only to vacate the judgment and remand the case with instructions that it be dismissed as moot after *al-Marri* was indicted on conspiracy and material support charges and transferred from military to civilian custody. *Al-Marri v. Spagone*, 129 S. Ct. 1545 (2009); Press Release, Dep't of Justice, "Ali Al-Marri Indicted for Providing Material Support to Al-Qaeda," Feb. 27, 2009, available at <http://www.usdoj.gov/opa/pr/2009/February/09-ag-177.html>.

country's most notorious case of extraordinary rendition.⁶⁶ While affirming dismissal of the complaint on other grounds, the Second Circuit felt compelled to cite *Verdugo-Urquidez* in critiquing the dissent's inadequate attention to the extraterritorial nature of some of Arar's claims.⁶⁷

II. STANDING AND THE SUBSTANTIAL-CONNECTIONS TEST

Both the zone-of-interests test of prudential standing and the substantial-connections test of the merits of constitutional claims are relatively new judicial creations. They emerged in very different contexts and, until very recently, they had nothing to do with each other. The zone-of-interests test of prudential standing (which was applied to Zoya's case) has its origins in the 1970s as part of the growth of the administrative state.⁶⁸ This test denied standing to litigants who otherwise met constitutional standing requirements if their claims fell outside the "zone of interests" that the statute or constitutional provision was intended to protect. The substantial-connections test was created in 1990 in the context of determining the merits of an argument about the extraterritorial application of the Warrants Clause.⁶⁹ As originally conceived, this "test" was really just a conclusion that constitutional history, text, and logic limited application of this provision to "the People" of the United States.

The combination of zone-of-interests prudential standing and the substantial-connections test at the start of the twenty-first century transformed the latter from a test used to resolve the merits of an alien's constitutional criminal defense to a way to evaluate the alien's privilege to be a plaintiff in a civil suit at all. This Section examines the steps toward that merger. Section II.A describes the origins of the substantial-connections test and describes the confusion, right from the start, about its constitutional premises. Section II.B describes the transformation of that test from a merits inquiry into a jurisdictional inquiry.

66. The fullest account of this incident is undoubtedly found in COMM'N OF INQUIRY INTO THE ACTIONS OF CANADIAN OFFICIALS IN RELATION TO MAHER ARAR, REPORT OF THE EVENTS RELATING TO MAHER ARAR (2006).

67. *Arar v. Ashcroft*, 532 F.3d 157, 179 n.15 (2d Cir. 2008). The dissent, in its turn, acknowledged the appropriateness of its sister circuit's reliance on the substantial-connections test in dismissing an extraterritorial Fifth Amendment claim of torture. *Id.* at 205 n.18 (citing application of the *Verdugo-Urquidez* test to *Harbury v. Deuch*, 233 F.3d 596, 602 (D.C. Cir. 2000), *rev'd on other grounds sub nom* *Christopher v. Harbury*, 536 U.S. 403 (2002)).

After rehearing the case en banc, the Second Circuit affirmed the district court's judgment. *Arar v. Ashcroft*, 585 F.3d 559 (2d Cir. 2009). The court declined to extend plaintiff's *Bivens* claim to the "new context" it held to be presented by extraordinary rendition. *Id.* at 563. The court noted "foreign policy considerations," citing *Verdugo-Urquidez*, as one of a number of special factors counseling hesitation. *Id.* at 573 (citing that portion of *Verdugo-Urquidez* in which the Court expressed concern that "aliens with no attachment to this country might well bring actions for damages" to remedy claimed constitutional injuries incurred abroad).

68. *Ass'n of Data Serv. Processing Org., Inc. v. Camp*, 397 U.S. 150 (1970).

69. *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990).

A. *Creation*: United States v. Verdugo-Urquidez

To understand just how completely the substantial-connections test has been wrenched free of its original context, it is worth taking a close look at the Supreme Court's analysis in *United States v. Verdugo-Urquidez*, where the test made its first appearance. In addition, a close look at the oral argument that influenced it demonstrates the difficulties inherent in grounding the substantial-connections test in any firm theoretical foundation.

The federal prosecution of Rene Martin Verdugo-Urquidez presented the question whether the Fourth Amendment's warrant requirement had extraterritorial application. The U.S. Government obtained a warrant for the defendant's arrest.⁷⁰ After Mexican authorities arrested Verdugo-Urquidez in Mexico, he was transferred to the custody of U.S. marshals in California, where he awaited trial on federal drug charges. U.S. D.E.A. agents, cooperating with Mexican police officials, then searched for and seized incriminating evidence from Verdugo-Urquidez's two residences in Mexico.⁷¹ No warrant was sought from an American magistrate for the search of his foreign residences once he was in U.S. custody in California.

Did the Fourth Amendment apply to this situation? It is hornbook law that "a violation of the [Fourth] Amendment is fully accomplished at the time of an unreasonable governmental intrusion."⁷² To phrase the question differently, is the Fourth Amendment violated when the *place* of the property searched is abroad, but its *owner* and his jailor and the trial where the fruits of the search will be used are in the United States? Chief Justice Rehnquist, writing for a plurality, was quite aware that Verdugo-Urquidez was in federal custody in the United States at the time of the search abroad, but concluded that Fourth Amendment protections should not turn on that "fortuitous circumstance."⁷³ Strangely, the Court repeatedly phrased the issue as if it were faced with a circumstance in which *both* the property *and* the property-holder were outside the United States.⁷⁴ This altered the tone of the opinion, simplifying the facts to neglect that "fortuitous circumstance."⁷⁵

70. *Id.* at 262. The defendant was suspected to be the kingpin of a major drug smuggling operation. He had previously been convicted of the torture and murder of a DEA special agent. *Id.*

71. *Id.* at 262–63.

72. *Id.* at 264 (internal quotation marks omitted). Violation of the Fifth Amendment right to self-incrimination, on the other hand, "occurs only at trial." *Id.*

73. *Id.* at 272.

74. Compare *id.* at 261 ("The question presented by this case is whether the Fourth Amendment applies to the search and seizure by United States agents of property that is owned by a nonresident alien and located in a foreign country."), *id.* at 266 ("[I]t was never suggested that the [Fourth Amendment] was intended to restrain the actions of the Federal Government against aliens outside of the United States territory."), *id.* at 267 ("There is likewise no indication that the Fourth Amendment was understood by contemporaries of the Framers to apply to activities of the United States directed against aliens in foreign territory or in international waters."), and *id.* at 268 ("[R]espondent's claim that the protections of the Fourth Amendment extend to aliens in foreign nations is even weaker."), with *id.* at 272 ("When the search of his house in Mexico took place, he had been present in the United States for only a matter of days. We do not think the applicability of the Fourth Amendment to the search of premises in Mexico should turn on the fortuitous circumstance of whether the custodian of its nonresident alien owner had or had not transported him to the United States at the time the search was made.").

75. *Id.* at 272.

The plurality opinion held that the Fourth Amendment presented no impediment to the search because Verdugo-Urquidez did not have a "previous significant voluntary connection" with the United States that would lead to his inclusion among "the people" that the Fourth Amendment protects.⁷⁶ Chief Justice Rehnquist asserted that a variety of cases establish "that aliens receive constitutional protections when they have come within the territory of the United States and developed substantial connections with this country."⁷⁷ But none of the cases that the Chief Justice cited actually contained the phrase "substantial connections," let alone used anything like it as a test of the Constitution's applicability abroad.⁷⁸ The Chief Justice did not purport to be quoting from these cases to derive this new test, but offered no other doctrinal support for it.

At first glance, this holding would appear to subscribe to the social compact theory of the Constitution that the Government petitioners presented. But the opinion is ambivalent on that score. Certainly, Verdugo-Urquidez is frozen out of Fourth Amendment protection because the Chief Justice says that he is not one of "the people" that the Amendment was intended to protect.⁷⁹ But that historical argument attracted only a plurality of the Court. Furthermore, the Court's reasoning elsewhere in the opinion adopts a territorial theory of the Constitution.⁸⁰

Justice Kennedy concurred in both the opinion and the judgment of the Court.⁸¹ However, he concluded that he could not "place any weight on the

76. *Id.* at 271, 273.

77. *Id.* at 271.

78. Compare *id.* (citing *Plyler*, *Yick Wo*, and *Kwong Hai Chew*), with *Plyler v. Doe*, 457 U.S. 202, 212 (1982) (concerning state attempts to limit the equal protection obligation of the Fourteenth Amendment to the children of undocumented aliens within their territory), *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886) (expressing same Fourteenth Amendment protection for aliens from discrimination in the licensing discretion of city officials), and *Kwong Hai Chew v. Colding*, 344 U.S. 590, 596 n.5 (1953) (concerning the admission into the United States of a returning noncitizen permanent resident). The case of *Kwong Hai Chew* comes closest in that it refers in dicta to the "generous and ascending scale of rights as [the alien] increases his identity with our society." *Kwong Hai Chew*, 344 U.S. at 596 n.5 (internal quotation marks omitted) (quoting *Johnson v. Eisentrager*, 339 U.S. 763, 770 (1950)). But the reference in both cases was made in the context of describing the rights of noncitizens seeking admission to, or resisting expulsion from, the United States. It does not follow that, outside the country, an alien's "generous and ascending scale of rights" begins in all respects and in all contexts at zero. *Verdugo-Urquidez*, 494 U.S. at 269.

79. *Verdugo-Urquidez*, 494 U.S. at 273.

80. *Id.* at 266 (presenting historical arguments that the Fourth Amendment's purpose was as a protection "in domestic matters" and was never "intended to restrain the actions of the Federal Government against aliens outside of the United States territory"); *id.* at 268 ("[O]ur rejection of extraterritorial application of the Fifth Amendment was emphatic" (citing *Eisentrager*, 339 U.S. 763)); *id.* at 271 ("These cases, however, establish only that aliens receive constitutional protections when they have come within the territory of the United States and developed substantial connections with this country." (emphasis added)).

81. *Id.* at 275-79 (Kennedy, J., concurring). Justice Stevens, on the other hand, concurred in the judgment only, finding the historical discussion of "the people" to be irrelevant. *Id.* at 279 (Stevens, J., concurring in judgment). He simply found that the search was not unreasonable. *Id.* Because Congress had not granted U.S. magistrates power to authorize searches abroad, Justice Stevens found the Warrant Clause inapplicable. *Id.* This seemed to put the cart before the horse. The warrant in this case would have given a judicial imprimatur not to the *right* of U.S. officials to con-

reference to 'the people' in the Fourth Amendment as a source of restricting its protections."⁸² He preferred the plurality opinion in *Reid v. Covert* that "the Government may act only as the Constitution authorizes, whether the actions in question are foreign or domestic."⁸³ But this approach, seemingly adopting a limited-government theory of the Constitution, was only a starting point for Justice Kennedy, not a blanket expression of a theory of constitutional extraterritoriality. Again drawing on *Reid* (this time Justice Harlan's concurrence), Justice Kennedy concluded that application of a provision of the Constitution abroad must not be "impracticable and anomalous," which in his opinion would be the case here.⁸⁴ This approach would become what has been called Justice Kennedy's "functional" test.

To suggest that the location of the search matters more than the location of the owner of the property to be searched is, at first glance, a strange approach, "[f]or the Fourth Amendment protects people, not places."⁸⁵ Even as to citizens, who are undoubtedly part of "the people" the Fourth Amendment protects, the opinion hedges: it studiously avoids any reference to the expatriate citizen's Fourth Amendment rights. Its references to the *Insular Cases*⁸⁶ (many of which involved U.S. citizens abroad)⁸⁷ make this evasion clear. And its reference to *Reid v. Covert* is only to exclude its broad statements from application to the Fourth Amendment. Its policy arguments, which forecast significant disruption to the nation's military

duct a search in a foreign country but to the reasonableness the officials were required to possess before taking the next step toward such a search: seeking the permission of the foreign sovereign to search within its territory. That permission could only be given by foreign officials, not by a U.S. court. But by the same token, the reasonableness of the U.S. officials' search (and therefore their power to conduct it) could only be ascertained by American judges, not foreign police. If American magistrates lacked statutory power to do what the Constitution required—confirm the reasonableness of nonemergency executive conduct—then the answer was to pass such a statute, not conform the Constitution to the existing statutory lacunae.

82. *Id.* at 276 (Kennedy, J., concurring).

83. *Id.* at 277 (Kennedy, J., concurring) (citing *Reid v. Covert*, 354 U.S. 1, 6 (1957)).

84. *Id.* at 278 (Kennedy, J., concurring) (internal quotation marks omitted). That conclusion, explicated in short order in the penultimate paragraph of the concurrence, is strange. While reserving the question of a citizen's Fourth Amendment protection abroad, Kennedy pointed to the absence of judicial authorities to issue warrants, confusion over what reasonableness and privacy might mean abroad, and the need for cooperation with foreign officials. *Id.* (Kennedy, J., concurring). But resolution of these issues would not have been impracticable or anomalous in *Verdugo-Urquidez*'s case. Because *Verdugo-Urquidez* was in a San Diego jail, both a local judge and local standards could have determined whether American officials had probable cause to search the defendant's property. The plea to foreign cooperation is, at best, irrelevant in this case (it is hard to imagine foreign officials more cooperative than these Mexican police) and, at worst, results-oriented policymaking from a judicial bench ill suited to assess such difficulties.

85. *Katz v. United States*, 389 U.S. 347, 351 (1967).

86. *Verdugo-Urquidez*, 494 U.S. at 277 (Kennedy, J., concurring).

87. *Balzac v. Porto Rico*, 258 U.S. 298, 304 (1922) (defendant-petitioner a U.S. citizen); *Dorr v. U.S.*, 195 U.S. 138, 156 (1904) (Harlan, J., dissenting) (observing that the majority's holding does not distinguish according to citizenship). It should be acknowledged that, although these cases undeniably concerned distant and unincorporated territories outside the United States, it was their very unusual nature as sovereign possessions of the United States that made the cases noteworthy, and their legacy so long lasting.

and intelligence work overseas, apply equally well to citizens and aliens abroad.

During oral argument, Lawrence Robbins, assistant to the Solicitor General and counsel for petitioner United States, emphasized the extraterritorial nature of the official conduct. This fit squarely with the Government's underlying theme of Constitution as social compact.⁸⁸ When Justice Sandra Day O'Connor asked him what prevented American officials abroad from breaking into houses and seizing evidence, assuming they could get away with it in the host jurisdiction, Mr. Robbins stated that the Fourth Amendment simply "doesn't control the analysis of that question."⁸⁹

"What did?" counsel was asked. There would come a point, Mr. Robbins explained, when the victim of government excess could rely upon "a safety net to this argument provided by the Due Process Clause which operates in a very different way from the Fourth Amendment . . . if the agents went in there and behaved in a fashion that just bespoke utterly no limitations."⁹⁰ But this Fifth Amendment protection, articulated in the case of *Rochin v. California*,⁹¹ did not extend extraterritorially, either. The *Rochin* test of conduct that "shocks the conscience" would be applied domestically, because the particular conscience to be shocked was the conscience of an American judge sitting in an American courtroom. While the political branches could, by treaty or statute, limit the powers of American officials abroad, those limits were not provided by extraterritorial application of the Fourth or Fifth Amendments.⁹²

Michael Pancer, counsel for Respondent-Defendant Verdugo-Urquidez, opened his presentation to the Court not from the perspective of his client's *rights*, but from the perspective of the government official's *source of legal authority*. Pancer explained this view when he was asked whether "Mexican authorities would be a little bit annoyed with an American offi-

88. Transcript of Oral Argument at 17–18, *Verdugo-Urquidez*, 494 U.S. 259 (No. 88-1353) [hereinafter Or. Arg.] ("Finally, the last factor that we think is relevant is what is the relationship of the claimant to the United States? This is a familiar inquiry, one raised in *Johnson* against *Eisen-trager*, more recently in *Landon* against *Plasencia* and the basic notion is that, 'aliens are accorded a generous and ascending scale of rights as he increases his identity with our society.' This is a point that comes up in a great many of the immigration cases. And the notion is, again, the closer the connection to the United States of citizenship or naturalization or permanent residence, the greater the claim for the protections of the social compact.").

89. *Id.* at 6–7.

90. *Id.* at 7.

91. 342 U.S. 165 (1952).

92. Or. Arg., *supra* note 88. Invited to speculate whether in the absence of a criminal prosecution that would present the "shocks the conscience" issue in an American courtroom, the United States could act "with impunity" abroad, Mr. Robbins refused to take the bait. "Well," he said, "impunity may make a greater claim that [sic] we wish to make here." *Id.* at 9. Counsel was willing to concede, however, that the Constitution "sometimes" controlled the actions of U.S. officials abroad. *Id.*

cial issuing a document that authorizes an American law enforcement officer to search their territory.”⁹³ Mr. Pancer replied:

I think they would be very annoyed if that document was presented to them by the agents as something that said this gives us the right vis-a-vis the Government of the Republic of Mexico to take action in Mexico. They'd have every right to be outraged.

No. All we're saying that the warrant does is create a relationship between the evidence and the court in the United States. It can't authorize the agents to search if the Mexican authorities don't want them to or don't give them permission. But it can say that this search is legal according to the laws of the United States. And that's all we're saying that the warrant accomplishes. Clearly, it can't force the Mexicans to let the agents search.⁹⁴

These exchanges in oral argument are important for the argument advanced in this Article, for they forecast the difficulty inherent in drawing sharp lines to distinguish the constitutional rights held by individuals on the basis of territory or “substantial prior connection” to the United States. The Government's social compact theory ultimately fails to explain its counsel's concession that official extraterritorial conduct by the United States against aliens with no prior substantial connection to the United States may ultimately be constrained by a “shocks the conscience” standard obtained from the Due Process Clause of the Fifth Amendment. Likewise, counsel for Verdugo-Urquidez focuses on the source of government power, rather than on the distribution of constitutional rights to various individuals at home or abroad.

Consider those concessions in the context of Zoya's case. Framing her claim as an exercise of *her* individual right to just compensation under the Takings Clause invites a doctrine of exclusion that ultimately descended into the discretionary exercise in judicial line drawing that marked the standing analysis that ended her case. As in Verdugo-Urquidez, it is possible to expose how unconnected those lines are to any consistent theory of the Constitution: simply imagine ever more egregious government conduct, in which case we discover that the distant alien plaintiff *does* have a right to be free from conduct that “shocks the conscience,” at least if he or she can gain access to a U.S. court. In a criminal prosecution, such as the one that convicted Verdugo-Urquidez, that access is presumed. But when the substantial-connections test is removed from that context and reimagined as a jurisdictional test, the protection that the government presumed that its argument would preserve—a limit on government power that extends beyond territory and beyond social compact—is utterly lost. That transformation is explored in the next Section.

93. *Id.* at 26.

94. *Id.* at 26–27.

B. Transformation: Substantial Connections & Prudential Standing

The Supreme Court has imposed limits on who may come before the federal courts. These limits, grounded in a sense of judicial prudence, extend beyond those limits that the Constitution has been read to require.⁹⁵ This prudential-standing doctrine “should be governed by general principles, rather than ad hoc improvisations.”⁹⁶ But the substantial-connections test of prudential standing is exactly that: an improvisation that transposes what was originally a test of the merits of a constitutional defense in a criminal case into a test of a court’s jurisdiction to decide a plaintiff’s standing in civil litigation. In other words, what was once a test of the merits is transformed into a means to avoid resolving the merits at all, by declaring the court to be without jurisdiction because the plaintiff is declared to be without standing.

The “substantial connection” that this test imagines, like the concept of standing onto which the test has been grafted, turns out to be a rather strange term of art. To borrow from Joseph Vining, judges facing foreign plaintiffs are seemingly mesmerized by them both.⁹⁷ In some ways, this is not surprising. The transformation of prudential standing to exclude foreign litigants may be part of a larger trend in the federal courts to reframe standing doctrines in general.⁹⁸ It has often been remarked that standing is a confused doctrine that is particularly susceptible to the elision of jurisdictional questions with the merits of the case.⁹⁹ As was seen above in Section I.B., no improvisation conflates those very different questions more than the substantial-connections test.

There are now six recognized species in the genus of justiciability called standing. These are divided equally among constitutional and prudential standing. In Zoya’s case, as in the case of other would-be plaintiffs whose cases are dismissed for lack of a prior substantial connection, only one of these six is implicated. It is worth taking the time to see why under *any* test—old or new—there is no question that Zoya and plaintiffs like her easily satisfy the other five requirements. Section II.B.1 undertakes

95. See *infra* text accompanying note 109.

96. *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 25 (2004) (Rehnquist, C.J., dissenting in part).

97. JOSEPH VINING, *LEGAL IDENTITY* xi (1978) (“*Standing* is a term of art that mesmerizes.”).

98. Weinstein, *supra* note 11, at 62 (“In the past half century, however, the courts have increasingly taken it upon themselves to close their doors to parties and complaints that they consider unsuitable for judicial resolution. One of the chief ways of petitioning for redress is through cases brought in our courts. Principal among the tools we use in violation of the constitutional promise of the right to petition is the doctrine of standing.”); see also Office of Comm’n of United Church of Christ v. F.C.C., 359 F.2d 994, 1004 (D.C. Cir. 1966) (“The gradual expansion and evolution of concepts of standing in administrative law attests that experience rather than logic or fixed rules has been accepted as the guide.”).

99. See Louis L. Jaffe, *Standing to Secure Judicial Review: Private Actions*, 75 HARV. L. REV. 255, 258 (1961) (“Furthermore the lack of standing in particular cases may be vaguely merged in the court’s mind with lack of merit or with the exercise of judicial discretion not to intervene—so often relevant to judicial review of public actions.”).

this review. An examination of the evolution of these standing requirements also shows how their malleability presents the possibility for novel legal transplants like the prior substantial-connections test. Section II.B.2 shows how this process occurred. Finally, Section II.B.3 dissects the sources of analytical danger that emerge from this conceptual confusion.

1. Constitutional Standing and Prudential Standing

The Constitution provides that the federal judicial power shall only extend to "Cases" or "Controversies."¹⁰⁰ From this textual limit, and from the structural concept of separation of powers, the Supreme Court has imposed three requirements on plaintiffs before federal courts will exercise jurisdiction to hear their claims.¹⁰¹ Plaintiffs must allege (1) an "injury in fact" that is both (2) "fairly traceable" to the defendant and (3) redressable by the court.¹⁰² These requirements are considered to be the "irreducible constitutional minimum" for the exercise of federal jurisdiction.¹⁰³

Zoya clearly has constitutional standing. First, loss of her property is undoubtedly an injury in fact.¹⁰⁴ Second, Zoya alleges in her complaint (the truth of which must be assumed for purposes of this inquiry) that the destruction of her café is fairly traceable to the United States: she contends that American officials conspired with local Uzbek officials to demolish the café to improve the embassy's security. Finally, just compensation would redress her property loss. Zoya unambiguously presents a "Case" or "Controversy" sufficient for standing under Article III.

Constitutional standing asks questions not about who plaintiffs are but about their relationship to the injury they allege.¹⁰⁵ Thus, the substantial-connections test has never been applied to evaluate any of these constitutional requirements.¹⁰⁶ Indeed, it is hard to see how it could be. Questions

100. U.S. CONST., art. III, § 2, cl. 1.

101. Ironically, the controversial development of constitutional standing mirrors the more recent transformation of prudential standing. Many scholars have questioned the validity of current constitutional standing doctrine on textual, historical, and structural grounds. See, e.g., LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 390–92 (3d ed. 2000); Amanda Leiter, *Substance or Illusion? The Dangers of Imposing a Standing Threshold*, 97 GEO. L. J. 391 (2009); Cass R. Sunstein, *What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163 (1992); Weinstein, *supra* note 11, at 62–77.

102. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992).

103. *Id.* at 560.

104. It is also a legal injury, cognizable as a cause of action for the taking of her personal property. For the history and demise of the "legal interest" test of standing, see *infra* Section II.B.2.

105. *Cardenas v. Smith*, 733 F.2d 909, 913 (D.C. Cir. 1984) ("For purposes of Article III standing, Cardenas' status as a nonresident alien does not obviate the existence of her injury; it is the injury and not the party that determines Article III standing. . . . Likewise, the location of the injury does not affect Cardenas' satisfaction of the Article III standing requirement.").

106. For reasons that are explained more fully below, the injury-in-fact requirement does not lend itself to the test, notwithstanding its demand that the plaintiff show "invasion of a legally protected interest." *Lujan*, 504 U.S. at 560. One might be tempted to ask "Whose legally protected interest?" and conclude that someone lacking a prior substantial connection necessarily lacks one. But the question in an injury-in-fact inquiry is not "whose" but "what." It is the injury and not the

about this injury (whether legal or factual or a shifting *mélange* of both), its source (whether in a classical common law legal right, or more modern conceptions of constitutional, statutory, or regulatory state action), and its remedy (whether damages or equitable relief), are questions disconnected from the personality, capacity, or other characteristics of the plaintiff.¹⁰⁷ It is neither helpful nor interesting to courts assessing constitutional standing to inquire who Zoya *is* beyond the question whether the injury she presents happened to *her*.¹⁰⁸

In addition to these constitutional requirements, the Supreme Court has imposed three additional limits on the jurisdiction of federal courts.¹⁰⁹ These compose the concept of prudential standing. Prudential standing is not a constitutional requirement and therefore may be revised or eliminated by Congress or the Court itself. It is normally conceived as addressing three concerns: the standing of third parties, generalized grievances, and the so-called “zone of interests.” Two of these three may be dismissed quickly. Zoya does not seek to litigate on behalf of a third party—her injury is clearly her own. Nor does Zoya present what has been termed a generalized grievance: her claim is not shared by an undifferentiated mass of potential litigants. Only the Feruza Café was demolished.

The sixth standing requirement—the zone-of-interests test of prudential standing—was a concomitant result of a revolution in standing doctrine as a whole. In 1970, the Supreme Court announced a change from the existing “legal interest” test in *Association of Data Processing Service Organizations v. Camp*.¹¹⁰ Justice Douglas’s opinion for the Court rejected

injured that must be legally protectable. (Likewise, the redressability question is not asking whether this plaintiff is entitled to a judicial remedy, but whether a court has the ability to remedy the *type* of injury claimed.) The reason for this confusion might be the origin of the injury-in-fact test, which owes much to the same opinion that gave birth to the zone-of-interests test, *Ass’n of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150 (1970). See William V. Dorsaneo, III, *The Enigma of Standing Doctrine in Texas Courts*, 28 REV. LITIG. 35, 40 (2008) (“In *Camp*, the Court replaced the traditional notion that a person was required to have a cause of action—or an injury in law—with the considerably more lenient, but nonetheless abstract, idea that the claimant was required to have sustained an injury in fact.”).

107. Or, at least, they should be. For an examination of the confusion between standing and capacity to sue, see Dorsaneo, *supra* note 106.

108. *Lujan*, 505 U.S. at 561–62 (“When the suit is one challenging the legality of government action or inaction, the nature and extent of facts that must be averred (at the summary judgment stage) or proved (at the trial stage) in order to establish standing depends considerably upon whether the plaintiff is himself an object of the action (or forgone action) at issue. If he is, there is ordinarily little question that the action or inaction has caused him injury, and that a judgment preventing or requiring the action will redress it.”).

109. Several courts of appeals have concluded that, unlike constitutional standing (which must exist throughout the course of the litigation and may be argued at any stage, with the result that jurisdiction may be lost) prudential-standing concerns may either be “bypassed,” *see, e.g.*, *Erie Forge & Steel, Inc. v. Erie Forge & Steel, Inc.*, 418 F.3d 270, 275 n.8 (3d Cir. 2005); *McNamara v. City of Chicago*, 138 F.3d 1219, 1222 (7th Cir. 1998); or “pretermitted,” *see, e.g.*, *Grubbs v. Bailes*, 445 F.3d 1275, 1281 (10th Cir. 2006); *Am. Iron & Steel Inst. v. OSHA*, 182 F.3d 1261, 1274 n.10 (11th Cir. 1999), in favor of resolving the merits, or that the argument is waived if not presented in the court below, *Finstuen v. Crutcher*, 496 F.3d 1139, 1147 (10th Cir. 2007).

110. 397 U.S. 150. Data processors sought to enjoin a rule by the Comptroller of the Currency to permit banks to engage in data processing services, but would have lacked standing to do so

the old "legal interest" test as one going "to the merits. The question of standing is different."¹¹¹ To understand the revolutionary nature of this change, a brief historical snapshot is helpful.

2. Legal Injury, Injury in Fact, and Zone of Interests

For obvious reasons, courts have always focused on the nature of a litigant's alleged injury. Although the term "standing" was not fully adopted by the Supreme Court to connote constitutional and other requirements for jurisdiction until well into the twentieth century,¹¹² the "gist" of the idea had always at least revolved around asking whether the plaintiff could allege "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues."¹¹³ For much of American history, the various writs and causes of action derived from English common law policed this boundary, as did a related sense of access to justice governed by both legal and equitable processes.¹¹⁴ In a case that decided the ownership of what became Arlington National Cemetery (ironically, a takings claim that arose out of the confiscation of an estate belonging to the wife of General Robert E. Lee), the Court explained the requirements with straightforward language, and without using the word "standing":

In the case supposed, the court has before it a plaintiff capable of suing, a defendant who has no personal exemption from suit, and a cause of action cognizable in the court—a *case* within the meaning of that term, as employed in the Constitution and defined by the decisions of this court. It is to be presumed in favor of the jurisdiction of the court that the plaintiff may be able to prove the right which he asserts in his declaration.¹¹⁵

All that was required in order to sue was a legal injury alleged by someone with the capacity to sue (i.e., someone with the legal ability to sue and be

under the old "legal interest" test: neither the Comptroller nor banks benefiting from the rule change had infringed any legal right of the plaintiffs.

111. *Id.* at 153.

112. Sunstein, *supra* note 101, at 169, 180. Professor Sunstein located the first use of the term connoting an Article III requirement in *Stark v. Wickard*, 321 U.S. 288 (1944). Professor Winter found it in a Frankfurter concurrence five years earlier in *Coleman v. Miller*, 307 U.S. 433, 460 (1939). Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371, 1378 (1988). For my purposes, it really doesn't matter when the term shifted in meaning. The shift itself is the important thing.

113. *Baker v. Carr*, 369 U.S. 186, 204 (1962). I say "at least" because of the historical debate over the relevance to the question of standing doctrines of citizen suits, *qui tam* relator actions, and suits by strangers for the public benefit in English and early American law. See Louis L. Jaffe, *Standing to Secure Judicial Review: Public Actions*, 74 HARV. L. REV. 1265 (1961); Winter, *supra* note 112.

114. TRIBE, *supra* note 101, at 393; Sunstein, *supra* note 101, at 168–79; Winter, *supra* note 112, at 1395.

115. *United States v. Lee*, 106 U.S. 196, 219 (1882).

sued in that judicial forum).¹¹⁶ This legal injury was nothing more than the violation of some legal right (whether derived from constitutional, statutory, or common law) that the courts could then redress.¹¹⁷ Whether this requirement was met was a question on the merits, not a question of jurisdiction.¹¹⁸

The dramatic changes in American society that began in the late nineteenth century radically changed the concept of standing in American law.¹¹⁹ Congress made access to court easier, thus expanding the dockets of federal courts.¹²⁰ Procedural reform movements culminated in the Federal Rules of Civil Procedure, and with them a difficult transition from a legal world defined by causes of action and a split between legal and equitable jurisdiction, to one of "claims," "notice pleading," and the unified legal and equitable jurisdiction of federal courts.¹²¹ Most significantly, the emergence of an administrative regulatory state further overwhelmed already swollen dockets with more federal lawsuits to defend the statutory rights and other entitlements created and increasingly controlled by government agencies.¹²²

These cases did more than swamp court dockets. They also sowed confusion by introducing new types of legal relationships and categories of conflict that had not existed before.¹²³ Something had to give in a world in which government was increasingly the defendant (by virtue of its far-reaching regulatory oversight and provision of entitlements) but injuries

116. For an analysis of this conceptual confusion in the Texas courts, see Dorsaneo, *supra* note 106, at 58–69.

117. William Burnham, *Injury for Standing Purposes When Constitutional Rights are Violated: Common Law Public Value Adjudication at Work*, 13 HASTINGS CONST. L.Q. 57, 60 (1985); see also Sunstein, *supra* note 101, at 170.

118. *General Inv. Co. v. N.Y. Cent. R.R. Co.*, 271 U.S. 228, 230–31 (1926) ("Whether a plaintiff seeking such relief has the requisite standing is a question going to the merits, and its determination is an exercise of jurisdiction. If it be resolved against him, the appropriate decree is a dismissal for want of merits, not for want of jurisdiction." (internal citations omitted)).

119. *Freedom from Religion Found., Inc. v. Chao*, 433 F.3d 989, 990 (7th Cir. 2006) ("Notions of standing have changed in ways to induce apoplexy in an eighteenth-century lawyer."), *rev'd on other grounds*, *Hein v. Freedom from Religion Found., Inc.*, 551 U.S. 587 (2007).

120. *Winter*, *supra* note 112, at 1452 (citing the Judiciary Act of March 3, 1875, §§ 1–2, 18 Stat. 470–73 (1875) (codified as amended at 28 U.S.C. § 1331 (2006))).

121. Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909 (1987).

122. See Burnham, *supra* note 117, at 69–70 (describing changes in the "overall statutory topography" of the country that led to a "revolution in social awareness of environmental quality," and the judicial recognition of environmental well-being and even aesthetic injuries sufficient for standing to sue).

123. *Winter*, *supra* note 112, at 1452–53 ("[T]he growth in the federal workload and the search for limits coincided with the systemization of the law of equity, from which standing law grew. Starting as a question of entrée to equity jurisdiction, 'standing' could, in a time of severe docket pressures, naturally evolve into a doctrine about entrée into the federal court system itself." (internal citation omitted)). Professor Winter also considers renewed attention to the concept of *damnum absque injuria*, the rise of liberalism and an emphasis on the private rights of individuals, and the political conflicts of the New Deal Supreme Court as additional important factors in the conceptual shift in standing. *Id.* at 1453–55.

alleged by plaintiffs did not fit squarely into old categories of legal interests—e.g., suits to enjoin allegedly unlawful rate setting, rule making or other government programs adversely affecting their interests but not cognizable in the old causes of action. That something was the former refusal to hear a litigant “unless the right invaded is a legal right,—one of property, one arising out of contract, one protected against tortious invasion, or one founded on a statute which confers a privilege.”¹²⁴ In a series of revolutionizing Supreme Court opinions, the law of standing shifted from its common law legal interest origins to a focus on “injury in fact” as a constitutional requirement derived from the “case or controversy” limitation of Article III.

The leading case in that revolution was *Association of Data Processing Service Organizations, Inc. v. Camp*.¹²⁵ Justice Douglas, writing for the majority, announced that standing inquiries seek answers to two separate questions. First, whether “the plaintiff alleges that the challenged action has caused him injury in fact, economic or otherwise.”¹²⁶ This first question overturned the long-standing view that standing required a legally cognizable interest (most obviously in the form of a cause of action for the invasion of a legal right). The second question was whether “the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.”¹²⁷ If these questions were affirmatively answered, then the plaintiff had standing to sue. Only then does a court ask the “questions which go to the merits”—what, if anything, gives the plaintiff a legal interest that the defendant may have violated.¹²⁸

The *Camp* case was a high water mark for liberal rules that led in short course to standing for a student group united in the shared injuries of “pay[ing] more for finished products, . . . breath[ing polluted] air, . . . and pay[ing] increased taxes,” all allegedly the result of increased railroad freight surcharges.¹²⁹ Unsurprisingly, the case provoked a reaction. It was not long before standing doctrine, although still employing the “injury in fact” language of *Camp*, was strengthened. Ten years later, the Supreme Court denied judicial review to individual consumers of milk who sought on that basis to challenge price regulations of certain dairy products.¹³⁰ The

124. *Tenn. Elec. Power Co. v. Tenn. Valley Auth.*, 306 U.S. 118, 137–38 (1939).

125. 397 U.S. 150 (1970); *see also* *Barlow v. Collins*, 397 U.S. 159 (1970) (a companion case).

126. *Ass'n of Data Processing Serv. Orgs., Inc.*, 397 U.S. at 152.

127. *Id.* at 153.

128. *Id.* at 158.

129. *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 679 (1973).

130. *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340 (1984). The Court of Appeals held that the milk drinkers had standing: they had suffered an injury in fact (market regulations denied them the ability to buy “a nutritious dairy beverage at a lower price than fresh drinking milk”) caused by the Agriculture Secretary’s price regulations and this could be redressed by a favorable ruling. *Cmty. Nutrition Inst. v. Block*, 698 F.2d 1239, 1246 (D.C. Cir. 1983). The Supreme Court concluded that

consumers were held, essentially, to be outside the zone of interests Congress intended its statute to cover. Eight years after that, *Lujan v. Defenders of Wildlife* signaled heightened judicial scrutiny of seemingly broad legislative extensions of standing to sue to “any persons” for procedural injuries in the process of adopting rules or administering federal programs.¹³¹ Unless the procedural injury could be tied to some other threatened concrete interest, the citizen-suit provision could not override the requirement that the plaintiff show more than a mere generalized grievance.¹³²

It will be noted that the zone-of-interests test appeared and was predominantly employed in the analysis of standing in the context of statutory rights. Nevertheless, the Supreme Court explicitly extended the test to constitutional rights, too.¹³³ And constitutional causes of action have been evaluated under the zone-of-interests test. A recent example is helpful. When a public school cut costs by dismissing three teachers and contracting with a religious school to fulfill their duties, the teachers sought damages under the Establishment Clause. The Sixth Circuit held that the mere fact that the teachers claimed an economic injury, rather than some spiritual one, “does not put them outside the zone of interests. . . . These teachers lost their jobs when their secular positions were outsourced to a religious institution, a type of harm that clearly falls within the zone of interests defined by an amendment meant to keep government neutral and secular.”¹³⁴

The court assessed the plaintiffs’ zone-of-interests standing according to their claim of injury, not by asking whether the Establishment Clause was intended to cover teachers as a class or these particular teachers per se. As will be seen in the next section, misapplication of the concept of a zone of interests lies at the heart of the problems that the prior substantial-connections test of prudential standing creates.

3. Substantial Connections as a Zone of Interests

Zoya’s case fell prey to the merging of the (originally merits-based) substantial-connections test and a jurisdictional inquiry, the zone-of-interests prudential standing requirement. As noted above, two courts held that Zoya lacked prudential standing because—as someone with no prior substantial

Congress did not intend for consumers to have a judicial remedy to its rate making and elected not to address the appellate court’s standing analysis. *Block*, 467 U.S. at 353 n.4.

131. 504 U.S. 555 (1992).

132. *Id.* at 573. This holding threw into confusion whether a generalized grievance presented an issue of constitutional or prudential standing. See ERWIN CHEMERINSKY, *FEDERAL JURISDICTION* 97–98 (5th ed. 2007); Richard Murphy, *Abandoning Standing: Trading a Rule of Access for a Rule of Deference*, 60 ADMIN. L. REV. 943, 952–59 (2008). Resolution of this problem is not relevant to this article.

133. *Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc.*, 454 U.S. 464, 474–75 (1982) (citing *Ass’n of Data Processing Serv. Orgs., Inc.*, 397 U.S. at 153).

134. *Smith v. Jefferson County Sch. Bd. of Comm’rs*, 549 F.3d 641, 651–52 (6th Cir. 2008).

connection to the United States—her claim fell outside the zone of interests of the Takings Clause. I think her complaint was wrongly dismissed because the substantial-connections test results in two separate errors when it is applied to assess the zone-of-interests facet of prudential standing.

First, it assigns the wrong meaning to the phrase “zone of interests.” We ask whether Zoya’s *claim* is within the zone of interests the Constitution addresses, not whether Zoya *herself* is within the Constitution’s zone of interests writ large. In other words, it is the grievance, the injury complained of, not the injured complainant, that must be within the zone of interests. Thus, the Court has repeatedly indicated that under the test “the plaintiff must establish that the injury he complains of (*his* aggrievement, or the adverse effect *upon him*) falls within the ‘zone of interests’ sought to be protected by the statutory provision whose violation forms the legal basis for his complaint.”¹³⁵

The zone-of-interests test is, simply, a zone of *interests*, not a zone of *plaintiffs*. Applied correctly, the zone-of-interests test would find that Zoya’s loss of property is within the zone of interests of the Takings Clause—the uncompensated seizure of property is precisely what the Takings Clause is all about. The test is applied incorrectly when it is misused to inquire prematurely whether some individual or class of individuals is within the zone of interests of a constitutional provision. Although a court might ultimately hold that the Takings Clause does not extend to Uzbekistan or even to Zoya herself, that is a decision on the merits of the claim, not a jurisdictional holding supportable by any known doctrine of standing.

Second, it falls prey to a common error in standing cases: it confuses a jurisdictional inquiry with the merits. Although the courts held Zoya lacked standing to sue, they did so by making conclusions about the merits of her claim. This conflation of jurisdiction and the merits is one to which zone-of-interests analyses are particularly susceptible. This may be, in part, because the vast majority of such inquiries are made in the context of interpreting statutory rights in an administrative law context. Indeed, the zone-of-interests prudential-standing inquiry has sometimes been called “statutory standing.”¹³⁶ In that statutory context, Justice Scalia noted in *Steel*:

The question whether *this* plaintiff has a cause of action under the statute, and the question whether *any* plaintiff has a cause of action under the statute are closely connected—indeed, depending upon the asserted basis for lack of statutory standing, they are sometimes identical, so that it would be exceedingly artificial to draw a distinction between the two.¹³⁷

Another way to perceive this confusion of merits-based versus jurisdictional inquiries is to approach the issue with reference to the classic elements of a cause of action: duty, breach, causation, damages. Extraterritorial claims

135. *Air Courier Conference of Am. v. Am. Postal Workers Union*, AFL-CIO, 498 U.S. 517, 523–24 (1991) (quoting *Lujan*, 497 U.S. at 883).

136. *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 97 (1998).

137. *Id.* at 97 n.2.

most directly raise the element of duty.¹³⁸ After all, what motivates the standing inquiry is the suspicion that the United States owes no constitutionally derived duty to foreign citizens on foreign soil. To succeed, Zoya must show that the United States owed her a duty. That may depend on who Zoya is and where she is located, both of which are factual inquiries. But resolution of the duty element requires a decision on the merits of Zoya's claim, not a jurisdictional prerequisite to suit.¹³⁹ This is a question of the validity of a cause of action, not a question of subject matter jurisdiction.¹⁴⁰ The former argument lies at the heart of a 12(b)(6) motion; the latter is a lack-of-standing argument. The Constitution may be construed to provide a cause of action; then again, it might be construed otherwise. That plaintiff's view of the law might not ultimately persuade a court, except in the most extreme cases, simply has nothing to do with the court's jurisdiction or the plaintiff's standing.¹⁴¹

This view, formed in the crucible of statutory rights, has led the lower courts to an error that is particularly dangerous when applied to constitutional rights. Judge Posner, for example, citing the *Steel* case, stated that "The latter type of jurisdictional issue ('prudential standing' as it is sometimes called) may be bypassed in favor of deciding the merits when the outcome is unaffected and the merits issue easier than the jurisdictional issue."¹⁴² In its more extreme form, the error takes the shape of deriving lack of standing to sue from the legal conclusion that the plaintiff lacks a constitutional right. That is backward, as then Judge Ruth Bader Ginsburg

138. Some might say Zoya has simply asserted the *wrong* cause of action. She should not have alleged a Fifth Amendment taking, but rather a violation of her right to property under the Fifth Amendment's Due Process Clause. Regardless of the cause of action, however, the element of duty remains the foremost obstacle to the success of her claim. From the point of view of standing, "a word game played by secret rules," *Flast v. Cohen*, 392 U.S. 83, 129 (1968) (Harlan, J., dissenting), redefinition of the injury may often make all the difference in proving standing. Burnham, *supra* note 117, at 73-76.

139. *Bell v. Hood*, 327 U.S. 678, 682 (1946) ("[I]t is well settled that the failure to state a proper cause of action calls for a judgment on the merits and not for a dismissal for want of jurisdiction. Whether the complaint states a cause of action on which relief could be granted is a question of law and just as issues of fact it must be decided after and not before the court has assumed jurisdiction over the controversy. If the court does later exercise its jurisdiction to determine that the allegations in the complaint do not state a ground for relief, then dismissal of the case would be on the merits, not for want of jurisdiction."). At least in cases in which a constitutional remedy is clear, even the dissenters agreed on this point. *Id.* at 685 (Stone, C.J., & Burton, J., dissenting) ("When the provision of the Constitution or federal statute affords a remedy which may in some circumstances be availed of by a plaintiff, the fact that his pleading does not bring him within that class as one entitled to the remedy, goes to the sufficiency of the pleading and not to the jurisdiction.").

140. *Steel*, 523 U.S. at 89 ("It is firmly established in our cases that the absence of a valid (as opposed to arguable) cause of action does not implicate subject-matter jurisdiction, *i.e.*, the courts' statutory or constitutional *power* to adjudicate the case.").

141. *Id.* ("Rather, the district court has jurisdiction if 'the right of the petitioners to recover under their complaint will be sustained if the Constitution and laws of the United States are given one construction and will be defeated if they are given another,' unless the claim 'clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is wholly insubstantial and frivolous.'" (internal citation omitted) (quoting *Bell v. Hood*, 327 U.S. 678, 682-85 (1946))).

142. *McNamara v. City of Chi.*, 138 F.3d 1219, 1222 (7th Cir. 1998).

observed with evident frustration, dissenting in a case concerning the First Amendment rights of foreign, nongovernmental family planning organizations:

I am unable sensibly to distinguish the [district] court's "standing" and "merits" dispositions. The two become one under the "merits first" approach adopted, *i.e.*, first the court decides the foreign NGOs "had no First Amendment rights," therefore the court concludes those NGOs had "no standing to assert a violation of such rights."¹⁴³

Zoya's case offers an excellent illustration of these two errors and how badly the injection of this new prior substantial-connections test for prudential standing can confuse the issues before the court. The Government's brief led to confusion from the start. *Verdugo-Urquidez* and *Eisentrager* were the twin hooks on which the Government hung its standing argument. The United States read those cases to establish the "rule" that a foreign citizen without a substantial connection to the United States lacked standing to allege a constitutional injury.¹⁴⁴ But while *Eisentrager* directly addressed the question whether enemy aliens have standing, neither the phrase "prior substantial connections" nor a test of standing on that basis appears in that case.¹⁴⁵ Likewise, the word "standing" did not even appear in *Verdugo-Urquidez*—a case decided on the merits.

Plaintiff's brief in opposition did not inject much clarity to the issue. On the one hand, plaintiff's counsel identified the "issue presented" as whether their client "has standing to bring suit" against the United States for taking her property.¹⁴⁶ On the other hand, counsel blurred this jurisdictional issue with the merits of plaintiff's cause of action, characterizing the Government's ground for dismissal as arguing that "absent 'substantial connections'

143. DKT Mem'l *Fund v. Agency for Int'l Dev.*, 887 F.2d 275, 307 n.10 (D.C. Cir. 1989) (Ginsburg, J., dissenting).

144. U.S. Mot., *supra* note 30, at 6. The United States argued that plaintiff's lack of standing warranted dismissal pursuant to RCFC 12(b)(6) for failure to state a claim upon which relief can be granted.

145. Justice Jackson's opinion for the Court ties the question of standing inextricably to multiple factors associated with military jurisdiction in a time of war:

The foregoing demonstrates how much further we must go if we are to invest these enemy aliens, resident, captured and imprisoned abroad, with standing to demand access to our courts.

We are here confronted with a decision whose basic premise is that these prisoners are entitled, as a constitutional right, to sue in some court of the United States for a writ of *habeas corpus*. To support that assumption we must hold that a prisoner of our military authorities is constitutionally entitled to the writ, even though he (a) is an enemy alien; (b) has never been or resided in the United States; (c) was captured outside of our territory and there held in military custody as a prisoner of war; (d) was tried and convicted by a Military Commission sitting outside the United States; (e) for offenses against laws of war committed outside the United States; (f) and is at all times imprisoned outside the United States.

Johnson v. Eisentrager, 339 U.S. 763, 777 (1950). Although the Court framed the matter with the term "standing," the nature of the writ of *habeas corpus* at issue—simultaneously a question of jurisdiction and substantive constitutional right—further strains the focus on standing.

146. Plaintiff Zoya Atamirzayeva's Opposition to the United States' Motion for Judgment on the Pleadings at 2, *Atamirzayeva v. United States*, 77 Fed. Cl. 378 (2007) (No. 05-01245 L).

with the United States, the Government owes no duty of compensation whatsoever when it takes property located abroad from an alien.”¹⁴⁷ Counsel did not challenge the propriety of this elision of the merits with jurisdiction, but instead chose to distinguish each case on its facts: *Eisentrager* concerned only enemy aliens, while *Verdugo-Urquidez* concerned only the Fourth Amendment.¹⁴⁸ As noted above, this choice is perhaps understandable given the confused state of the court’s case law.¹⁴⁹ Plaintiff’s counsel apparently judged one of those cases, *Turney v. United States*, to offer the best chance of success and urged the court to follow that precedent to hold that their client was entitled to compensation.

The opinion of the Court of Federal Claims started well enough, noting the distinction between constitutional and prudential components of standing. It correctly concluded that constitutional standing was “not the issue here,” and that “the focus of the prudential standing inquiry is on the plaintiff’s position—as it is in the instant case.”¹⁵⁰ But the court then erroneously assigned the wrong meaning to the zone-of-interests inquiry. Notwithstanding an acknowledgment that “the issue of standing is technically irrelevant in *Verdugo-Urquidez*,”¹⁵¹ the court accepted the United States’ invitation to import the substantial-connections test from it for this new purpose, asserting that standing was analogous to the issue presented in that criminal case. Adopting the test, the court made clear the shift in the type of question it perceived itself to be answering, “In other words, the question in a standing inquiry is ‘May this person argue in court that the United States is responsible for a taking?’—not, ‘Does the Takings Clause apply in these circumstances?’”¹⁵² The court derived this view of prudential standing from *Warth v. Seldin*, which it cited for the proposition that the standing inquiry required the court to ask “whether the constitutional or statutory provision on which the claim rests properly can be understood as granting persons in the plaintiff’s position a right to judicial relief.”¹⁵³

But the court clearly misconceived what the phrase “plaintiff’s position” meant. As noted above, it does not mean that one inquires into the personal characteristics of the individual. Nor does it mean a *sotto voce* conclusion that the Constitution does not extend to foreigners—a conclusion on the merits hidden in the guise of the jurisdictional question of standing. The “position” in question is only relevant to the question of whether the plaintiff should be invoking judicial relief rather than the aid of the political branches. In other words, it goes to the core question, the “gist” of standing: whether the plaintiff is in a position to allege “such a personal stake in the

147. *Id.* at 1.

148. *Id.*

149. *See supra* Section I.A.

150. *Atamirzayeva*, 77 Fed. Cl. at 382.

151. *Id.* at 383.

152. *Id.* at 382.

153. *Id.* at 383 (quoting *Warth v. Seldin*, 422 U.S. 490, 500 (1975)).

outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues.”¹⁵⁴

This first error made commission of the second error—blurring the jurisdictional question with the merits question—almost inevitable. The court reached the conclusion that Zoya lacked standing by determining that the Takings Clause did not extend to her—a decision about the merits of her cause of action.

Similarly, the Court of Appeals for the Federal Circuit framed the “sole question presented on appeal” as “whether a foreign citizen with no connection to the United States *has a right* to just compensation under the Fifth Amendment for a taking of property that occurs in a foreign country.”¹⁵⁵ This again conflated two distinct issues: the appellate court affirmed the trial court’s holding that Zoya lacked standing to sue—a jurisdictional question—while engaging the merits of Zoya’s cause of action. Notwithstanding this conflation of standing to sue with the possession of rights, the court appeared to focus on the substantive question of the extraterritorial reach of the Takings Clause, and after a lengthy disquisition of Supreme Court precedents concerning the extraterritorial reach of the Constitution (only one of which was a decision about the standing of litigants),¹⁵⁶ Judge Bryson affirmed the decision of the trial court, including its reading of *Turney*.

This was error. As Justice Scalia wrote for a unanimous Supreme Court, “It is firmly established in our cases that the absence of a valid (as opposed to arguable) cause of action does not implicate subject matter jurisdiction, *i.e.*, the courts’ statutory or constitutional *power* to adjudicate the case.”¹⁵⁷ It

154. *Baker v. Carr*, 369 U.S. 186, 204 (1962). An alternative way of framing the same issue is found in *Flast v. Cohen*, 392 U.S. 83, 99–100 (1968): “In other words, when standing is placed in issue in a case, the question is whether the person whose standing is challenged is a proper party to request an adjudication of a particular issue and not whether the issue itself is justiciable.” Whether framed as the right “position” or the right “party,” the purpose of that framework is not to determine whether plaintiff is within some zone of coverage of the statutory or constitutional provision. Rather, as the Court noted:

[T]he question of standing is related only to whether the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution. It is for that reason that the emphasis in standing problems is on whether the party invoking federal court jurisdiction has a personal stake in the outcome of the controversy, and whether the dispute touches upon the legal relations of parties having adverse legal interests.

Id. at 101 (internal citations and quotation marks omitted).

155. *Atamirzayeva v. United States*, 524 F.3d 1320, 1322 (Fed. Cir. 2008) (emphasis added). Since the trial court held that Zoya lacked standing, this formulation is incorrect. *See supra* note 36.

156. *Atamirzayeva*, 524 F.3d at 1322–26. Of all of the cases cited in this section, only *Johnson v. Eisentrager*, 339 U.S. 763, 776–77 (1950), actually concerned the issue of standing. *See* *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990) (criminal appeal); *Reid v. Covert*, 354 U.S. 1 (1957) (habeas corpus); *Kinsella v. Krueger*, 351 U.S. 470 (1956) (habeas corpus); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936) (criminal appeal); *Russian Volunteer Fleet v. United States*, 282 U.S. 481 (1931) (jurisdiction under predecessor to the Reciprocity Act, 28 U.S.C. § 2502 (2006)); *Balzac v. Porto Rico*, 258 U.S. 298 (1922) (libel prosecution); *Dorr v. United States*, 195 U.S. 138 (1904) (libel prosecution); *Hawaii v. Mankichi*, 190 U.S. 197 (1903) (habeas corpus); *Downes v. Bidwell*, 182 U.S. 244 (1901) (duties claim); *In re Ross*, 140 U.S. 453 (1891) (habeas corpus); *Cook v. United States*, 138 U.S. 157 (1891) (criminal appeal).

157. *Steel v. Citizens for a Better Env’t*, 523 U.S. 83, 89 (1998).

might well be that Zoya cannot recover under her stated cause of action, but “[t]his Court held [in *Bell v. Hood*] that the nonexistence of a cause of action was no proper basis for a jurisdictional dismissal.”¹⁵⁸ The possibility that a judicial construction of the Fifth Amendment would frustrate her prayer for relief and result in the defeat of Zoya’s claim on the merits, unless the claim were “wholly insubstantial and frivolous,” does not mean that a court lacks jurisdiction to hear the claim.¹⁵⁹ To subsume the merits of her claim into a test for jurisdiction is worse than putting the cart before the horse—it puts the horse inside the very cart itself, for a conclusion about the merits of the claim is used as proof that the plaintiff lacks standing!

This was easier for the Federal Circuit to perceive when its vision was not clouded by the mesmerizing question of standing. A separate panel of the Federal Circuit reaffirmed this bedrock principle distinguishing inquiries into jurisdiction and the merits just three weeks before the *Atamirzayeva* panel upheld the lower court’s dismissal for lack of standing (conflating the two inquiries). In *Jan’s Helicopter Service v. FAA*, the Federal Circuit resolved its jurisdiction over a regulatory takings claim the opposite way.¹⁶⁰ In so doing, it reaffirmed a far more established line of precedent behind its Tucker Act jurisdiction, which requires “a separate source of substantive law that creates the right to money damages.”¹⁶¹ It is well established that the Takings Clause is just such a source of substantive law.¹⁶² Having established that money-mandating source of law, the court has established its jurisdiction. The court then “asks only whether the plaintiff is within the class of plaintiffs entitled to recover under the statute if the elements of a cause of action are established.”¹⁶³ In the context of the Takings Clause, this is an easy question to answer “because appellants, having alleged a taking of their

158. *Id.* at 96.

159. *Bell v. Hood*, 327 U.S. 678, 682–83 (1946). As the *Bell* Court said long ago, and the current Supreme Court has repeatedly affirmed:

Jurisdiction, therefore, is not defeated as respondents seem to contend, by the possibility that the averments might fail to state a cause of action on which petitioners could actually recover. For it is well settled that the failure to state a proper cause of action calls for a judgment on the merits and not for a dismissal for want of jurisdiction. Whether the complaint states a cause of action on which relief could be granted is a question of law and just as issues of fact it must be decided after and not before the court has assumed jurisdiction over the controversy. If the court does later exercise its jurisdiction to determine that the allegations in the complaint do not state a ground for relief, then dismissal of the case would be on the merits, not for want of jurisdiction. . . . Thus, the right of the petitioners to recover under their complaint will be sustained if the Constitution and laws of the United States are given one construction and will be defeated if they are given another. For this reason the district court has jurisdiction.

Id. at 682, 685; see also *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 513 n.10 (2006); *Steel*, 523 U.S. at 89.

160. See 525 F.3d 1299 (Fed. Cir. 2008).

161. *Fisher v. United States*, 402 F.3d 1167, 1172 (Fed. Cir. 2005) (en banc in relevant part).

162. *Jan’s Helicopter Serv. v. FAA*, 525 F.3d at 1309 (“It is undisputed that the Takings Clause of the Fifth Amendment is a money-mandating source for purposes of Tucker Act jurisdiction.”).

163. *Id.* at 1308 (citing *Greenlee County v. United States*, 487 F.3d 871, 876 (Fed. Cir. 2007)).

property by the government, are within the class of plaintiffs entitled to recovery if a takings claim is established.”¹⁶⁴

The court should *not* consider the actual merits of the claim to determine its jurisdiction. This was a point so important that Judge Dyk placed it entirely in italics: “*Only after this initial inquiry is completed and the Court of Federal Claims takes jurisdiction over the case does it consider the facts specific to the plaintiff’s case to determine ‘whether on the facts [the plaintiff’s] claim f[alls] within the terms of the statutes.’*”¹⁶⁵ If, upon examining the merits of the plaintiff’s claim, the court concludes “that plaintiff’s case does not fit within the scope of the source” of the court’s jurisdiction—in this case, the Takings Clause—then “the consequence of a ruling by the court . . . is simply this: plaintiff loses on the merits for failing to state a claim on which relief can be granted.”¹⁶⁶

Looked at from this perspective, it is obvious that the “substantial connection” standing argument injected needless confusion into Zoya’s case. Zoya, like the plaintiffs in *Jan’s Helicopter*, asserted that the Court of Federal Claims had subject matter jurisdiction under the Tucker Act, 28 U.S.C. § 1491; both plaintiffs presented causes of action under the Takings Clause.¹⁶⁷

Zoya’s petition for rehearing en banc was denied.¹⁶⁸ But that petition highlighted the confusion that prudential standing had introduced into the case. Petitioner-plaintiff continued to identify the case as one to be decided based on Circuit precedent, the *Turney* decision. Zoya’s counsel went to considerable lengths to show that the real party in interest in that case, like Zoya, had no substantial connection to the United States. Among their arguments was the fact that Turney, a U.S. citizen, was appointed trustee of the Filipino corporation “*after the complaint was filed.*”¹⁶⁹

This was an important point for counsel, as their added italics indicated, because counsel read this to mean that the panel had held that “conduct the plaintiff takes after filing its complaint can perfect a Takings claim and create a sufficient connection with the United States to withstand dismissal. That position is contrary to both law and logic.”¹⁷⁰ Of course, that would be true if standing were not a matter of jurisdiction. But if a plaintiff must maintain standing at all times during the pendency of the action for a court to maintain jurisdiction, both law and logic might be quite different when viewed through the prism of standing, rather than the merits of the case

164. *Id.* at 1309.

165. *Id.* at 1308 (quoting *Greenlee County*, 487 F.3d at 876).

166. *Id.* at 1307 (quoting *Fisher v. United States*, 402 F.3d 1167, 1175–76 (Fed. Cir. 2005)).

167. Compare Compl., *supra* note 17, at ¶ 1, with Amended Complaint for Just Compensation at ¶ 7, *Jan’s Helicopter Serv. v. United States*, No. 08-671C (Fed. Cl. Nov. 17, 2008).

168. See *supra* note 37.

169. Plaintiff-Appellant Mrs. Zoya Atamirzayeva’s Petition for Rehearing En Banc at 6, *Atamirzayeva v. United States*, 524 F.3d 1320 (Fed. Cir. 2008) (No. 2007-5159) [hereinafter Plaintiff-Appellant’s Petition].

170. *Id.*

itself. And when the prism is prudential standing, not the constitutional standing required by Article III for courts to exercise their subject matter jurisdiction, the issue is even further confused.¹⁷¹ This subtlety was missed by plaintiff's counsel, who cited Supreme Court cases regarding constitutional standing for the proposition that conduct that occurs after a complaint is filed can confer neither jurisdiction nor standing.¹⁷²

III. WHEN SHOULD THE CONSTITUTION FOLLOW THE FLAG?

Not only is the substantial-connections test in conflict with the standing inquiry it purports to facilitate, it is inconsistent with any coherent view of the extraterritorial reach of the Constitution. Section III.A exposes these inconsistencies. Section III.B addresses concerns about the practical effect of depriving courts of this tool to control their jurisdiction. This Article is grounded in the assumption that it is critically important to keep a judicial forum open to resolve questions about when the Constitution should follow the flag, asked by those with constitutional standing to do so, whether citizens or foreigners. A judicially created rule that denies prudential standing to those best placed to allege governmental excesses, be they real or imagined or even ultimately nonjusticiable, is a rule that serves no useful purpose

171. There is no consensus about when standing must be established or how long it must remain. This is largely caused by the connection made between standing and the jurisdiction of federal courts. See EUGENE GRESSMAN ET AL., SUPREME COURT PRACTICE 919 (9th ed. 2007) ("The [standing] requirements must be satisfied at every stage of a federal court proceeding, from the initiation of the suit to its final review in the Supreme Court."). But see *Cleveland Branch, NAACP v. City of Parma*, 263 F.3d 513, 524 (6th Cir. 2001) ("[C]ontrary to the district court's conclusion, standing does not have to be maintained throughout all stages of litigation. Instead, it is to be determined as of the time the complaint is filed.").

In the context of adjudicating patent disputes, for example, the courts are split regarding whether assignments of interest may retroactively perfect standing to sue. See, e.g., *Randolph-Rand Corp. v. Shafmaster Co.*, No. CIV 97-44-M, 1999 WL 814367, at *2 (D.N.H. Apr. 8, 1999); *Procter & Gamble Co. v. Paragon Trade Brands, Inc.*, 917 F. Supp. 305, 309-10 (D. Del. 1995). In other litigation, courts have also permitted retroactive, corrective filings to establish standing (and thus jurisdiction). See, e.g., *Newark Branch, NAACP v. City of Clifton*, Civ. A. No. 89-3238, 1990 WL 238665, at *5 (D.N.J. Dec. 27, 1990) ("[I]f plaintiffs have fulfilled the requirements of [Federal Rule of Civil Procedure] 15(d), the Court will consider whether standing exists on the basis of the amended complaint."). Where the standing in question is prudential, not constitutional, the grounds for permitting or prohibiting the inclusion of postfiling events to establish standing are clouded even further. This is, again, linked to jurisdiction. Since prudential standing is discretionary, not required, the rationale that jurisdiction must be established at the initiation of the action is not well grounded. From a practical standpoint, this approach may also be quite disruptive and expensive. Years may pass and considerable lucre wasted in litigation that culminates in the final appeal with a successful jurisdictional argument to dismiss for lack of prudential standing. See, e.g., *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1 (2004). "Uncertainty regarding the question of jurisdiction is particularly undesirable, and collateral litigation on the point particularly wasteful." *Grupo Dataflux v. Atlas Global Group*, 541 U.S. 567, 582 (2004) (discussing the time-of-filing rule for diversity jurisdiction).

172. Counsel cited *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 191 (2000), and *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 571 n.5 (1992), for this proposition. Brief of Plaintiff-Appellant's Petition, *supra* note 169, at 6-7. But both of those cases concerned constitutional standing, not prudential standing, and therefore they are not authority for the issue most pressing to plaintiff Atamirzayeva (who lacked prudential standing). *Friends of the Earth, Inc.*, 528 U.S. 167; *Lujan*, 504 U.S. 555.

in American constitutional law, regardless of one's view of the extraterritorial reach of the Constitution.

A. *The Extraterritorial Constitution and Substantial Connections*

The story of America's changing conceptions of the reach of its Constitution has been told frequently and elsewhere by many scholars and courts and need not be recited again here.¹⁷³ For purposes of this Article, it is worth noting the protean nature of the story itself.¹⁷⁴ It should be unsurprising that, as America changed from a hardscrabble outpost of colonists to an independent sovereign state, to a regional power, to an imperial power, to a Cold War superpower, the perceived reach of the Constitution has changed, too. There was little need to worry about the power of federal officials to affect the lives of citizens or foreigners abroad when an urgent response to a foreign crisis meant congressional authorization to establish a permanent navy consisting of no more than six frigates.¹⁷⁵ That concern changed as America did, with the most extreme changes occurring in the twentieth century.¹⁷⁶ A navy of six frigates has grown to one of six fleets.¹⁷⁷

As the United States grew in size and power, its courts were confronted with claims of litigants at home and abroad. How was the Constitution to be understood to apply to foreigners and citizens in American states, federal territories destined for statehood, far-off territorial possessions, and in other sovereign states? The easiest approach was to draw the boundaries of constitutional inclusion by reference to geography (the "territorial" premise). Immigration and the growth of American expatriate communities abroad led to caveats defined by citizenship or residency (the "social compact" premise). As the capacity to project American power grew, especially in the twentieth century, courts resolved constitutional questions with pragmatic tests of various formulations (the functional premise).

173. See, e.g., *Boumediene v. Bush*, 128 S. Ct. 2229, 2253–58 (2008); GERALD L. NEUMAN, *STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW* (1996); Kermit Roosevelt III, *Guantanamo and the Conflict of Laws: Rasul and Beyond*, 153 U. PA. L. REV. 2017, 2042–59 (2005). My taxonomy draws heavily on the work of Neuman and Roosevelt. A very recent monograph by Kal Raustiala, although unfortunately published too late to have been consulted in the drafting of this Article, also deserves mention. Kal Raustiala, *DOES THE CONSTITUTION FOLLOW THE FLAG? THE EVOLUTION OF TERRITORIALITY IN AMERICAN LAW* (2009).

174. NEUMAN, *supra* note 173, at 3 ("The domain of U.S. constitutionalism has always been contested, and it has grown as the nation has grown.").

175. Naval Act of 1794, ch. 12, sec. 1, 1 Stat. 350 (authorizing the president "to provide, by purchase or otherwise, equip and employ four ships to carry forty-four guns each, and two ships to carry thirty-six guns each."). The sole purpose of the Act was to defeat Barbary Pirates who harassed American shipping; the Act self-terminated "if a peace shall take place between the United States and the Regency of Algiers." *Id.* sec. 9.

176. *Boumediene*, 128 S. Ct. at 2253 ("[T]hroughout most of our history there was little need to explore the outer boundaries of the Constitution's geographic reach. . . . Fundamental questions regarding the Constitution's geographic scope first arose at the dawn of the 20th century . . .").

177. The Second, Third, Fourth, Fifth, Sixth, and Seventh Fleets are currently active components of the United States Navy. Commander, U.S. Naval Forces, http://www.cusns.navy.mil/numbered_fleets.htm (last visited Aug. 20, 2009).

The prior substantial-connections test of prudential standing is consistent with none of these constitutional theories. Return one last time to Zoya's café to consider how this doctrinal test is completely untethered from these constitutional options. To recap: the test is straightforward in its application. Notwithstanding her allegations that the United States destroyed her livelihood by seizing her property, Zoya's connection to the United States is held to be too insubstantial to give her standing to sue. She is a foreigner, outside of and without ties to the United States. She is, the logic goes, therefore outside the zone of interests of the Takings Clause of the Fifth Amendment, the basis for her constitutional cause of action. U.S. courts are closed to her *not* because of any defect in her cause of action, but because of a conclusion about the prudence of hearing *her* in particular plead it. A court willing to make that determination (and it is a determination that is discretionary, not obligatory) would conclude that Zoya lacks standing, and therefore the court lacks jurisdiction. Her complaint would be dismissed with prejudice.

1. *A Test Bound Neither By Territory . . .*

Territorialists would say that Zoya has no right to just compensation because the Constitution does not apply to state action involving aliens abroad.¹⁷⁸ This conclusion, which "prevailed as dogma for most of American constitutional history,"¹⁷⁹ rests on the premise that the Constitution does not limit the exercise of federal power abroad, whether with regard to U.S. citizens or noncitizens.¹⁸⁰ Territorialists would thus say that Zoya's complaint should be expeditiously dismissed on the merits: to prolong a lawsuit based on rights that the plaintiff does not possess would be "a charade at best pointless, and more likely cruel."¹⁸¹

It is easy to see why the prior substantial-connections test for standing fits so poorly with a strictly territorial view of the Constitution.¹⁸² An honest territorialist should not care how substantial a connection Zoya had to the

178. See, e.g., *In re Ross*, 140 U.S. 453, 464 (1891) ("By the constitution a government is ordained and established 'for the United States of America,' and not for countries outside of their limits. . . . The Constitution can have no operation in another country."). Of course, there are obvious exceptions to this rigid statement of the territorialist position. The plaintiff need not always be physically present in the United States to be entitled to constitutional protection of her interests. For example, well settled case law protects property within the United States even though the plaintiff alleging some legal injury to it is outside the United States. This exception would not apply to Zoya who, like the property at issue, is in a foreign land.

179. NEUMAN, *supra* note 173, at 7.

180. This view regarding citizens was overruled by *Reid v. Covert*, 354 U.S. 1, 5-6 (1957), which held that the Constitution extends to protect U.S. citizens abroad. As to *Ross*, the *Reid* Court was dismissive: "At best, the *Ross* case should be left as a relic from a different era." *Id.* at 12.

181. Roosevelt, *supra* note 173, at 2020 (describing reasoning based on territorial premise).

182. One might be equally suspicious of the consistency between such a view of the Constitution and a substantial-connections test applied to the merits of the claim, rather than as a jurisdictional inquiry. Although the arguments are surely very similar, the substantive question is beyond the scope of this Article.

United States if Zoya (or her property) were not *in* the United States as those boundaries have been variously defined. Under this test, however, if Zoya has a substantial enough connection to the United States, then geography does not matter. Zoya's standing to sue presents a factual question affected by "the nature and duration" of her contacts.¹⁸³ Such fact-finding is improper if one believes that the Constitution only has force at home.

2. . . . Nor By Functionalism . . .

Some scholars and judges, holding to a theory that the Constitution is a limit on government power irrespective of where it is exercised, would say that Zoya's complaint presents a straightforward takings claim that should be decided on its merits absent a collateral reason to dismiss it. If, for example, the litigation would raise a nonjusticiable political question (e.g., the conduct of the country's foreign relations) or expose state secrets, dismissal may be appropriate. Reasonable minds may differ on these issues, but they do not turn on the extraterritorial application of the Constitution. The extent of Zoya's prior substantial connections with the United States has little if anything to do with whether her claim would inevitably expose state secrets or be entangled with issues of national security or foreign affairs.

Proponents of this approach necessarily hold a very different view of the Constitution than does the territorialist. The Constitution *does* apply to state action abroad because it is the only source of power for government officials. The limited and enumerated powers of the federal government do not expand or contract according to the caprice of geography or the civic status of those affected by its actions. As Justice Black observed in *Reid v. Covert*, "The United States is entirely a creature of the Constitution. Its power and authority have no other source."¹⁸⁴ This approach may be styled the "limited government" premise.

In its absolute form, an advocate of a limited government theory of the Constitution would be hard pressed to explain the accordion-like expansion and contraction of *de facto* government authority that results when standing to sue is based on the personal characteristics of a foreign plaintiff. If the Constitution proscribes the taking of private property for public use without just compensation (a command that lacks any obvious textual limit based on geography or civic classification), then the substantial connection of the victim of that state action beyond the action itself would appear to be irrelevant.

To rest here, however, would be to rest on the shoulders of a straw man, for the "limited government" premise has rarely if ever been adopted in such an absolutist form. A variant of this approach, most notably associated with Justice Kennedy, would take what has been called a functional approach to the matter. "I take it to be correct, as the plurality opinion in *Reid v. Covert* sets forth," he observed in his concurring opinion in *Verdugo-Urquidez*,

183. *Martinez-Aguero v. Gonzalez*, 459 F.3d 618, 625 (5th Cir. 2006).

184. 354 U.S. at 5–6.

“that the Government may act only as the Constitution authorizes, whether the actions in question are foreign or domestic.”¹⁸⁵ But this foundational principle is only a starting point for him. Acknowledging the precedents that traced the development of American power from the *Insular Cases* to *United States v. Curtiss-Wright* to *Reid v. Covert*, Justice Kennedy concluded that “we must interpret constitutional protections in light of the undoubted power of the United States to take actions to assert its legitimate power and authority abroad.”¹⁸⁶ Adopting the second Justice Harlan’s view expressed in *Reid*, he eschewed “rigid and abstract” rules in favor of a functional test: the Constitution would follow the flag unless there existed “conditions and considerations” that would “make adherence to a specific guarantee altogether impracticable and anomalous.”¹⁸⁷ This is a view that Justice Kennedy reaffirmed in his majority opinion in *Boumediene v. Bush*: “[Q]uestions of extraterritoriality turn on objective factors and practical concerns, not formalism.”¹⁸⁸

Thus, the relevant question for Justice Kennedy and others with his functionalist or pragmatic view of the extraterritorial reach of the Constitution would be whether the extraterritorial application of the Takings Clause in this circumstance would be “impracticable and anomalous.”¹⁸⁹ Since Justice Kennedy concurred in the plurality opinion in *Verdugo-Urquidez*, which, he said, did not “depart in fundamental respects” from his own views,¹⁹⁰ we might be tempted to suppose that an important “consideration”

185. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 277 (1990) (Kennedy, J., concurring).

186. *Id.* It is worth making a brief digression about the middle case in this triptych, *Curtiss-Wright*. Some might be tempted to argue that the constitutional theory described by Justice Sutherland in this case would deprive Zoya and aliens like her of any remedy for her constitutional claims. In this case, Justice Sutherland famously held that “the investment of the federal government with the powers of external sovereignty did not depend upon the affirmative grants of the Constitution.” *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 318 (1936). These are inherent powers, not constitutional ones. *Id.* Hence, the temptation: when the United States acts abroad, it is not limited by the Constitution.

This argument is susceptible to criticism from several directions. First, the “powers of external sovereignty” identified by Justice Sutherland are limited to the “powers to declare and wage war, to conclude peace, to make treaties, to maintain diplomatic relations with other sovereignties.” *Id.* Perhaps when the United States acts abroad outside of these subject areas, the Constitution does apply. Indeed, in the very next sentence, Justice Sutherland makes that concession with respect to U.S. citizens. *Id.* A second concession follows shortly thereafter: this inherent power over foreign affairs “like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution.” *Id.* at 320. Whatever those may be with regard to aliens simply begs us to return to the question with which we started. That question, however, cannot be answered by limiting ourselves to a prudential judgment about the substantiality of prior connections with the United States. At least, there is nothing in the doctrine of *Curtiss-Wright* to support such a narrow and formalistic approach.

187. *Verdugo-Urquidez*, 494 U.S. at 277–78 (Kennedy, J., concurring) (quoting *Reid*, 354 U.S. at 74 (Harlan, J., concurring)); see also *Boumediene v. Bush*, 128 S. Ct. 2229, 2255 (2008).

188. *Boumediene*, 128 S. Ct. at 2258.

189. *Id.* at 2255.

190. *Verdugo-Urquidez*, 494 U.S. at 275 (Kennedy, J., concurring).

for Justice Kennedy were he to examine Zoya's case would be her lack of prior substantial connections.¹⁹¹

Reasonable minds may differ about the result to which a judgment of impracticality and anomaly would lead *if the inquiry were with regard to the merits of Zoya's takings claim*. But the question cannot be answered with any fidelity to this functional approach solely by a limited, *jurisdictional* inquiry into the degree of connection between the plaintiff and the United States. Such an inquiry into Zoya's standing (which would consider no other "objective factors and practical concerns" beyond her personal connection) would seem to have much more in common with the "formalism" that Justice Kennedy rejected in *Boumediene*. At the very least, therefore, the narrow question of Zoya's prior substantial connections should not lead a court to deny her standing to sue. Perhaps it should be one of many considerations in assessing the *merits* of her cause of action. Surely the more straightforward and consistent approach would be to dismiss the suit for failure to state a *claim* upon which relief can be granted rather than for being the wrong kind of *plaintiff*.

3. . . . Nor By Social Compact

At first glance, the intermediate approach of the social compact theory would seem to offer the best support for a standing exercise that assesses a plaintiff's prior substantial connections to determine whether the court should hear her claims of constitutional injury abroad. After all, this theory is based on a conception of the Constitution as an agreement about governance over a definable population, and a substantial-connections test seems well suited to defining that very population deemed to have assented to be governed under those rules.

This social compact theory, too, ultimately falls short. It does so for much the same reason that it cannot support the substantial-connections test in its original, merits-focused form, for there exists a class of government conduct that "shocks the conscience." Such conduct is so shocking that, even absent such contacts, proponents of this theory would not only agree

191. It is unclear how Justice Kennedy would approach Zoya's case. Since her petition for a writ of certiorari was denied without any opinion by Justice Kennedy or other members of the Court, one is left to pure speculation.

On the one hand, Justice Kennedy did join Chief Justice Rehnquist's plurality opinion in *Verdugo-Urquidez*, saying that his views did not "depart in fundamental respects from the opinion of the Court, which I join." *Id.* In addition to his application of the "impracticable and anomalous" standard, Justice Kennedy went out of his way to note his acceptance of "the other persuasive justifications stated by the Court." *Id.* at 278. Presumably, this included *Verdugo-Urquidez's* lack of any prior substantial connections to the United States, no less a "condition[] and consideration[]" that could render a warrant requirement impracticable and anomalous in this context, even without placing "any weight on the reference to 'the people' in the Fourth Amendment as a source of restricting its protections." *Id.* at 276, 278.

On the other hand, *Verdugo-Urquidez* was decided on the merits. Even if Justice Kennedy considered the property owner's connection to the United States to be relevant in determining the extraterritorial application of the Takings Clause, there is no indication that Justice Kennedy would apply that reasoning in a *jurisdictional* inquiry into the plaintiff's standing.

that the Constitution forbids it but also that it necessarily permits (in fact promotes as a means of redress) a civil action to be heard on the merits.

Conduct so shocking to the conscience is said to violate due process of law.¹⁹² This was almost certainly the point of the hypothetical raised by Justice O'Connor during oral argument in *United States v. Verdugo-Urquidez*.¹⁹³ The question led the Government to argue that a domestically applied "shocks the conscience" standard of substantive due process would enforce limits on what American officials could do abroad to obtain admissible evidence in criminal prosecutions back in the United States. This admission by Assistant Solicitor General Robbins in *Verdugo-Urquidez* was confined to the context of the exclusionary rule.

This logic is hardly confinable to the admission of evidence in a criminal trial. Although it is well established that courts are not barred from presiding over a prosecution enabled by the "forcible abduction" of the defendant into its jurisdiction (the so-called *Ker-Frisbie* Doctrine),¹⁹⁴ a narrow exception exists for conduct that passes the *Rochin* "shocks the conscience" standard.¹⁹⁵ In *United States v. Toscanino*, the Second Circuit heard a horrifying account of the kidnapping, torture, and transport into the United States of an Italian citizen living in Uruguay by American agents who suspected him of drug trafficking.¹⁹⁶ The United States refused to either affirm or deny

192. *Rochin v. California*, 342 U.S. 165, 172 (1952).

193. See *supra* text accompanying notes 88–92.

194. *Frisbie v. Collins*, 342 U.S. 519, 522 (1952) ("[T]he power of a court to try a person for crime is not impaired by the fact that he had been brought within the court's jurisdiction by reason of a 'forcible abduction.'" (citing *Ker v. Illinois*, 119 U.S. 436, 444 (1886))). Shirley Collins alleged that he was "forcibly seized, handcuffed, blackjacked and [taken]" from his home in Chicago by Michigan officers for prosecution in Michigan. *Frisbie*, 342 U.S. at 520. Frederick Ker alleged that he was "kidnaped [sic] . . . [and] forcibly and with violence arrested" by an American official in Lima, Peru, and then kept a "close prisoner" on board ships bound first for Honolulu, then to San Francisco, and then transferred to Cook County, Illinois, for prosecution. *Ker*, 119 U.S. at 438.

195. It should be noted that this exception can also give pause even to those who lean towards the more restrictive, territorial conception of the limits of the Constitution. Professor Geoffrey S. Corn says "with qualification" that the Fifth Amendment's Due Process Clause has no extraterritorial application, citing *Johnson v. Eisentrager* and *United States v. Verdugo-Urquidez*. *Ten Questions on National Security*, 34 WM. MITCHELL L. REV. 5007, 5011 (2008). The qualification is drawn from the "shocks the conscience" exception to the *Ker-Frisbie* Doctrine described above. *Id.* "These authorities," Professor Corn writes, "all indicate that individual constitutional protections are fundamentally linked to nationality or territoriality." *Id.* But this theory of the Constitution is at odds with the theory that supports the exception. The "shocks the conscience" exception to the *Ker-Frisbie* Doctrine that is derived from *Rochin v. California* is based on an entirely different theory. To believe that the conduct of U.S. officials abroad could so shock the judicial conscience at home that a court would find a deprivation of due process is to affirm that the Constitution *does not* always have a territorial limit. On the contrary, it is to say that the Constitution may be a source of, and a limit on, power for U.S. officials regardless of where in the world that power is exercised for it cannot be exercised in a way that would shock an Article III court.

196. 500 F.2d 267, 268–71 (2d Cir. 1974). Toscanino alleged that over a seventeen-day period he was denied sleep and nourishment, forced to walk for seven to eight hours at a time, kicked and beaten, and hurt by pliers applied to his fingers, alcohol flushed into his eyes and nose, other fluids forced into his anus, and electric shocks applied to his earlobes, toes, and genitals. *Toscanino*, 500 F.2d at 270. Toscanino alleged that "[t]hroughout this entire period the United States government and the United States Attorney for the Eastern District of New York prosecuting this case was aware of the interrogation and did in fact receive reports as to its progress." *Id.*

Toscanino's allegations, arguing that they were immaterial to the legal question of the court's jurisdiction over his prosecution.¹⁹⁷ In an opinion often distinguished but never overruled, the Second Circuit held that the Constitution's protection of due process of law required that "a court [] divest itself of jurisdiction over the person of a defendant where it has been acquired as the result of the government's deliberate, unnecessary and unreasonable invasion of the accused's constitutional rights."¹⁹⁸ The court was uninterested in the citizenship of the defendant, the locus of the torture done by American agents and supervised by distant U.S. officials, or the substantiality of the defendant's prior connections.¹⁹⁹

The Court of Appeals for the Seventh Circuit applied that same logic to civil actions in the course of rejecting a petition for habeas corpus just days before *Verdugo-Urquidez* was decided.²⁰⁰ In *Matta-Ballesteros v. Henman*, the petitioner was a Honduran citizen who had escaped from an American prison camp and fled to Honduras (which did not extradite its citizens).²⁰¹ He alleged that he was kidnapped by U.S. marshals (working in tandem with Honduran special forces) and tortured by the American officials. The court ultimately denied habeas relief to the returned fugitive. More significantly from the standpoint of the social compact theory, the court assumed that *Matta-Ballesteros* could file a *Bivens* action "alleging violation of his due process rights."²⁰² The court explicitly took no position on the merits of such a claim, but certainly assumed that *Matta-Ballesteros* would have standing to pursue it in a U.S. court. In fact, in another appeal five years later in the Ninth Circuit by the same defendant, the Government itself suggested in its brief to the court that "[o]ther remedies, such as a damages action under [*Bivens*] are the exclusive means of redress" for the kidnapping and torture that *Matta-Ballesteros* continued to allege.²⁰³

Thus, when a noncitizen outside the United States is the victim of such conduct at the hands of U.S. officials, a civil suit is possible, substantial connection to the polity or no. This would be a cruel admission by courts and government if (without ever saying so, before or after *Verdugo-Urquidez*) these courts and officials expected that a filter based on prior substantial

197. *Id.*

198. *Id.* at 275.

199. This is clear in light of the court's deep interest in examining that question with regard to Toscanino's claim of unlawful wiretapping. *Id.* at 279–81.

200. *Matta-Ballesteros v. Henman*, 896 F.2d 255, 262 (7th Cir. 1990). This case was decided on February 21, 1990. The opinion in *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990), was announced on February 28, 1990.

201. 896 F.2d at 256.

202. *Id.* at 262.

203. Brief for the United States at 20, *United States v. Matta-Ballesteros*, 71 F.3d 754 (9th Cir. 1995) (No. 91-50336); see also *Matta-Ballesteros*, 71 F.3d at 765 n.6 ("As the government suggests, the availability of civil damages may be a sufficient remedy for the misconduct alleged by *Matta-Ballesteros*." (citing *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 397 (1971))).

connections could screen such claims. This exception would then swallow the rule. But if such a suit is possible, then the Constitution is either no longer a social compact with a defined people, or it is one in which the people have compacted to extend its protections against conscience-shocking (and thus unconstitutional) conduct by its agents abroad.

Seen in historical context, this result should not be particularly surprising. Over and over again, one question has repeatedly been raised in the face of arguments that the Constitution's reach should be restricted, whether by territoriality, citizenship, social compact, or other limiting criteria. The question invariably asks whether an extreme act (usually one of violence) may be committed by the government against the outsider. In his report on the Virginia Resolutions against the Alien and Sedition Acts (in that case concerning the alien *within* the United States), James Madison complained that: "If aliens had no rights under the Constitution, they might not only be banished, but even capitally punished, without a jury or the other incidents to a fair trial."²⁰⁴

Two hundred years later, Justice John Paul Stevens asked the same question at oral argument in *Clark v. Martinez*.²⁰⁵ In that case, the Supreme Court was confronted with the indefinite detention of two Mariel Cubans. The case turned on an interpretation of immigration statutes, but Justice Stevens left the Deputy Solicitor General speechless in an exchange about the extraterritorial reach of the Constitution:

JUSTICE STEVENS: Mr. Kneedler, can I ask you a question, forgetting the statutes for a moment—I—which we've already covered at some length? Just going to your constitutional position, it's clear that a person who's not been admitted and has been paroled could be excluded forthwith, summarily, and so forth because he's never been admitted. But does that person have any protection under the Constitution? Could we shoot him?

[DEP. SG] KNEEDLER: No, no, surely. What—the—the—

JUSTICE STEVENS: Then what is the protection under the Constitution that deals—is it the Due Process Clause?

MR. KNEEDLER: Whatever right—in—in a criminal prosecution the Bill of Rights would apply to that person.

JUSTICE STEVENS: Is he—is he a person within the meaning—

MR. KNEEDLER: Yes. We—our position is not that he's—not that he's not a person. The question is what—is what process is due.

204. Neuman, *supra* note 1, at 935–36 (quoting Madison's Report on the Virginia Resolutions, reprinted in 4 DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787, at 546 (Jonathan Elliot ed., 2d ed. 1836)).

205. 543 U.S. 371 (2005).

JUSTICE STEVENS: And is he a person who has a right to liberty, entitled to some protection, very, very, very minimal, but there is some protection to that—that individual.

MR. KNEEDLER: It—depending upon the context. The one protection for liberty he does—

JUSTICE STEVENS: Well, the context is he got off a boat. We couldn't—but Cuba won't take him back or—or whatever—wherever he came from. They can't. And the only thing we can do to keep him out of the country is to keep him in jail.

MR. KNEEDLER: He has no substantive due process right to be released into the United States.

JUSTICE STEVENS: He—he doesn't have a right to be released. But—but you do not contend that we could kill him.

MR. KNEEDLER: No, absolutely not. Absolutely not.²⁰⁶

But why not? Mr. Kneedler never provided a constitutional source of support for his answer to Justice Stevens's question.

Why was it so difficult to state the source of this person's constitutional protection? There is something strange in the repeated difficulties that such a simple question has presented over time.²⁰⁷ Suppose, for instance, that upon hearing Zoya complain about the seizure of her property, a deranged clerk at the American embassy summarily seized, tortured, and executed her. Would Zoya's survivors have any civil remedy for such an act in an American court? As shown above, courts and government officials have both said yes. What meaning could that possibly have if such a lawsuit, once filed, were to be dismissed for lack of prudential standing?

B. Two Remaining Concerns

If the preceding analysis persuades the reader to question the legitimacy of a prior substantial-connections test for prudential standing, two remaining concerns might nevertheless prevent the reader from supporting its

206. Transcript of Oral Argument at 23–25, *Clark*, 543 U.S. 371 (No. 03-878).

207. Although the context was the question of extraconstitutional executive authority instead of extraterritorial constitutional reach, a high-ranking official of the Justice Department was tongue-tied by just such a question in the *Steel Seizure* case. Judge David A. Pine of the United States District Court for the District of Columbia caught Assistant Attorney General Holmes Baldrige flat-footed during an injunction hearing that ultimately led to the Supreme Court's landmark decision in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). After AAG Baldrige asserted that "there is no power in the Courts to restrain the President" with an injunctive order, Judge Pine asked what recourse Baldrige would have from a presidential order that he be arrested and executed the following day. As Maeva Marcus summarized: "Baldrige floundered for an answer until Judge Pine observed: 'On the question of the deprivation of your rights you have the Fifth Amendment; that is what protects you.'" MAEVA MARCUS, *TRUMAN AND THE STEEL SEIZURE CASE: THE LIMITS OF PRESIDENTIAL POWER* 117 (Duke Univ. Press 1994) (1971).

abolition. The first concern may be that court dockets will be overwhelmed by foreign litigants if this discretionary key to access is taken away from judges. The second concern queries what limits, if any, should be placed on litigation that (unlike Zoya's case) implicates government action taken in pursuit of national security.

These concerns, by no means unique to this context, are addressed in conclusion. Neither concern justifies retaining a test at war with both standing doctrine and constitutional theory. Furthermore, there are hidden benefits to the transparency promoted by getting rid of the substantial-connections test.

1. *The Problem of Court Clog*

The first concern is the easiest to set to rest. Whenever a proposal to expand access to courts and tribunals is made, the first criticism is often a practical one: the "the oft-expressed fear that a 'host of parties' will descend upon it and render its dockets 'clogged' and 'unworkable.'"²⁰⁸ It is clearly the prospect of such litigation that has worried the Supreme Court when confronted with extraterritorial claims in the past.²⁰⁹

The argument is practically self-refuting. The answer to the threat of court clog is not to create an arbitrary device to exclude plaintiffs with legitimate claims. The answer is to expand the capacity of courts. In any event, it is hard to see how the criticism has any traction: whether the motion to dismiss is for lack of standing or for some other reason, the motion will be submitted and must be decided. A fact-intensive inquiry into the substantiality of connections does not lend itself to quick disposition.²¹⁰

Indeed, anyone with a genuine fear that foreign litigants would overwhelm American courts should welcome the end of this strange standing test, for once it is removed courts will increasingly reach the merits of extraterritorial claims. Some clauses of the Constitution may be held to extend beyond our shores while others will be held to have only domestic application. Whatever the conclusion of the courts, those merits-based decisions will have the effect of decreasing some foreign litigation, expediting judicial review of other foreign claims, or they may have no more or less effect than the present system. This is so because this case law will inform litigants whether going to court is likely to be worth the expense. Such case law

208. *Office of Commc'n of United Church of Christ v. FCC*, 359 F.2d 994, 1004 (D.C. Cir. 1966).

209. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 274 (1990) ("Were respondent to prevail, aliens with no attachment to this country might well bring actions for damages to remedy claimed violations of the Fourth Amendment in foreign countries or in international waters.").

210. Economic realities, especially salient in long-distance litigation, may be an independent dampener. *Office of Commc'n*, 359 F.2d at 1006 ("The fears of regulatory agencies that their processes will be inundated by expansion of standing criteria are rarely borne out. Always a restraining factor is the expense of participation in the administrative process, an economic reality which will operate to limit the number of those who will seek participation; legal and related expenses of administrative proceedings are such that even those with large economic interests find the costs burdensome.").

would also presumably have a valuable informative effect on prospective government action. If, for example, the Takings Clause is held not to extend to the claims of noncitizen plaintiffs regarding property abroad, then courts will quickly be able to dismiss such claims without any need for further inquiry. If the opposite conclusion is reached, one would expect greater respect to be shown by American officials for the property interests of aliens abroad, respect born out of knowledge that constitutional liability might result from their decisions. Isn't that what we mean when we say that rules affect behavior?

Might a decision on the merits that the Takings Clause extends to foreign-owned property abroad result in the filing of more claims? Perhaps. But it seems unlikely that that number could be so much greater than the number of claims filed when nobody knows—because so few pass through the sieve of a prudential-standing doctrine exercised at the discretion of a changing cohort of judges—what the merits of the claim actually are.

2. The Problem of "Exceptional" Litigation

The second concern implicates the current global fight against terrorism. If the arguments above have been persuasive, what are their limits? I have already implicitly restricted the discussion by my frequent reference to foreign citizens in or of nations at peace with the United States. It is not the intention of this Article to address questions currently resolved under international humanitarian law a.k.a. laws of war. And there already exists an extensive body of law that describes the role of federal courts when asked to resolve claims filed by citizens of states with which we are at war or that truly implicate the conventional military actions or foreign relations of the United States.²¹¹ My inquiry has been limited to what might be termed "unexceptional" litigation, the most obvious example of which is the taking of private property for public use at a civilian government installation abroad.

The problem, of course, is that the line between unexceptional and exceptional civil litigation was blurred at the start of the twenty-first century. There is no reason to think that clarity will be restored to that dividing line any time soon. Would foreign citizens in or from nations allied with the United States who allege that they have been abducted or tortured by American officials acting abroad to fight the so-called War on Terror now have standing to sue for their claimed constitutional injuries?²¹² Consider a

211. See, e.g., Trading with the Enemy Act, ch. 106, § 7(b), 40 Stat. 411, 417 (1917) (codified as amended at 50 U.S.C. § 7(b) (2006)); *Ex parte Kumezo Kawato*, 317 U.S. 69, 75 (1942) ("The ancient rule against suits by resident alien enemies has survived only so far as necessary to prevent use of the courts to accomplish a purpose which might hamper our own war efforts or give aid to the enemy. This may be taken as the sound principle of the common law today.").

212. On his second full day in office, President Obama signed an Executive Order entitled "Ensuring Lawful Interrogations" that revoked his predecessor's Executive Order 13,440. Exec. Order No. 13,491, 74 Fed. Reg. 4893 (Jan. 27, 2009). President Bush's order set forth his administration's view of the domestic and international law that would apply to a "program of detention

new hypothetical in which the alleged harm is to Zoya herself, not her café:

U.S. officials believe that Zoya, a citizen and resident of a foreign nation at peace with the United States, possesses important intelligence information about a suspected imminent terrorist attack. Zoya is not suspected of any crime and is not herself considered to be a threat to national security. Zoya is seized by American agents and sent to an allied state for coercive interrogation by United States officials. Should Zoya be entitled to damages for the deprivation of her liberty without due process of law?

Zoya has no substantial voluntary connection to the United States. But she has experienced a substantial *involuntary* connection—seizure of her person abroad by American officials. Should the rule be the same for such a *Bivens* action as for a takings claim under the Fifth Amendment? It is black-letter law that the president of the United States “may not authorize the conduct of a covert action by departments, agencies, or entities of the United States Government . . . that would violate the Constitution or any statute of the United States.”²¹³ To decide the *Bivens* claim, therefore, we must know the extraterritorial application of the Constitution in this circumstance.²¹⁴ To reach the merits, Zoya must establish standing to sue.

To frame the question properly, a certain inherent inequality should be noted at the outset. Questions of standing do not inhibit the United States when it seeks to expose foreign citizens abroad to liability under U.S. criminal or civil laws for the simple reason that criminal and civil defen-

and interrogation operated by the Central Intelligence Agency.” Exec. Order 13,440, 72 Fed. Reg. 40,707, 40,708 (Jul. 24, 2007). It was a program of broad scope and reach. *Id.*

President Obama ordered the CIA to close “as expeditiously as possible any detention facilities that it currently operates and shall not operate any such detention facility in the future.” Exec. Order No. 13,491, 74 Fed. Reg. 4893, 4894 (Jan. 27, 2009). Tucked into the definition section of the order, however, was a crucial exception. The order, by its terms, exempted from its sweep any facilities “used only to hold people on a short-term, transitory basis.” *Id.* at 4893. In other words, extraordinary rendition was not a program covered by this executive order. Greg Miller, *CIA Retains Power to Abduct*, L.A. TIMES, Feb. 1, 2009, at A1 (“Obviously you need to preserve some tools—you still have to go after the bad guys,” said an Obama Administration official, speaking on condition of anonymity when discussing the legal reasoning. “The legal advisors working on this looked at rendition. It is controversial in some circles and kicked up a big storm in Europe. But if done within certain parameters, it is an acceptable practice.”).

213. 50 U.S.C. § 413b(a). The same applies to intelligence activities. *See* Exec. Order No. 12,333, 46 Fed. Reg. 59,941, 59,952 (Dec. 8, 1981) (“Nothing in this Order shall be construed to authorize any activity in violation of the Constitution or statutes of the United States.”). The order also prohibits human experimentation, assassination, and indirect participation in prohibited activities. *Id.*

214. Sitting en banc, the Second Circuit recently held, inter alia, that extraordinary rendition is a “new context” that presents “special factors counseling hesitation” to extend a *Bivens* cause of action, and declined to do so. *Arar v. Ashcroft*, 585 F.3d 559, 563 (2d Cir. 2009). The future of this holding is uncertain. The court was split 7-4, with strong dissents against this portion of the opinion. The court was also deprived of the opinion of then-Judge Sotomayor, who participated in oral argument but was elevated to the Supreme Court before the appeal was decided. As of this writing, the time for petitioning the Supreme Court for review on certiorari had not expired. *See* Sup. Ct. R. 13.1.

dants are not plaintiffs (and thus need not demonstrate standing to sue).²¹⁵ Foreigners on foreign-flagged vessels in international waters may be hauled into American courts on drug charges.²¹⁶ In fact, the criminal statute expressly states that the person charged “does not have standing to raise a claim of failure to comply with international law as a basis for a defense.”²¹⁷ As Justice Brennan noted in his dissenting opinion in *Verdugo-Urquidez*, “foreign nationals must abide by our laws even when in their own countries,” citing federal criminal, antitrust, and securities laws.²¹⁸

Should the requirement that a would-be plaintiff have substantial voluntary connections to the United States in order to be heard in our courts be a one-way ratchet applicable only to dismiss claims against the United States but not an impediment to foreign application of our law? In an important article published eighteen years ago in the *Yale Law Journal*, Gerald Neuman examined arguments about extraterritoriality in the immediate aftermath of *Verdugo-Urquidez* and asked where the Constitution could be said to “end.”²¹⁹ He argued forcefully for extending constitutional protections “to aliens outside United States territory *only* in those circumstances in which the United States seeks to impose obligations upon them under United States law.”²²⁰

That public law answer to the challenge of *Verdugo-Urquidez* was a powerful argument when the prior substantial-connections test was used to determine the merits of a constitutional claim. But it is now incomplete in a world in which *Verdugo-Urquidez* has been wrenched from its public law foundations (where such a municipal-law approach might make sense) to create a judicial gate-keeping power over private law matters. It now is used to deny foreign plaintiffs access to American courts to complain not of public law obligations imposed upon them under U.S. law, but of injuries caused them by (as they seek to claim) unconstitutional state action.

The circularity of the substantial-connections approach is matched only by its pointlessness: why deny a forum to litigants who possess constitutional standing to argue that an American official has exceeded her

215. Although questions of standing do not inhibit such jurisdiction, questions of due process may well place limits on the “extraterritorial application of U.S. prescriptive jurisdiction,” as my colleague Anthony Colangelo authoritatively details. See Anthony J. Colangelo, *Constitutional Limits on Extraterritorial Jurisdiction: Terrorism and the Intersection of National and International Law*, 48 HARV. INT’L L. J. 121, 123, 162–65 (2007).

216. See Maritime Drug Law Enforcement Act, 46 U.S.C. §§ 70501–70507 (2006); see also *United States v. Garcia*, 182 F. App’x 873 (11th Cir. 2006). This is permitted under what is known as the “protective principle” in international law, which permits states to assert universal jurisdiction over certain crimes. This law considers foreign-flagged vessels to be subject to U.S. jurisdiction if the foreign government consents to or waives objection to enforcement of the statute against its national. 46 U.S.C. § 70502(c)(1)(C).

217. 46 U.S.C. § 70505.

218. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 280 (1990) (Brennan, J., dissenting).

219. Neuman, *supra* note 1.

220. *Id.* at 919. Or, as Neuman expresses the idea later in the article, “when the United States asserts an alien’s obligation to comply with American law, the alien is presumptively entitled *pro hac vice* to all constitutional rights.” *Id.* at 978.

constitutional authority? Given the ample mechanisms available in law to dismiss genuinely ill-founded claims, as well as claims that are deemed contrary to constitutionally established preferences for nonjudicial resolution (such as the nonjusticiability of certain otherwise valid questions,²²¹ or the application of a state-secrets exception,²²² or perhaps the existence of “special factors counselling hesitation” that would preclude a *Bivens* action²²³), this approach should be rejected.

Return now to Zoya’s hypothetical abduction to see how this might play out. Zoya may well be able to draft a plausible complaint that meets the recently heightened pleading standards.²²⁴ With regard to allegations against high-level officials, she might even manage to satisfy the requirements of *Ashcroft v. Iqbal*.²²⁵ If she can do that, there is little reason to doubt that she could satisfactorily allege an actual injury, fairly traceable to the defendant and redressible by the court. In other words, she would have satisfied all that the Constitution and the rules of civil procedure require of her to access a federal court. Perhaps she could survive a motion to dismiss her complaint on other justiciability grounds, such as for presenting a political question. And, maybe—just maybe—Zoya’s complaint could pass unscathed through a government motion to dismiss based on assertion of the state-secrets privilege.

Having evaded each pleading obstacle and cleared each hurdle to reach an Article III court, can it really be that *prudence* dictates that Zoya’s constitutional claim should be dismissed on jurisdictional grounds and thus never decided on its legal or factual merits? What is prudent about leaving such an important constitutional issue perennially undecided?

There is also a practical benefit to requiring motions on all of these other grounds (rather than the easier motion to dismiss for lack of a prior substantial connection) that should not be overlooked. There is a benefit to making the state prove its case. Not every action by the U.S. Government abroad implicates the foreign relations of the United States in a way that a court would understand the matter to sound as a political question, not a judicial one. As Justice Brennan noted in his dissent in *Verdugo-Urquidez*, the constitutional value at stake was the “assurance of neutrality” in the protection provided by a “neutral and detached magistrate” against governmental action.²²⁶ No more and no less is provided by rejecting the prior substantial-connections test of standing.

221. *Baker v. Carr*, 369 U.S. 186, 211–12 (1962) (describing application of political question doctrine to issues concerning foreign relations).

222. *United States v. Reynolds*, 345 U.S. 1 (1953) (establishing state-secrets doctrine).

223. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 396 (1971); *Arar v. Ashcroft*, 585 F.3d 559, 573–81 (2d Cir. 2009).

224. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007).

225. 129 S. Ct. 1937, 1952 (2009).

226. 494 U.S. 259, 294–95 (1990) (Brennan, J., dissenting) (quoting, in part, Justice Jackson’s opinion for the Court in *Johnson v. United States*, 333 U.S. 10, 13–14 (1948)).

Judge Weinstein, in his Cardozo lecture, identified this benefit from a different perspective: the transparency necessary to hold officials accountable. In notes to his public lecture he wrote: "Expansion of this door-closing doctrine has the secondary effect of violating one of the essentials of our form of government: transparency If the people cannot discover what is going on in our government through litigation, how can they control officials?"²²⁷

The benefits of this transparency are not just that the public might hear allegations from plaintiffs (of varying degrees of credibility) against their government for actions done in their name. Removing this prudential barrier to decisions on the merits has a valuable effect on lawyers, especially those advising or later representing the government defendant. As one scholar noted in a context far removed from our current crises: "There is a terrible tendency on the part of lawyers—including executive branch lawyers—to equate the absence of standing to challenge some government action with *lawful authority* to engage in such action. . . . Where there is (and can be) no decisional law, there is thought to be no law."²²⁸

Professor Kermit Roosevelt described this effect more starkly in remarks published from his Donahue Lecture at Suffolk University Law School. Roosevelt described the infamous "torture memos" produced by the Office of Legal Counsel in order to note the value in preventing strategic behavior designed to avoid legal constraint in the interpretation of the Constitution. These memoranda, like the selection of Guantánamo Bay to house detainees out of the (later proven to be mistaken) belief that this was a place beyond the jurisdiction of federal courts, treat the Constitution "the way aggressive lawyers treat the tax code, as an annoyance to be evaded."²²⁹ He continued:

Under this approach, the Constitution must be followed, if you cannot figure out how to get around it, but is not of any normative significance. Guantánamo is also in fact much like a tax shelter, something created solely to circumvent the law. But using clever constructs to avoid tax liability is one thing; using them to evade the Constitution is another. Constitutional prohibitions on brutal or shocking conduct reflect a moral judgment that there are some tactics our government must refrain from using on individuals. This moral judgment is not altered by the location

227. Weinstein, *supra* note 11, at 62. Although Judge Weinstein's remarks were focused on defending "the People's" access to courts, his reasoning regarding transparency is equally applicable to access by aliens with claims against the United States, for their suits will promote transparency no less than suits by citizens. Criticizing the political question doctrine in remarks immediately following his comments on standing, Judge Weinstein gave the example of his judicial experience in the Agent Orange litigation brought by Vietnamese nationals. Rejecting the doctrine in that context, even as to the rights of noncitizens, Judge Weinstein wrote: "'A categorical rule of non-justiciability because of possible interference with executive power, even in times of war,' does not exist." *Id.* at 238.

228. Michael Stokes Paulsen, *Is Lloyd Bentsen Unconstitutional?*, 46 STAN. L. REV. 907, 916 (1994).

229. Kermit Roosevelt III, *Detention and Interrogation in the Post-9/11 World*, 42 SUFFOLK U. L. REV. 1, 29 (2008).

of such acts and eluding the reach of the prohibition does nothing to make the conduct less offensive. Treating the Constitution like the tax code disrespects it and to the extent that the Constitution is a charter of American values, it disrespects those values.²³⁰

When there is little expectation that those directly affected by one's decisions will be in a position to contest them, decisionmaking loses an important constraint. That constraint is not diminished by the likelihood of success on the merits. There is a value to that constraint even when the ultimate outcome to a constitutional challenge will be a holding that the constitutional clause in question finds no extraterritorial purchase whatsoever in the circumstances presented by the ultimately unsuccessful plaintiff. Notice has been served. The public is aware (both the domestic public, capable of a political response, and the foreign public, whose political influence is less direct but in some cases no less real). All of those affected by the reach of the Constitution are better off for the development of case law on the question by thoughtful judges considering the positions of zealous advocates.

CONCLUSION

This Article argues that the substantial-connections test, and the prudential-standing analysis that rests on it, should be rejected. Removing this judicially imposed filter will neither open floodgates of foreign litigation nor deny the executive branch constitutional tools for the conduct of the nation's foreign affairs and protection of national security.

Testing a plaintiff's prudential standing to sue on the basis of her prior substantial connection to the United States promotes none of the values that the judge-made doctrine of prudential standing was designed to serve. At its best, prudential standing serves a valuable role in promoting judicial self-restraint. But judicial reluctance to determine the constitutional rights of litigants does not further those principles. Rather, it imprudently abdicates an important judicial role in defining the limits of state power.

Such a test is also detached from any firm constitutional foundation. One might view the Constitution as a document that governs a particular territory, a particular people, or as a document that must be interpreted with a certain pragmatism necessary to govern in a complex and dangerous world. Assessing the prior substantial connection of foreign plaintiffs to the United States does not cohere with any of those views. If anything, it obscures them.

The question "When should the Constitution follow the flag?" is not as simple a question to answer as it is to ask. Answers have always varied based on who has asked the question, in what historical context it is asked, and which clauses are considered for application abroad. The contingent nature of the question might make categorical answers nearly impossible. But whatever those answers might be, and this Article does not purport to

230. *Id.*

say what they are, it is of paramount importance that a judicial forum remain open to those whose injuries make asking the question more than just an academic exercise. A discretionary standing test that excludes those best placed to ask this very question has no place in our republic.

Zoya alleged that she was injured by the United States. She therefore sought her remedy in the courts of the country that she thought had injured her. Her constitutional claim might have merit and it might not. But Zoya is entitled to an answer beyond the one this prudential test of standing gives to her: "We choose not to hear you." Whatever answer Zoya might expect from courts in Uzbekistan, she should not hear that one from a court of the United States.

