

Boumediene v. Bush and the extraterritorial reach of the U.S. Constitution A step towards judicial cosmopolitanism?

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Abstract

In this article I analyse the Supreme Court's landmark ruling in *Boumediene v. Bush* against the background of the discussion concerning the extraterritorial scope of the U.S. Constitution. The long-standing discussion about the scope of constitutional rights is situated within the theoretical framework elaborated by Gerald Neuman who distinguishes between membership models, universalism, 'global due process' and the model of 'mutual obligations'. The last model, which is based on a limited government perspective tends towards the ideal of judicial cosmopolitanism. I argue that Justice Kennedy's opinion for the Court does not live up to the cosmopolitan ideal of the model of mutual obligations as it was elaborated in Justice Brennan's dissent in *Verdugo* and that Kennedy's casuistic and flexible approach lends itself to possible manipulation. I argue that this danger can be reduced by adopting the minimum standards of international law as a second order framework for constitutional interpretation and I show that the ethical nexus between effective control and responsibility is common to the normative model of mutual obligations, on the one hand, and to the framework adopted in European human rights law and international humanitarian law, on the other.

Keywords

extraterritorial rights; U.S. Constitution; *habeas corpus*; Guantanamo; judicial cosmopolitanism

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ISSN 1871-515X

