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The Contested "Bright Line" of Territorial Presence Symposium: Essays

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THE CONTESTED "BRIGHT LINE" OF TERRITORIAL PRESENCE

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For this symposium on "Immigrants and the First Amendment," this Essay considers the current scope of First Amendment protection for noncitizens abroad. Courts have interpreted the constitutional rights of noncitizens to vary with factors including status, ties, and location. But in a recent case, Agency for International Development v. Alliance for Open Society International, *the Supreme Court announced that the First Amendment simply does not apply to noncitizens abroad. This Essay considers this new rule and its implications, concluding that a bright-line rule based on territorial presence masks more complex questions about the meaning of "here" and "abroad."*

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TABLE OF CONTENTS

I. INTRODUCTION

What protection does the First Amendment afford noncitizens abroad? None, according to a recent Supreme Court decision, *Agency for International Development v. Alliance for Open Society International* (*AOSI II*).[1] For this symposium on "Immigration and the First Amendment," this Essay considers the Supreme Court's new bright-line rule limiting constitutional protection for noncitizens abroad. It first considers the key determinants of immigrants' rights–status, connection to the United States, and territorial presence. It then evaluates the Court's bright-line rule limiting the First Amendment abroad with respect to noncitizens, finding that conclusion to be neither necessary nor inevitable under key precedents. Finally, it explores how this rule might falter in practice, demonstrating that geographic judgments of "here" and "abroad" remain contested. This Essay ultimately calls for less reliance on the purported "bright line" of the border and greater attention to the interconnectedness of citizen and noncitizen First Amendment rights.

II. STATUS, CONNECTION, AND TERRITORIAL PRESENCE IN IMMIGRANTS' RIGHTS JURISPRUDENCE

The Constitution protects some noncitizens some of the time.[2] In her important essay synthesizing immigrants' rights jurisprudence in three areas—Equal Protection, Due Process, and the Fourth Amendment—Judge Karen Nelson Moore analyzes the roles of an immigrant's status,[3] ties to the United States,[4] and territorial

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[1] *See* 140 S. Ct. 2082, 2086 (2020) ("[T]he Court has not allowed foreign citizens outside the United States or such U.S. territory to assert rights under the U.S. Constitution.").

[2] *See* Karen Nelson Moore, *Aliens and the Constitution*, 88 N.Y.U. L. REV. 801, 803–04 (2013) (stating that the rights afforded to aliens "var[y] with the closeness of their ties to this country").

[3] *See id.* at 877 (noting that the rights of noncitizens unlawfully present within U.S. territory are "in the greatest state of flux").

[4] *See id.* ("[T]here seems to be a deeply ingrained sense that the increasing closeness of an alien's ties with the United States should afford greater entitlement to the Constitution's protections.").

presence[5] in determining noncitizens' rights in these settings. Professor David A. Martin has similarly analyzed modern immigrants' rights jurisprudence, concluding that the Court has taken a "graduated categorical approach to noncitizens' rights."[6] This means that some categories of noncitizens enjoy substantial constitutional protection, whereas others enjoy less, and some are wholly unprotected, depending on certain factors.[7]

Immigrants' rights jurisprudence has evolved in the shadows of a longstanding distinction in immigration law between "excludable" noncitizens and "deportable" ones.[8] Since the nineteenth century, the government regarded "excludable" noncitizens as not yet having effectuated an entry.[9]

In *Shaughnessy v. Mezei*, the Supreme Court affirmed the government's plenary power to detain such noncitizens, even indefinitely.[10] Though screened on U.S. soil at ports of entry and held in detention facilities in places like Ellis Island, the government deemed these noncitizens to be standing on the cusp of entry. This characterization is known as the "entry fiction."[11] Accordingly, these noncitizens could not claim the same protections available to those who had successfully entered.[12] In contrast to excludable noncitizens, deportable noncitizens were those who had

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[5] *See id.* (noting that extraterritorial application of the Constitution often coincides with wartime Executive action, leading to unsettled jurisprudence).

[6] *See* David A. Martin, *Graduated Application of Constitutional Protections for Aliens: The Real Meaning of* Zadvydas v. Davis, 2001 SUP. CT. REV. 47, 48.

[7] *See id.* ("Certain categories of aliens enjoy a strong measure of constitutional protection, while others have reduced protection, and on some issues, it appears, no protection.").

[8] *See id.* at 49 ("The one categorical line that usually receives the most attention, in scholarly commentary and in court decisions . . . is the division between excludable and deportable aliens . . . .").

[9] *See id.* at 52 ("Before 1996, an alien was placed in exclusion proceedings if INS questioned his right to be in the United States during an encounter at the border, whether at a port of entry or through interception before he could accomplish entry away from the inspection station. In contrast, those who had made entry . . . were placed in deportation proceedings whenever their entitlement to remain was put in issue.").

[10] 345 U.S. 206, 215 (1953) ("[W]e do not think that respondent's continued exclusion deprives him of any statutory or constitutional right.").

[11] *See* Martin, *supra* note 6, at 57 (defining "entry fiction" as "the view that a parolee has never entered the country, and so has not graduated into the more favored category reserved under pre-1996 law for those who were deportable").

[12] *See* Martin, *supra* note 6, at 52 ("[E]xcludable aliens could be detained indefinitely, after the order was final . . . deportable aliens could be held only for six months, a period prescribed by statute . . . .").

effectuated an entry. Even recent entrants, including those who had entered illegally,[13] could claim the protection of the Constitution, although this typically yielded minimal protections.[14]

In 1996, Congress replaced the excludable-deportable distinction with a distinction between inadmissible noncitizens and removable ones.[15] Such a move eliminated the advantage that unauthorized entrants enjoyed, as they were previously deemed "deportable" and would now be subjected to the more severe provisions applicable to "inadmissible" noncitizens. Professor Martin notes the lack of clarity as to whether Congress "thought this change might affect the constitutional status of [noncitizens who entered the U.S. without inspection]."[16] Congress further distinguished "arriving" noncitizens from inadmissible noncitizens in the interior, suggesting the enduring importance of the distinction between noncitizens who are inside the United States from those who are outside.[17]

Although immigrants' rights jurisprudence has often featured claims under the Due Process Clause, noncitizens have also claimed protection under the First Amendment.[18] Unlike other provisions of

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[13] *See Shaughnessy*, 345 U.S. at 212 (distinguishing between the due process afforded to "aliens who have once passed through our gates, even illegally" as compared to the different legal status of "an alien on the threshold of initial entry").

[14] *See* Yamataya v. Fisher, 189 U.S. 86, 101 (1903) (recognizing that due process constrains administrative officers who have admitted a noncitizen, even erroneously, from then taking the noncitizen into custody and deporting the noncitizen without an opportunity to be heard); Kwong Hai Chew v. Colding, 344 U.S. 590, 592 (1953) (holding that the Attorney General lacks authority to deny a lawful permanent resident the opportunity to be heard in opposition to an order for permanent exclusion and deportation).

[15] *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIR-IRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546.

[16] Martin, *supra* note 6, at 65.

[17] *See id.* ("Congress chose to subdivide the inadmissible alien category still further, distinguishing 'arriving aliens' (basically those formerly called excludables) from other inadmissibles (basically EWIs).").

[18] For a discussion of key First Amendment cases brought by noncitizens, see Maryam Kamali Miyamoto, *The First Amendment After* Reno v. American-Arab Anti-Discrimination Committee: *A Different Bill of Rights for Aliens?*, 35 HARV. C.R.-C.L. L. REV. 183, 185 (2000) (critiquing the "sliding scale" of First Amendment protection based on status and ties given the central role of free speech and association in a democracy); TIMOTHY ZICK, THE COSMOPOLITAN FIRST AMENDMENT 27 (2014) (identifying geography and citizenship as the principal axes upon which First Amendment protection varies). For further related commentary, see Ronald J. Krotoszynski, Jr., *Transborder Speech*, 94 NOTRE DAME L. REV.

the Bill of Rights, which bestow rights on "the people"[19] or "person[s],"[20] the speech and religion clauses of the First Amendment articulate a seemingly structural constraint on the government, at least with respect to restrictions on speech and religious exercise.[21] The First Amendment reads in full: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."[22]

In *Bridges v. Wixon*, the Court considered a habeas petition by a noncitizen, Harry Bridges, whom the government had detained pending deportation.[23] Government officials sought to deport Bridges based on a statute providing for the deportation of noncitizens with a past affiliation to the Communist Party.[24] Here, Bridges had published a newspaper for workers in a labor union that was affiliated with the Communist Party.[25] The Court adopted a narrow conception of affiliation, concluding that Bridges was not deportable.[26] In reaching this conclusion, the Court approvingly

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473, 474 (2018) (arguing that First Amendment protection should not diminish when applied to speech across borders).

[19] *See, e.g.*, U.S. CONST. amends. II, IV.

[20] *See* U.S. CONST. amend. V.

[21] *See* Michael Kagan, *When Immigrants Speak: The Precarious Status of Non-Citizen Speech Under the First Amendment*, 57 B.C. L. REV. 1237, 1248 (2016) (acknowledging that rights of assembly and petitioning the government for redress of grievances apply to "the people," but that the speech and religion clauses are not so limited, noting, "whatever 'the people' refers to, free speech is not one of the rights for which it matters"); *see also* Geoffrey Heeren, *Persons Who Are Not The People: The Changing Rights of Immigrants in the United States*, 44 COLUM. HUM. RTS. L. REV. 367, 378 (2013) (suggesting a distinction between rights of "persons" that accrue based on personhood and rights of "the People" that are contingent on political membership).

[22] U.S. CONST. amend. I.

[23] 326 U.S. 135, 137–138 (1945).

[24] *See id.* at 138–39 (differentiating the prior statute, which required *present* membership or affiliation, and the 1940 amendments, which identified membership or affiliation "at the time of entering the United States" or "at any time thereafter," as sufficient grounds for deportation).

[25] *See id.* at 145 (noting that Bridges "sponsored" and "was responsible" for the publication of the Waterfront Worker, a publication associated with a union that was found to be a Communist organization).

[26] *See id.* at 156 (finding that Bridges's "sympathy" with the Communist Party was insufficient for deportation).

quoted the hearing examiner's analysis that "'affiliation' implies a 'stronger bond' than 'association;'" it means "less than membership but more than sympathy."[27]

The majority's narrow interpretation of the statute made no mention of the First Amendment, but the concurring opinion made the constitutional question plain. According to Justice Murphy, the statute violated the First Amendment.[28] Modern cases demonstrate that noncitizens' First Amendment rights in the U.S. are not equal to citizens' First Amendment rights,[29] but courts recognize some basic protection—even for deportable noncitizens.[30] Longstanding precedents demonstrate that the First Amendment applies, at least to some extent, to noncitizens of various statuses within the United States.[31] Although the First Amendment does not substantially constrain the government's power to exclude noncitizens,[32] the scope of the First Amendment as a constraint on government action not relating to the exclusion or removal of noncitizens has only recently become clear.

III. *AOSI II*'S BRIGHT LINE

In its 2020 decision in *Agency for International Development v. Alliance for Open Society International* (*AOSI II*), the Supreme

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[27] *Id.* at 143.

[28] *See id.* at 160–61 (Murphy, J., concurring) (arguing that Bridges maintained constitutional protections regardless of his citizenship status).

[29] *See* Harisiades v. Shaughnessy, 342 U.S. 580, 591–92 (1952) (holding that a deportable noncitizen had no First Amendment right against deportation based on membership in the Communist Party).

[30] *See* Reno v. Am.-Arab Anti-Discrim. Comm., 525 U.S. 471, 491 (1999) (recognizing that it is possible for discrimination to be "so outrageous" as to require consideration of a constitutional violation); Ragbir v. Homan, 923 F.3d 53, 70–71 (2d Cir. 2019) (noting that allowing efforts to deport a noncitizen based on "the viewpoint of his political speech" and the "public attention it received" would "broadly chill protected speech [among noncitizens and citizens alike]").

[31] *See* Kagan, *supra* note 21, at 1240 (concluding that American courts do at times protect speech of migrants under the First Amendment); Alina Das, *Deportation and Dissent: Protecting the Voices of the Immigrant Rights Movement*, 65 N.Y.L. SCH. L. REV. 225, 241 (2020) (arguing that the First Amendment protects all people regardless of immigration status).

[32] *See* Kleindienst v. Mandel, 408 U.S. 753, 770 (1972) (upholding the government's decision to exclude a Marxist professor because it proffered a "facially legitimate and bona fide reason" for the decision).

Court held that foreign organizations affiliated with American organizations had no First Amendment right to disregard a policy requiring recipients of federal funds to oppose prostitution.[33] Justice Kavanaugh framed the question presented as one of the constitutional rights of foreign entities abroad rather than the constitutional rights of American entities with foreign counterparts.

A. *AOSI II*'S READING OF THE EXTRATERRITORIALITY PRECEDENTS

In *AOSI II*, the Supreme Court considered the constitutionality of a provision of the United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act (Leadership Act), which allocated billions of dollars to American and foreign NGOs to address the spread of HIV/AIDS.[34] Congress limited funding to organizations that explicitly opposed prostitution and sex trafficking, and this restriction became known as the "Policy Requirement."[35]

In a 2013 case also involving Alliance for Open Society International, the Supreme Court had ruled in favor of American NGOs challenging the Policy Requirement on First Amendment grounds.[36] The Court there noted that Congress can impose limits on the use of federal funds that incidentally curb recipients' First Amendment rights, but Congress cannot "reach [speech] outside" the federal program.[37] In this case, however, the Court held that corporate structuring made all the difference. When an American NGO operates in other countries through NGOs incorporated under foreign law, the Policy Requirement does not violate *their* First Amendment rights when applied to their foreign affiliates.[38]

The majority explained that noncitizens "in the United States may enjoy certain constitutional rights," but in its reading, the Court had generally not allowed noncitizens outside of U.S. territory to assert constitutional rights.[39] In reaching this conclusion, the

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[33] *See* 140 S. Ct. 2082, 2086 (2020).

[34] 140 S. Ct. 2082, 2085.

[35] United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003, Pub. L. No. 108-25, 117 Stat. 711.

[36] Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc., 570 U. S. 205, 214 (2013).

[37] *Id.* at 214, 217.

[38] *AOSI II*, 140 S. Ct. at 2087 ("As foreign organizations operating abroad, plaintiffs' foreign affiliates possess no rights under the First Amendment.").

[39] *Id.* at 2086.

Court invoked a post-World War II case, *Johnson v. Eisentrager*.[40] In that case, the Court rejected the right of "enemy aliens" abroad to petition the U.S. courts for a writ of habeas corpus to challenge their detention by U.S. military authorities in a prison controlled by Allied Forces in Germany at the close of the war.[41]

The *Eisentrager* Court offered two rationales. First, noncitizens' presence abroad robbed the federal courts of "power to act."[42] In no instance, the Court noted, had an enemy alien, who at no point had been held in U.S. territory, been afforded a writ of habeas corpus.[43] Had they been, perhaps the Court would have offered a somewhat different analysis of their rights. Second, the wartime context sharpened the distinction between citizens and noncitizens.[44] Noncitizens, after all, escape conscription, compulsory service, and other mobilization efforts that befall citizens during wartime. Because these "enemy aliens" were noncitizens, jurisdiction based on citizenship was unavailable.

As later courts and commentators have noted, however, *Eisentrager* also articulated a sliding scale of constitutional rights based on membership.[45] Justice Jackson, writing for the majority, described the "ascending scale of rights" for noncitizens as they increase their "identity with our society."[46] Lawful presence within the territory created "an implied assurance of safe conduct" and gave certain rights.[47] The deeper the ties, such as when a noncitizen declares the intention to become a citizen, the more those rights expand. The Court further acknowledged noncitizen residents' rights to a full and fair deportation hearing.[48] Accordingly, commentators have questioned whether *Eisentrager* can fairly be

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[40] *Id.* at 2087 (citing Johnson v. Eisentrager, 339 U.S. 763 (1950)).

[41] *Eisentrager*, 339 U.S. 763, 777–78.

[42] *Id.* at 771.

[43] *Id.* at 768.

[44] *Id.* at 768–69 ("[There was a] time when outbreak of war made every enemy national an outlaw . . . . But even by the most magnanimous view, our law does not abolish inherent distinctions recognized throughout the civilized world between citizens and aliens . . . .").

[45] *See, e.g.*, Ibrahim v. Dep't of Homeland Sec., 669 F.3d 983, 995 (9th Cir. 2012); Fatma E. Marouf, *Extraterritorial Rights in Border Enforcement*, 77 WASH. & LEE L. REV. 751, 779 (2020).

[46] *Eisentrager*, 339 U.S. at 770.

[47] *Id.*

[48] *Id.* at 770–71 ("[T]his Court has steadily enlarged [the probationary resident's] right against Executive deportation except upon full and fair hearing.").

read to circumscribe rights based on territory, given the wartime context and this conception of rights varying with membership.[49] One might infer that noncitizens have no rights abroad, but once they enter the United States, they enjoy rights on a sliding scale. But even that inference raises questions. What about noncitizens with substantial connections to the United States who temporarily leave—are their ties a nullity because of their presence overseas at the time when the U.S. government acts upon them? *Eisentrager* does not unequivocally support such a conclusion.

Nonetheless, *Eisentrager*'s dicta centering on territorial presence has lived on. In *United States v. Verdugo-Urquidez*, the Court held that the Fourth Amendment did not apply to the U.S. government's search of a Mexican national's home in Mexico, even though he had been extradited to the United States for prosecution.[50] Verdugo-Urquidez's physical presence in the United States—to stand trial—did not bestow him with constitutional rights because his presence was involuntary, and therefore not indicative of "any substantial connection with our country."[51] In a multifaceted decision, Justice Rehnquist seized on *Eisentrager*'s dicta about territoriality, noting its "emphatic" rejection of the extraterritorial application of the Fifth Amendment.[52] Justice Rehnquist noted the Fifth Amendment's general application to all "persons" and the Fourth Amendment's more circumscribed application to "the people."[53] If the Fifth Amendment did not apply extraterritorially in *Eisentrager*, Justice Rehnquist reasoned, then the Fourth Amendment could not apply extraterritorially given its even more limited scope.[54] The principal reason it did not apply abroad,

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[49] *See* Moore, *supra* note 2, at 827 (noting that the "dual rationale" in *Eisentrager* renders the "exact import and significance of *Eisentrager*'s holding somewhat cryptic"); Marouf, *supra* note 45, at 780 ("While *Eisentrager*'s language suggests that strict territoriality is required for constitutional rights to apply to noncitizens, subsequent decisions clearly rejected that notion, drawing more on the concept of membership that *Eisentrager* described.").

[50] *See* United States v. Verdugo-Urquidez, 494 U.S. 259, 274–75 (1990) ("At the time of the search, he was a citizen and resident of Mexico with no voluntary attachment to the United States, and the place searched was located in Mexico. Under these circumstances, the Fourth Amendment has no application.").

[51] *Id.* at 271.

[52] *Id.* at 269.

[53] *Id.*

[54] *Id.* ("If such is true of the Fifth Amendment . . . it would seem even more true with respect to the Fourth Amendment . . . .").

however, was the practical burden government officials would face if constrained by the Fourth Amendment. Applying the Fourth Amendment to federal government operations abroad would hobble the government's ability to "respond to foreign situations involving our national interest."[55] Complete strangers abroad would clog the federal courts with *Bivens* claims—private rights of action to vindicate constitutional rights. But as Professor Gerald Neuman has observed, it remains unclear why the Fourth Amendment's burdens, on this view, would not preclude extraterritorial application *regardless* of citizenship status.[56] In other words, the Fourth Amendment likely applies to *no one* abroad and has nothing to do with the purportedly inferior status of noncitizens.

More recently, in *Boumediene v. Bush*, the Supreme Court analyzed *Eisentrager* and "other extraterritoriality opinions" to discern factors relevant in determining whether the Constitution's Suspension Clause applied to enemy combatants detained at Guantánamo Bay.[57] The Court deemed relevant the detainees' citizenship and status, as well as the adequacy of the process through which their status was determined; the nature of the sites of apprehension and detention; and the practical obstacles to granting the writ.[58] First, the Court noted that the detainees in *Boumediene* were unlike the enemy combatants in *Eisentrager*, who underwent a "rigorous adversarial process to test the legality of their detention" and did not contest their classification as enemy aliens.[59] Unlike the *Eisentrager* detainees, the detainees in *Boumediene* denied that they were enemy combatants and complained of an inadequate process for contesting their classification.[60] Second, the Court determined that U.S. control over

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[55] *Id.* at 273–74.

[56] *See* GERALD L. NEUMAN, STRANGERS TO THE CONSTITUTION 106 (1996) ("If these [data cited by Rehnquist from the 1790s] suggest anything, however, it is that *no one* has Fourth Amendment rights outside the nation's borders, which was the prevailing view [during an earlier time].").

[57] U.S. CONST. art. I, § 9, cl. 2 ("The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."); Boumediene v. Bush, 553 U.S. 723, 766 (2008) ("[T]he outlines of a framework for determining the reach of the Suspension Clause are suggested by the factors the Court relied upon in *Eisentrager*.").

[58] *Boumediene*, 553 U.S. at 766.

[59] *Id.* at 766–67.

[60] *Id.*

the U.S. Naval Station at Guantánamo Bay exceeded U.S. control over the prison where the *Eisentrager* detainees were held in Germany, which was "under the jurisdiction of the combined Allied Forces."[61] Unlike the Landsberg Prison, Guantánamo "is no transient possession. In every practical sense Guant[á]namo is not abroad; it is within the constant jurisdiction of the United States."[62] Finally, the Court recognized the government resources that would be expended if the Suspension Clause were held to apply to military detention abroad, but it did not find those concerns dispositive.[63] Accordingly, the Court concluded that the Suspension Clause applied to detention at Guantánamo Bay.[64]

After determining that the Suspension Clause applied, the Court considered whether the writ had been suspended, and if so, whether Congress had supplied an adequate and effective substitute for the protections of the writ.[65] The Court first determined that the Military Commissions Act of 2006 provision indeed stripped the federal courts of "jurisdiction to hear habeas corpus actions pending at the time of its enactment."[66] It then determined that the procedures provided by the Detainee Treatment Act of 2005 failed to offer an adequate or effective substitute for the habeas corpus privilege.[67] Accordingly, the MCA violated the Suspension Clause.

Boumediene articulates a functionalist analysis of the scope of constitutional rights.[68] Crucially, the detainees' noncitizen status did not determine their constitutional status.[69] Rather than reading *Eisentrager* as establishing a rigid territorial conception of rights, the Court viewed *Eisentrager* as part of a functionalist tradition.[70] The nature of the U.S. government's control of the detention site in *Eisentrager* influenced whether the site was abroad.[71] The quality

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[61] *Id.* at 768.

[62] *Id.* at 768–69.

[63] *Id.* at 769.

[64] *Id.* at 771.

[65] *Id.*

[66] *Id.* at 736–37.

[67] *Id.* at 792.

[68] *See* Marouf, *supra* note 45, at 784–85 (describing the Court's functional approach).

[69] *See id.* at 786 ("While citizenship is part of the first factor, *Boumediene* makes it clear that citizenship is not determinative.").

[70] *See Boumediene*, 553 U.S. at 786–87 (noting that the proceedings in *Eisentrager* had a significant adversarial structure that was lacking in the proceedings in *Boumediene*).

[71] *Id.* at 755 (discussing the United States' "*de facto* sovereignty" over Guantánamo).

of process determining the *Eisentrager* detainees' status was relevant along with their status as noncitizens.[72]

In *AOSI II*, however, the Court retreated from a functionalist analysis of constitutional rights. The Court instead seized on the *Eisentrager* dicta, amplified in *Verdugo-Urquidez*, to adopt a strict territorial conception of First Amendment rights.[73] The Court deemed the rights at issue to be those of the NGO affiliates incorporated under foreign law, who were noncitizens operating abroad.[74] For that reason, the First Amendment had no relevance.

B. ALTERNATIVE POSSIBILITIES

The Court read *Eisentrager* and *Verdugo-Urquidez* to endorse a strict territorial conception of noncitizens' constitutional rights, and cabined *Boumediene* to the Suspension Clause, but none of those analytic choices are obvious or inevitable. At least one circuit court decision engaging with these precedents long before *AOSI II* illustrates an alternative reading.

In *Ibrahim v. DHS*, for example, the Ninth Circuit considered the case of a lawfully admitted noncitizen, a graduate student at Stanford University, who traveled abroad to attend a conference.[75] She claimed that the government mistakenly placed her on a "No-Fly" list and that she was never allowed to return to the United States, which "limited her academic and professional activities."[76] Apart from being unable to participate in projects at Stanford or work with her advisor in person, she was unable to visit friends, and when her advisor died, and his widow asked her to speak at the memorial, she could not attend.[77] She filed a suit for injunctive relief, asserting claims under the First, Fourth, and Fifth Amendments.[78]

On the question of the scope of constitutional protection for a noncitizen located abroad, the Ninth Circuit applied the "significant voluntary connection" test of *Verdugo-Urquidez* and the "functional

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[72] *Id.* at 767 (discussing the significance of the process in *Eisentrager*).

[73] *AOSI II*, 140 S. Ct. 2082, 2086–87 (2020).

[74] *Id.* at 2087.

[75] Ibrahim v. Dep't of Homeland Sec., 669 F.3d 983, 986 (9th Cir. 2012).

[76] *Id.* at 986, 988.

[77] *Id.*

[78] *Id.* at 986.

approach" of *Boumediene* to reason that Ibrahim had "the right to assert claims under the First and Fifth Amendments."[79] Ibrahim's presence outside of the United States evinced her "significant voluntary connection" to the United States, and the functional approach of *Boumediene* further called for an assessment of "objective factors and practical concerns" over formalism.[80] The court noted that, unlike the *Eisentrager* detainees, Ibrahim had never been charged with or convicted of "any violation of law."[81] The court concluded that "the border of the United States is not a clear line that separates aliens who may bring constitutional challenges from those who may not."[82] *Ibrahim* suggests that a reasonable reading of precedent does not compel strict territoriality, but in *AOSI II*, the Court rejected this approach.

C. THE BRIGHT LINE BLURS

AOSI II announced a bright line rule, but the promise of a bright line falters when determining what counts as "here" versus "abroad" itself involves complex judgments.[83] In *Department of Homeland Security v. Thuraissigiam*, for example, the Court observed that an asylum seeker who had entered some twenty-five yards into U.S. territory before being apprehended lacked any right to due process.[84] Vijayakumar Thuraissigiam, a Sri Lankan national, entered the United States from the southern border without inspection one evening when a Border Patrol agent arrested him "within 25 yards of the border . . . and detained him for expedited removal."[85] After finding that the immigration statute did not violate the Suspension Clause, the Court further opined in dicta that Thuraissigiam lacked any constitutional rights because his presence a mere twenty-five yards into U.S. territory did not amount to an "entry."[86] Why? Because he was not formally

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[79] *Id.* at 997.

[80] *Id.* at 995 (quoting Boumediene v. Bush, 553 U.S. 723, 764 (2008)).

[81] *Id.* at 996.

[82] *Id.* at 995.

[83] *See supra* Section III.A.

[84] 140 S. Ct. 1959, 1964 (2020).

[85] *Id.* at 1967.

admitted, and therefore, he stood on the "cusp" of entry.[87] One might reason from this result that territorial presence is necessary but insufficient to trigger constitutional protection, but the Court has disavowed that view.[88]

Thuraissigiam's dissenting Justices and academic commentators have warned that this approach—and the attendant conclusion that entering the United States is not *really* entering—diverges from established immigrants' rights jurisprudence that recognizes constitutional protection for noncitizens present in the country.[89] As a recent entrant, and someone who never reached the interior, Thuraissigiam did not have substantial ties to the United States, but he was physically present. An approach that ignores his presence erodes the very territorial conception that the Court endorsed in *AOSI II*.[90] Moreover, privileging or requiring formal admission as a sufficient condition for constitutional protection endangers long-term residents who were never formally admitted. It swaps a nuanced conception centering presence and ties for one based on formal membership.

Although not a First Amendment case, *Thuraissigiam* might yet be relevant to understanding the scope of noncitizens' rights "abroad." It demonstrates that "abroad" might be twenty-five yards *within* the United States. The U.S. interior is functionally "abroad" when the noncitizen at issue has only been here a short time, hasn't gotten very far, and hasn't been formally admitted. The questions raised about the scope of Thuraissigiam's due process rights apply to the scope of noncitizens' First Amendment rights as well. If those

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[87] *Id.* at 1982; *see also* Amanda L. Tyler, *Thuraissigiam and the Future of the Suspension Clause*, LAWFARE (July 2, 2020), https://www.lawfareblog.com/thuraissigiam-and-future-suspension-clause ("[I]t was of no relevance to the majority that [Thuraissigiam] had crossed the border and been apprehended some 25 yards inside the United States. . . . Such a conclusion was important, the majority opined, lest the rule reward those who cross the border illegally.").

[88] *Cf.* Shaughnessy v. Mezei, 345 U.S. 206, 212 (1953) ("It is true that aliens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law.").

[89] *Thuraissigiam*, 140 S. Ct. at 2012 (Sotomayor, J., dissenting) ("[P]resence in the country is the touchstone for at least some level of due process protections." (citing Mathews v. Diaz, 426 U.S. 67, 77 (1976) ("There are literally millions of aliens within the jurisdiction of the United States. The Fifth Amendment . . . protects every one of these persons. . . . Even one whose presence in this country is unlawful, involuntary, or transitory is entitled to that constitutional protection.")).

[90] *See supra* Part II.

rights don't attach absent formal admission, because *functionally* the noncitizen remains on the cusp of entry, the Court has essentially conflated inquiries into geography and status. A functionalist conception of territorial "entry" has the effect of transforming questions about the scope of rights "abroad" into questions of about the significance of formal admission and citizenship for noncitizens already here. This is a long way from a bright line rule. As discussed below, a better approach involves recognizing the interconnectedness of citizen and noncitizen interests relating to free exercise, association, and speech.

IV. THE INTERCONNECTEDNESS OF CITIZEN-NONCITIZEN INTERESTS

The First Amendment protects lawful permanent residents and some deportable noncitizens to a much lesser extent, but its protection fades when noncitizens reside abroad. That is the territorial conception of the First Amendment for noncitizens as articulated in *AOSI II*. As noted in the preceding Section, however, that story is complicated by contested designations of "here" and "abroad." This Section contends that the interconnectedness of citizen-noncitizen interests further strains the strict territorial conception. Specifically, when citizens and noncitizens seek to associate in the United States, but the noncitizens are physically located abroad, citizens' interests and freedoms are plainly devalued and relatively unprotected.[91] Centuries of precedent confirm the political branches' power to exclude noncitizens,[92] but that broad pronouncement hides the prudential doctrines and policy choices that implement it. Those policy judgments create a space for better protecting citizens and noncitizens' shared interests in speech, religious exercise, and assembly.

Citizens' First Amendment rights receive minimal protection when they seek to bring a noncitizen residing abroad into the United States. In *Kleindienst v. Mandel*, for example, the Supreme Court considered the Attorney General's decision to exclude a

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[91] *See, e.g.,* Kleindienst v. Mandel, 408 U.S. 753, 777 (1972) (Marshall, J., dissenting) (noting the Attorney General's "extraordinary governmental interference with the liberty of American citizens").

[92] *See* Ping v. United States, 130 U.S. 581, 609 (1889) (announcing the plenary power doctrine).

Marxist professor from Belgium, Ernst Mandel, purportedly because Mandel had previously violated the terms of his visa by speaking at more universities than listed on his itinerary.[93] Given that Mandel had no right of entry under the First Amendment or any other legal authority, U.S. *citizens* challenged the decision as violating *their* First Amendment right to associate with Mandel.[94] The Court, however, declined to scrutinize the Attorney General's exclusion decision, instead concluding that his decision rested on a "facially legitimate and bona fide reason," namely Mandel's prior violation of the conditions of his visa.[95]

Decades later, the Court again applied a deferential form of review to a citizen's claim that a visa denial violated her right to associate with her husband, an un-admitted noncitizen abroad.[96] The citizen, Fauzia Din, petitioned for a visa for her husband, who worked in Afghanistan. The petition was granted, and her husband applied for a visa. The consular official, however, denied the visa, citing an inadmissibility ground relating to terrorism but offering no explanation of how Din's husband had violated that INA provision.[97] Din claimed that her husband's visa denial, without an adequate reason, violated her right to due process.[98] But a plurality of Justices determined that "a long practice of regulating spousal immigration precludes Din's claim that [the visa denial] deprived her of a fundamental liberty interest."[99] In his concurring opinion, which controls,[100] Justice Kennedy passed on that conclusion and instead reasoned that, even if citizens had fundamental rights to associate with their noncitizen spouses in the United States, the

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[93] *Kleindienst*, 408 U.S. at 759.

[94] *Id.* at 765.

[95] *Id.* at 770.

[96] Kerry v. Din, 576 U.S. 86, 96–97 (2015). Din's claim was brought under the Due Process Clause rather than the First Amendment, but the interest at stake was an association with her husband.

[97] *Id.* at 89–90.

[98] *Id.* at 88.

[99] *Id.* at 95.

[100] In a split plurality, the controlling opinion is the concurring opinion that succeeds on the "narrowest ground." Marks v. United States, 430 U.S. 188, 193 (1977). Although there remains debate as to what the narrowest ground actually was, Kennedy's concurring opinion is generally thought to prevail. *See, e.g.*, Desiree C. Schmitt, *The Doctrine of Consular Nonreviewability in the Travel Ban Cases:* Kerry v. Din *Revisited*, 33 GEO. IMMIGR. L.J. 55, 64 (2018).

notice Din received satisfied due process.[101] Applying *Mandel,* he concluded that the consular officer's citation of a provision of the INA supplied a "facially legitimate and bona fide reason" for the visa denial.[102] This ended the Court's inquiry.

Most recently, the Supreme Court rejected a First Amendment challenge to an entry ban. In *Trump v. Hawaii,* the Court rejected an Establishment Clause challenge to the Trump Administration's entry ban on noncitizens, some of whom had already been granted visas, from several majority-Muslim countries.[103] In *Hawaii,* the Court purported to apply *Mandel* but did not consider the implications of *Din.*[104] The Court ultimately ignored ample evidence of the former President's anti-Muslim animus.[105] Instead, it credited the Administration's post-hoc justification for the entry ban—cited as the integrity of identity management systems in those countries––as a facially legitimate and bona fide reason.[106] Despite plaintiffs' ample showing of the bad faith that Justice Kennedy contemplated in *Din,* the Court refused to scrutinize the government's stated justification.[107] The Court thus viewed the Establishment Clause as a pause en route to an unfettered exclusion power, rather than as a constraint on permissible government motives.

Mandel, Din, and *Hawaii* show how citizens may incur detriment when noncitizens' First Amendment interests are downgraded or

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[101] *Din*, 576 U.S. at 103–104.

[102] *Id.* at 103 (quoting Kleindienst v. Mandel, 408 U.S. 753, 770 (1972)).

[103] *See* 138 S. Ct. 2392, 2423 (2018) (holding that because the proclamation containing the ban was "a sufficient national security justification to survive rational basis review," the "plaintiffs ha[d] not demonstrated a likelihood of success on the merits of their constitutional claim" that the proclamation violated the Establishment Clause).

[104] *See id.* at 2419–20 (explaining that "[a] conventional application of *Mandel*, asking only whether the policy is facially legitimate and bona fide, would put an end to our review").

[105] *See* Shalini Bhargava Ray, *Plenary Power and Animus in Immigration Law*, 80 OHIO ST. L. J. 13, 59 (2019) ("[T]he Court acknowledged its authority to consider the President's statements of animus, but then did nothing with them.").

[106] *See id.* (explaining that "the Court determined that animus was not the 'sole' motive behind the exclusion order" and thus met the "facially legitimate and bona fide" standard of review applicable under *Mandel* (citing *Hawaii*, 138 S. Ct. at 2421)); *Hawaii*, 138 S. Ct. at 2421 ("The Proclamation is expressly premised on legitimate purposes: preventing entry of nationals who cannot be adequately vetted and inducing other nations to improve their [identity-management] practices.").

[107] *See Hawaii*, 138 S. Ct. at 2420 (stating that the Court "may consider plaintiffs' extrinsic evidence [of animus] but will uphold the policy so long as it can reasonably be understood to result from a justification independent of unconstitutional grounds").

simply not recognized at all. This problem manifests in *AOSI II* itself. The dissent understood the question presented in the case to implicate the rights of U.S. organizations acting through foreign affiliations, not the rights of those foreign affiliates under the Constitution.[108] The disagreement over the basic framing of the issues shows the high degree of interdependence between the rights of citizens and the rights of noncitizens as well as the current lack of protection for both.[109]

A recent Eleventh Circuit case illustrates an exceedingly narrow avenue for protecting citizens' noncitizen associational rights, given the grip territorial conception now holds on federal courts. In *Del Valle v. Department of State*, a U.S. citizen plaintiff contested the denial of a visa for her husband, a Mexican national.[110] The plaintiff faced substantial headwinds given the doctrine of consular non-reviewability, which typically prevents federal courts from reviewing consular decisions.[111] The court first held that the doctrine of consular non-reviewability is prudential rather than jurisdictional.[112] It further held that the *Mandel* standard only requires that the consular official cite the relevant INA provision, provided that provision "sets out factual predicates."[113] The recognition that the federal courts possess the power to review consular decisions, but decline to do so for prudential reasons, suggests room for more muscular review. Second, the court's agreement that mere recitation of a statutory provision that *doesn't* set out factual predicates shows that *Mandel*, *Din*, and their

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[108] *See* Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc. (*AOSI II*), 140 S. Ct. 2082, 2090 (2020) (Breyer, J., dissenting) ("This case is not about the First Amendment rights of foreign organizations . . . . [but] the First Amendment rights of American organizations.").

[109] *See, e.g.*, Baaghil v. Miller, 1 F.4th 427, 433 (6th Cir. 2021) (noting that visa denial for plaintiff's spouse did not violate plaintiff's constitutional rights because plaintiff, an American resident, "do[es] not have a constitutional right to require the National Government to admit noncitizen family members") (citing Kerry v. Din, 576 U.S. 86, 96–97 (2015))).

[110] *See* 16 F.4th 832, 836 (11th Cir. 2021).

[111] *See id.* at 835 ("The doctrine of consular non-reviewability, established by the Supreme Court, bars judicial review of a consular official's decision regarding a visa application if the reason given is 'facially legitimate and bona fide.'" (quoting Kleindienst v. Mandel, 408 U.S. 753, 770 (1972))).

[112] *See id.* at 838 ("'[O]ur deference goes to our willingness, not our power,' to review a consular official's decision on a visa application." (quoting Allen v. Milas, 896 F.3d 1094, 1101 (9th Cir. 2018))).

[113] *Id.* at 835.

progeny offer an avenue, however narrow, for protecting citizen-noncitizen associations, a topic for further exploration and development elsewhere.

V. CONCLUSION

This Essay sought to demonstrate how the Court's bright-line rule denying First Amendment rights to noncitizens "abroad" falters amid complex judgments of exactly where "abroad" is and whose rights are at issue. A bright line with respect to citizenship further presupposes parallel rights between citizens and noncitizens, rather than overlapping or interconnected rights between them. As the consular non-reviewability cases powerfully illustrate, when noncitizens' rights abroad are downgraded, citizens stand to suffer constitutional injury.