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"Words being what they are, people being what they are, perhaps it would be better always to say the opposite of what one means?"[1]

INTRODUCTION

This article notes the practice in judicial opinions and commentary on the Fourth Amendment[2] of using the word "citizen" when referring to the rights secured by the Amendment. This practice essentially treats "citizen" as synonymous with person or "people," the term actually used in the Amendment. Thus, judges and commentators use the term, to some extent indiscriminately, in cases and commentary that do not deal with issues of citizenship or the degree to which the protection afforded under the Fourth Amendment is affected by one's citizenship status. Although the trend is long-standing, the author suggests that use of the term "citizen" has increased in the post-9/11 era, concurrent with a trend to emphasize or recognize citizenship status as material to determining the extent of an individual's constitutional rights. The article explores use of the word "citizen" in describing or conceptualizing Fourth Amendment rights and suggests that use of the term may be inaccurate or misleading where it is not material. Moreover, use of the term where it is not material tends to exacerbate bias against immigrants because it serves as a continual reminder of their difference from the native population.

This issue impacts Latinas/os because they are a significant portion of the foreign-born.[3] A substantial number of Latinas/os are U.S. citizens either through naturalization or by birth. Many Latinas/os may be first, second or more generation Americans. While many Latinas/os may be unauthorized, a substantial portion are documented immigrants. Bias directed at undocumented or unauthorized Latina/o immigrants tends to affect not just authorized immigrants, but citizens who may be physically and linguistically indistinguishable from authorized or unauthorized non-

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1. LAWRENCE DURRELL, CLEA (1960).

2. U.S. CONST. amend. IV.

3. U.S. Census Bureau, 2006 American Community Survey, S0501. Selected Characteristics of the Native and Foreign-Born Populations, http://factfinder.census.gov/servlet/STTable?_bm=y&geo_id=01000US&qr_name=ACS_2006_EST_GOO_S0501&ds_name=AC.

citizens.[4] Emphasizing "citizenship" where it is not relevant may encourage unconscious and conscious prejudice towards Latinas/os, whether citizen or non-citizen, as well as other immigrant groups; thus, the author argues, use of the term should be avoided when it is not material to argument, advocacy or legal analysis. Use of the term "citizen" facilitates departure from precedent that accords Fourth Amendment protections to all persons in the United States.

Traditionally, courts have not required citizenship for Fourth Amendment protections to apply, whether those protections are secured through the exclusionary rule or through tort liability.[5] Fourth Amendment protection in this view is co-extensive with the territory of the United States.[6] Some cases suggested that the Fourth Amendment might apply even to U.S. governmental searches and seizures overseas or in other countries,[7] but it appeared well settled that persons facing criminal prosecution in the United States were entitled to the full protections provided by the Fourth Amendment.[8] Recent cases suggest, however, that this aspect of Fourth Amendment law is under challenge.[9] Lack of citizenship now affects Fourth Amendment rights in certain narrow contexts: when a search occurs outside of the territory of the United States;[10] in deportation hearings;[11] in interactions with law enforcement officers where

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4. *See* United States v. Montero-Amargo, 208 F. 3d 1122 (9th Cir. 2000) *cert denied sub nom.*, Sanchez-Guillen v. United States, 531 U.S. 889 (2000); *see, e.g.*, Alfredo Mirandé, *Is There a Mexican Exception to the Fourth Amendment?*, 55 FLA. L.REV. 365, 381–89 (2003).

5. *See, e.g.*, Weeks v. United States, 232 U.S. 383, 397–98 (1914); Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotcs, 403 U.S. 388, 392–95 (1971).

6. *See* Johnson v. Eisentrager, 339 U.S. 763, 770–71 (1950).

7. *See e.g.*, United States v. Conroy, 589 F.2d 1258, 1264 (5th Cir. 1979) ("The Fourth Amendment not only protects all within our bounds; it also shelters our citizens wherever they may be in the world from unreasonable searches by our own government."); United States v. Rose, 570 F.2d 1358, 1362 (9th Cir. 1978) ("[I]f American law enforcement officials participated in the foreign search, or if the foreign authorities actually conducting the search were acting as agents for their American counterparts, the exclusionary rule can be invoked."); United States v. Toscanino, 500 F.2d 267, 280 (2d Cir. 1974) ("That the Bill of Rights has extraterritorial application to the conduct abroad of federal agents directed against United States citizens is well settled."); Best v. United States, 184 F.2d 131, 138 (1st Cir. 1950) ("[T]he protection of the Fourth Amendment extends to United States citizens in foreign countries under occupation by our armed forces."); United States v. Bin Laden, 126 F. Supp. 2d 264, 270 (S.D.N.Y. 2000) ("The Supreme Court cases on point suggest that the Fourth Amendment applies to United States citizens abroad.").

8. INS v. Lopez-Mendoza, 468 U.S. 1032, 1050–51 (1984).

9. *See, e.g.*, Martinez-Aguero v. Gonzalez, Civ. No. EP-03-CA-411 (KC), 2005 U.S. Dist. LEXIS 2412, *16–*60 (W.D. Tex. Feb. 2, 2005); United States v. Esparza-Mendoza, 265 F. Supp. 2d 1254, 1273–74 (D. Utah 2003), *aff'd on other grounds*, 386 F.3d 953 (10th Cir. 2004); United States v. Guitterez, 983 F. Supp. 905, 911 (N.D. Cal. 1998), *rev'd on other grounds*, 203 F.3d 833 (9th Cir. 1999).

10. *See* United States v. Verdugo-Urquidez, 494 U.S. 259, 274–75 (1990); United States v. Davis, 905 F.2d 245, 250–51 (9th Cir. 1990) (concerning searches on the high seas); United States v. Peterson, 812 F.2d 486, 495 (9th Cir. 1987). *But see* United States v. Juda, 797 F. Supp. 774, 781 (N.D.Cal. 1992) (holding that the Fourth Amendment applies to resident aliens in searches conducted by U.S. agents abroad). *See generally* Kal Raustiala, *The Geography of Justice*, 73 FORDHAM L. REV. 2501 (2005) (exploring the concept of territoriality–the author calls it "legal spatiality"–and arguing that it should be as inapplicable to limit the rights of non-

the status of being an undocumented alien is used as grounds for reasonable suspicion or probable cause;[12] and with regards enemy aliens during a state of declared war.[13] Fourth Amendment rights in other contexts, like the border[14] and in the workplace,[15] may be affected by the presence of non-citizens but in these contexts, both citizens and non-citizens are affected similarly in terms of what the Fourth Amendment protects.[16]

In a number of cases, however, the government has argued that undocumented non-citizens are not entitled to Fourth Amendment protections although the target of law enforcement efforts by government officials in the United States.[17] The government has argued that undocumented non-citizens lack a substantial connection to the United States and, thus, do not come under the "people" that the Fourth Amendment was intended to protect.[18] Thus far, courts have resisted adoption of a rule that would represent a substantial break with settled precedent with little or no benefit to law

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citizens as it may be to citizens).

11. *See Lopez-Mendoza*, 468 U.S. at 1050. *But see* Salgado-Diaz v. Ashcroft, 395 F.3d 1158, 1166 (9th Cir. 2005); Gonzalez-Rivera v. INS, 22 F.3d 1441, 1452 (9th Cir. 1994). *See generally* Judy C. Wong, *Egregious Fourth Amendment Violations and the Use of the Exclusionary Rule in Deportation Hearings: The Need for Substantive Equal Protection Rights for Undocumented Immigrants*, 28 COLUM. HUM. RTS. L. REV. 431 (1997).

12. *See* United States v. Brignoni-Ponce, 422 U.S. 873, 880 (1975) (finding Mexican appearance relevant to establishing individualized reasonable suspicion to a stop person suspected of having entered the United States illegally). *But see* United States v. Montero-Camargo, 208 F.3d 1122, 1132 (9th Cir. 2000) (finding Mexican appearance not relevant to establish individualized reasonable suspicion to stop because Hispanics/Latinos are too sizable a portion of the population); Mena v. City of Simi Valley, 332 F.3d 1255, 1264–65 (9th Cir. 2003), *vacated and remanded sub nom.* Muehler v. Mena, 544 U.S. 93 (2005); Farm Labor Org. Comm. v. Ohio St. Highway Patrol, 991 F. Supp. 895, 901 (N.D. Ohio 1997). Some cases have posed the issue to be one of standing to raise the Fourth Amendment privacy right. *See, e.g.*, *Juda*, 797 F. Supp. at 781.

13. *See* Johnson v. Eisentrager, 339 U.S. 763, 775–76 (1950). It is not clear that the *Eisentrager* analysis would apply in the context of the criminal prosecution of an enemy alien by federal or state law enforcement officials.

14. United States v. Martines-Fuerte, 428 U.S. 543 (1976).

15. INS v. Delgado, 466 U.S. 210 (1983). *See Of Katz and "Aliens": Privacy Expecations and the Immigration Raids*, 41 U.C. DAVIS L.REV. 101 (2008) (noting an even greater demise to Fourth Amendment protections for non-citizens than articulated in this essay).

16. The permanent immigration checkpoint within 100 miles of the U.S. Mexico border set up to detect unauthorized entries and challenged in *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976), was challenged by at least one permanent resident alien and a U.S. citizen. 428 U.S. at 547–48. The INS practices challenged in *INS v. Delgado*, 466 U.S. 210 (1983), were challenged by citizens and permanent resident aliens. 466 U.S. at 213 n.1.

17. *See* Martinez-Aguero v. Gonzalez, Civ. No. EP-03-CA-411 (KC), 2005 U.S. Dist. LEXIS 2412, *16–*60 (W.D. Tex. Feb. 2, 2005); v. No. EP-03-CA-411 (KC), 2005 U.S. Dist. LEXIS 2412, *16–*60 (W.D. Tex. Feb. 2, 2005); United States v. Esparza-Mendoza, 265 F. Supp. 2d 1254, 1273–74 (D. Utah 2003), *aff'd on other grounds*, 386 F.3d 953 (10th Cir. 2004).

18. *See Martinez-Aguero*, 2005 U.S. Dist. LEXIS at *16; *Esparza-Mendoza*, 265 F. Supp. 2d at 1257; United States v. Iribe, 806 F. Supp. 917, 919 (D. Colo. 1992), *rev'd in part on other grounds, aff'd in part*, 11 F.3d 1553 (10th Cir. 1993); *see also* United States v. Tehrani, 826 F. Supp. 789, 793 (D. Vt. 1993), *aff'd*, 49 F. 3d 54 (2d Cir. 1995); Riechmann v. State, 581 So. 2d 133, 138 (Fla. 1991).

enforcement, and would introduce confusion and indeterminacy where there has been certainty, predictability and clarity in the law.[19]

This article examines the ways in which courts and commentators use the word "citizen" when writing about Fourth Amendment rights. The article suggests that use of the term to describe and define Fourth Amendment rights makes sense when citizenship status is an issue that the writing deals with, and when one is advocating that citizenship should be material in defining or describing the rights. Since it is a material term, however, with legal consequences, the author suggests that jurists and commentators alike avoid use of the term "citizen" when describing the nature and scope of the right unless the term is material to the discussion. Then, the article explores briefly the extent to which Fourth Amendment rights are affected by citizenship status, explains the importance of the issue to Latinas/os, in particular, and to immigrants, and supports the current view that Fourth Amendment protections within the territory of the United States should not be affected by citizenship status. Since citizenship status, however, has increasingly received attention in the development of Fourth Amendment law, the author concludes, more conscious use of the word "citizen" in opinions and commentary is appropriate.

I. RESEARCHING FOURTH AMENDMENT LAW

Often it is when looking for one thing in particular that one finds or notices another, more interesting thing that although not looked for or anticipated becomes the thing more deserving of study or attention. In 2003 a federal district court in Utah denied a motion to suppress evidence in a criminal case on the grounds that the accused was "not one of 'the People' the Amendment protects."[20] The accused was an undocumented person from Mexico, residing in the United States, arrested and charged with illegal reentry into the United States.[21]

Undocumented or unauthorized persons are persons born in other countries who entered the United States without authorization (a visa) or inspection, or who became undocumented after entry because they overstayed the terms of their visa.[22] Some undocumented persons may be eligible for admission into the United States under one of the admission categories, but may be denied actual admission to the country for substantial periods of time because of the numerical per-country quotas imposed by the

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19. *See* United States v. Flores-Montano, 541 U.S. 149, 155–56 (2004) (applying Fourth Amendment analysis to the search of a permanent resident alien's vehicle at the border upon entry into the United States); United States v. Uscanga-Ramirez, 475 F.3d 1024, 1027 (8th Cir. 2007); United States v. Torres-Castro, 470 F.3d 992, 1000 (10th Cir. 2006); Martinez-Aguero v. Gonzalez, 459 F.3d 618, 624, (5th Cir. 2006); United States v. Esparza-Mendoza, 386 F.3d 953, 960 (10th Cir. 2004); United States v. Herrera-Ochoa, 245 F.3d 495, 498 (5th Cir. 2001); *Iribe*, 806 F. Supp. at 921. *But see* United States v. Hernandez-Reyes, 501 F. Supp. 2d 852, 855 n.3 (W.D. Tex. 2007). *See also* James G. Connell, III & René L. Valladares, *Search and Seizure Protections for Undocumented Aliens: The Territoriality and Voluntary Presence Principles in Fourth Amendment Law*, 34 AM. CRIM. L. REV. 1293 (1997).

20. *Esparza-Mendoza*, 265 F. Supp. 2d at 1255.

21. *Id.*

22. MICHAEL HOEFER, NANCY RYTINA & CHRISTOPHER CAMPBELL, ESTIMATES OF THE UNAUTHORIZED IMMIGRANT POPULATION RESIDING IN THE UNITED STATES: JANUARY 2005 1 (2006), http://www.dhs.gov/xlibrary/assets/statistics/publications/ILL_PE_2005.pdf

immigration statute as well as the numerical quotas imposed on permanent resident visas.[23] These persons may risk undocumented status simply to unite with family members or pursue employment. Undocumented entry is a federal civil offense that may rise to the level of a misdemeanor or felony in certain circumstances and may pose a bar to lawful admission as an immigrant indefinitely or for a period of time.[24] The Department of Homeland Security estimates that there are approximately 11 million undocumented persons residing in the United States.[25] The majority are of Mexican national origin, not surprising given the strong historical, cultural, geographic, economic and familial ties between Mexico and the United States.[26] To a degree, and as many have noted, Americans perceive the undocumented to be, for the most part, Mexican.[27]

The decision was distinctive enough to justify further research. That research confirmed that the Utah case was not the predominant view. In fact, the United States Court of Appeals for the Tenth Circuit, and other courts faced with the same issue have consistently ignored or rejected any distinction between citizens and undocumented non-citizens in the context of criminal process and Fourth Amendment protections.[28]

Something interesting, however, emerged from the cases. The search, expressly directed at Fourth Amendment cases that used the term "citizen," turned up a substantial number of cases (in March 2003, 707 on the Lexis federal courts database for the term search "citizen w/25 arrest or search or seizure" for the previous two years) but the majority of the cases did not involve citizenship issues. The cases included five Supreme Court cases: *United States v. Drayton*,[29] *United States v. Knights*,[30] *Saucier v. Katz*,[31] *Kyllo v. United States*,[32] and *Atwater v. City of Lago*

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23. 8 U.S.C. § 1151 (2005). For an explanation of the immigrant visa categories and the application of the numerical quotas see STEPHEN H. LEGOMSKY, IMMIGRATION AND REFUGEE LAW AND POLICY 241–46 (4th ed. 2005); THOMAS ALEXANDER ALEINIKOFF, DAVID A. MARTIN & HIROSHI MOTOMURA, IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 274–87 (5th ed. 2003).

24. *See* 8 U.S.C. §§ 1325–1326 (2005); 8 U.S.C. §§ 1183(a)(9)(A), (B) and (C) (2005).

25. *See* HOEFER ET AL., *supra* note 22, at 1; *see also* JEFFREY S. PASSEL, PEW HISPANIC CTR., ESTIMATES OF THE SIZE AND CHARACTERISTICS OF THE UNDOCUMENTED POPULATION 1 (2005), http://www.pewhispanic.org/files/reports/44.pdf.

26. PASSEL, *supra* note 25, at 7.

27. *See, e.g.*, Kevin R. Johnson, *"Aliens" and the U.S. Immigration Laws:The Social and Legal Construction of Nonpersons*, 28 U. MIAMI INTER-AM. L. REV. 263, 282–88 (1996); Mirandé, *supra* note 4, at 385–89; Mae M. Ngai, *The Strange Career of the Illegal Alien: Immigration Restriction and Deportation Policy in the United States, 1921–1965*, 21 LAW & HIST. REV. 69, 85–89 (2003).

28. United States v. Esparza-Mendoza, 386 F.3d 953, 959–60 (10th Cir. 2004). The Tenth Circuit concluded that Mr. Esparza-Mendoza's encounter with the police was consensual and, therefore, did not implicate the Fourth Amendment. The court expressly disavowed reliance on the lower court's reasoning. *See also* Martinez-Aguero v. Gonzalez, 459 F.3d 618, 625–26 (5th Cir. 2006); United States v. Guitterez, 983 F. Supp. 905, 911–16 (N.D. Cal. 1998) *rev'd on other grounds*, 203 F.3d 833 (9th Cir. 1999).

29. 536 U.S. 194, 204–07 (2002).

30. 534 U.S. 112, 119–21 (2001).

31. 533 U.S. 194 (2001). The *Katz* opinion opens with a reference to the word "citizen." *Id.* at 197 ("In this case a citizen alleged excessive force was used to arrest him."). The case deals

Vista.[33] Like most of the cases the search turned up, these cases for the most part did not involve or raise the issue of citizenship or the extent to which the Fourth Amendment protected persons who lacked citizenship status in the United States. Instead, the opinions reflected use of the term "citizen" as a generic substitute for "accused," "person," "defendant," or "individual." Judges seemed to be using the term "citizen" to define and describe the nature of Fourth Amendment rights in cases where the issue of whether or not the accused was a citizen was not remotely in issue.

Subsequent searches were conducted to determine the frequency of the practice in court opinions. The results suggested that to some extent, the events of 9/11 may have resulted in an increase in the use of the term to describe Fourth Amendment rights.[34] It seemed understandable that jurists would reflect the heightened tensions with national security by evincing a preference for the use of the word "citizen" when writing about constitutional rights.[35] Nonetheless, subsequent searches made clear that courts have been using the term "citizen" in reference to the Fourth Amendment for some time.[36]

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with a claim of excessive force during an arrest of an animal rights protester at a political event. Thus, the use of the word "citizen" draws attention to the political rights at stake and tends to suggest that citizens enjoy greater First Amendment political protest rights than do non-citizens.

32. 533 U.S. 27, 33–34 (2001) ("It would be foolish to contend that the degree of privacy secured to citizens by the Fourth Amendment has been entirely unaffected by the advance of technology.").

33. 532 U.S. 318, 342 (2001); *id.* at 360 (O'Connor, J., dissenting).

34. I present one actual set of results with some trepidation because of its arbitrary nature. The research is the result of word searches through Lexis databases. The smallest change to the search definitions causes a numerical difference in the results. Thus, the results are not submitted with a claim that the search represents an absolutely accurate count of the entire world of Fourth Amendment cases for any particular period of time, nor in any confidence that I have captured the entire world of cases that have used the term "citizen" in connection with the Fourth Amendment. They are submitted, however, comfortable in the sense that they establish that the use occurs, has occurred in the past and is occurring now with more frequency. *See infra* app. A.

35. *See, e.g.*, Mena v. City of Simi Valley, 332 F.3d 1255, 1262 (9th Cir. 2003) ("The Fourth Amendment protects citizens from unreasonable government seizures."), *vacated and remanded sub nom.* Muehler v. Mena, 544 U.S. 93 (2005). The *Mena* court cited to the Fourth and Fourteenth Amendments. *Mena* is an interesting example because Mena was a resident alien, not a U.S. citizen, and the Ninth Circuit's use of the word "citizen" follows directly after its pronouncement that "there is no doubt that Mena has alleged a violation of her constitutional rights under the Fourth Amendment." *Id.*

36. *See, e.g.*, Carroll v. United States, 267 U.S. 132, 149, 164, 168 (1925). In the years 1929 to 1931, for example, 25 cases out of a total of 685 cases that discussed or cited to the Fourth Amendment used the word "citizen." Ten out of the 685 used the word "citizen" in the context of a Fourth Amendment issue and six out of those ten used the term descriptively. *See* United States v. Kozan, 37 F. 2d 415, 418 (E.D. N.Y. 1930) ("It is a critical decision for any citizen to make who desires to preserve simultaneously his physical integrity and his constitutional rights, when confronted by a police official who proclaims his fourth visitation of the citizen's premises."); Kempf v. United States, 33 F. 2d 4 (1st Cir. 1929); United States v. Blich, 45 F. 2d 627 (1930); United States v. O'Connell, 43 F. 2d 1005 (S.D.N.Y. 1930); Camden County Beverage Co. v. Blair, 46 F. 2d 648 (D.N.J. 1930); United States v. Rogato, 39 F. 2d 171 (M.D. Pa. 1930).

Examples occur as early as the 1920s, during Prohibition, when a substantial number of cases arose challenging searches and seizures under the Fourth Amendment. In *Carroll v. United States*, two alleged bootleggers challenged their conviction for transporting liquor on the grounds that the warrantless search of their automobile violated the Fourth Amendment and, therefore, admission of the liquor seized from the automobile was improper.[37] In explaining why the search was consistent with the Fourth Amendment the Court noted: "The Fourth Amendment is to be construed in the light of what was deemed an unreasonable search and seizure when it was adopted, and in a manner which will conserve public interests as well as the interests and rights of individual citizens."[38] Later in the opinion, the Court states that, "It would be intolerable and unreasonable if a prohibition agent were authorized to stop every automobile on the chance of finding liquor, and thus subject all persons lawfully using the highways to the inconvenience and indignity of such a search."[39] The reference to "citizens" in the first instance appears to refer to the generic relationship between governments and the governed, not necessarily to individuals who have the legal status of citizen. The second reference to "persons" expressly recognizes that citizenship is not material to the discussion or to defining the contours of the Fourth Amendment right.[40] Thus, the use of the term "citizen" in discussions of the Fourth Amendment appears in judicial opinions by the early part of the twentieth century.[41]

In the latter half of the 20th Century, the practice continued. The number of Fourth Amendment cases dramatically increased in the latter half of the 20th century after the Supreme Court, in *Mapp v. Ohio*, held that the protections of the Fourth Amendment applied to the states.[42] Moreover, it is likely that the federal government's "war" on drugs sharply increased the number of cases raising Fourth Amendment issues in state and federal courts. To some extent, therefore, it is difficult to identify or isolate one particular cause for the increase in court opinions and use of the word "citizen."[43]

It is possible that this practice in judicial opinions was most affected, perhaps, by the United States Supreme Court's opinion in *United States v. Verdugo-Urquidez*,[44] a 1990 decision interpreting the Fourth Amendment's Warrant Clause not to apply extraterritorially to the search by United States federal agents of a residence located in Mexico and owned by a foreign national, jailed and facing prosecution in the United States.[45]

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37. 267 U.S. 132 (1925).

38. *Id.* at 149.

39. *Id.* at 153–54.

40. There is inherent danger in parsing the language of the Supreme Court (or of any court opinion for that matter) in this manner; it is dicta, after all, and the *Carroll* opinion itself is a good example of the danger. The Court later makes a reference to the difference in treatment between travelers at the point of entry into the country and "those lawfully within the country . . . [who] have a right to free passage." *Id.* at 154. We could interpret that language to suggest that those unlawfully within the country might have different Fourth Amendment standards applied to them. *Id.* at 154.

41. *See infra* app. A.

42. Mapp v. Ohio, 367 U.S. 643 (1961).

43. *See infra* app. A.

44. 494 U.S. 259 (1990).

45. *Id.* at 271–72.

Verdugo-Urquidez is the decision upon which challenges to the application of Fourth Amendment protections to undocumented non-citizens rest. Interestingly, the *Verdugo-Urquidez* case did not use citizenship to demarcate the boundaries of Fourth Amendment protection. Instead, the Court suggested that "the people" the Amendment protects are those with "substantial connections" to the United States.[46] This decision will be discussed in more detail below. The research indicates, however, that even though use of the word "citizen" in cases in relation to Fourth Amendment protections occurs in pre-*Verdugo-Urquidez* opinions, the number of courts using the terminology in cases where it is not material has increased since the decision was handed down and in the post-9/11 era.[47] Even if the increase in use is not statistically significant, however, since the number of Fourth Amendment cases has skyrocketed in the past three decades, the changed legal climate for undocumented non-citizens in the country suggests its use is problematic.[48]

The use of the term in more modern judicial opinions occurs with frequency. For example, in its 2000 Term the United States Supreme Court decided seven cases dealing with Fourth Amendment issues.[49] Three of these opinions reflected use of the word "citizen" to describe or define Fourth Amendment rights in cases where the citizenship or status of the person was not an issue.

In *Kyllo v. United States*,[50] the Court considered whether the use of a thermal-imaging device aimed at a private home from the street constituted a search for Fourth Amendment purposes. The Court held that use of the device to detect heat within the home was a search. Throughout the opinion, when referencing who Fourth Amendment rights attach to, the Court used words like "person's Fourth Amendment rights,"[51] "individual,"[52] "homeowner,"[53] "lady of the house,"[54] and "the people."[55] The Court also, however, used the word "citizen" in describing who was entitled to Fourth Amendment protections. Thus, the Court noted, "It would be foolish to contend that the degree of privacy secured to citizens by the Fourth Amendment has been entirely unaffected by the advance of technology."[56]

During the same Term the Court handed down *Saucier v. Katz*,[57] involving the arrest of an animal rights protester at a celebration marking the conversion of a military base into a national park at which then-Vice-President Al Gore was speaking.[58] Katz, the protester, sued claiming that the arresting officer had used excessive force in

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46. *Id.*

47. *See supra* note 34 and accompanying text.

48. *See infra* app. A.

49. Saucier v. Katz, 533 U.S. 194 (2001); Kyllo v. United States, 533 U.S. 27 (2001); Florida v. Thomas, 532 U.S. 774 (2001); Atwater v. City of Lago Vista, 532 U.S. 318 (2001); Ferguson v. City of Charleston, 532 U.S. 67 (2001); Illinois v. McArthur, 531 U.S. 326 (2001); City of Indianapolis v. Edmond, 531 U.S. 32 (2000).

50. 533 U.S. 27 (2001).

51. *Id.* at 32.

52. *Id.* at 34.

53. *Id.* at 35, 40.

54. *Id.* at 38.

55. *Id.* at 39.

56. *Id.* at 33–34.

57. 533 U.S. 194 (2001).

58. *Id.* at 197.

violation of the Fourth Amendment; the officer moved for summary judgment on the grounds that he enjoyed qualified immunity.[59] The Court's opinion began with the sentence, "In this case a citizen alleged excessive force was used to arrest him."[60] The Court then used the word "respondent" to refer to Katz, and proceeded to tell readers that it was going to refer to him throughout as "respondent."[61] In both *Saucier v. Katz* and *Kyllo v. United States*, the Court was using the term "citizen" not in its legal sense, but to refer to members of a community. In *Saucier v. Katz*, the person arrested was exercising rights of protest, and perhaps this factual context led the Court to open the opinion with a reference to citizens. Ultimately, the references do little to develop Fourth Amendment law and have the tendency to miscommunicate the exact relationship between rights that are protected and who are entitled to the protections secured by those rights, whether they are rights to protest or rights to be free from unreasonable searches and seizures.

Commentators, as well, increasingly use the terms "people" or "persons" interchangeably with "citizens" when writing about the Fourth Amendment. A search in the Lexis database for articles exploring Fourth Amendment issues and using the terms "citizen" and "person" suggested that a significant number of commentators used the terms interchangeably in discussions that were not focused on citizenship or alienage issues.[62] The search yielded 467 documents, 288 of which used the terms

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59. *Id.* at 198.

60. *Id.* at 197.

61. *Id.*

62. The initial search was conducted on March 27, 2003 on the Lexis database using the search terms "person w/25 citizen w/25 fourth." The search was conducted on the "Law Reviews, Combined" file. That search yielded 770 documents. Out of those 770 documents 232 used the terms interchangeably. The search reported here was conducted on April 25, 2004 on the Lexis database using the search terms "citizen w/15 person w/25 fourth w/5 amendment." The search was conducted in the U.S. & Canadian Law Reviews, Combined Lexis file. The results of both searches are available from the author. *See, e.g.*, Akhil Reed Amar & Vikram David Amar, *The New Regulation Allowing Federal Agents to Monitor Attorney-Client Conversations: Why It Threatens Fourth Amendment Values*, 34 CONN. L. REV. 1163 (2002); Dana E. Christman, *Change and Continuity: A Historical Perspective of Campus Search and Seizure Issues*, 2002 B.Y.U. EDUC. & L.J. 141; Stanley H. Friedelbaum, *The Quest for Privacy: State Courts and an Elusive Right*, 65 ALB. L. REV. 945 (2002); Michael Steven Green, *The Paradox of Auxiliary Rights: The Privilege Against Self-Incrimination and the Right to Keep and Bear Arms*, 52 DUKE L.J. 113 (2002); Samuel R. Gross & Debra Livingston, *Racial Profiling Under Attack*, 102 COLUM. L. REV. 1413 (2002); Wayne A. Logan, *An Exception Swallows a Rule: Police Authority to Search Incident to Arrest*, 19 YALE L. & POL'Y REV. 381 (2001); Tracey Maclin, *Let Sleeping Dogs Lie: Why the Supreme Court Should Leave Fourth Amendment History Unabridged*, 82 B.U. L. REV. 895 (2002); William J. Stuntz, *Local Policing After the Terror*, 111 YALE L.J. 2137 (2002); Kathryn R. Urbonya, *Determining Reasonableness Under the Fourth Amendment: Physical Force to Control and Punish Students*, 10 CORNELL J.L. & PUB. POL'Y 397 (2001); Jessica Kobos, Note, Kyllo v. United States*: A Lukewarm Interpretation of the Fourth Amendment*, 64 MONT. L. REV. 519 (2003); Kathleen R. Sandy, Commentary, *The Discrimination Inherent in America's Drug War: Hidden Racism Revealed by Examining the Hysteria Over Crack*, 54 ALA. L. REV. 665 (2003); Stephen W. Tountas, Note, *Carnivore: Is the Regulation of Wireless Technology a Legally Viable Option to Curtail the Growth of Cybercrime?*, 11 WASH. U. J.L. & POL'Y 351 (2003).

interchangeably.[63] Law scholars routinely refer to "citizen's Fourth Amendment rights,"[64] the "right of privacy of citizens,"[65] or "police-citizen encounters,"[66] where it is clear that under established Fourth Amendment law it is the person found within the United States and the object of United States law enforcement efforts that is protected under the Fourth Amendment, not "citizens."

The term "citizen" is not a vague or ambiguous term in the American legal system. It has a specific, determinate meaning under the Fourteenth Amendment to the United States Constitution and as developed by Congress through a series of federal statutes that determine who is entitled to derivative citizenship and who is allowed to gain citizenship through naturalization.[67] The increase in use of the term by courts and commentators may have coincided with or been influenced by an "explosion of interest" among political theorists and legal scholars in the concept of citizenship in the past two decades.[68] Political and legal theorists both would take issue with the contention that opens this paragraph—that "citizen" is a word of specific, determinate meaning. Instead, for example, Kymlica and Norman would point out that "citizen" could relate to one's legal status but it could also refer to the extent and quality of one's participation in a community.[69] In this latter sense, as Linda Bosniak notes in her comprehensive examination of citizenship and alienage, a non-citizen could be a "good

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63. *See, e.g.*, Akhil Reed Amar, *Lord Camden Meets Federalism—Using State Constitutions to Counter Federal Abuses*, 27 RUTGERS L.J. 845 (1996); Akhil Reed Amar, *Substance and Method in the Year 2000*, 28 PEPP. L. REV. 601 (2001); Peter Erlinder, Florida v. J.L.—*Withdrawing Permission to "Lie with Impunity": The Demise of "Truly Anonymous" Informants and the Resurrection of the* Aguilar/Spinelli *Test for Probable Cause*, 4 U. PA. J. CONST. L. 1 (2001); Kobos, *supra* note 62, at 519, 520 (2003) ("The Fourth Amendment protects ordinary citizens from unjustifiable government invasion of their private homes and papers."); George P. Varghese, Comment, *A Sense of Purpose: The Role of Law Enforcement in Foreign Intelligence Surveillance*, 152 U. PA. L. REV. 385 (2003).

64. *See, e.g.*, Alyssa Sacks, Essay, *Can Attempted Seizures be Unreasonable?: Applying the Law of Attempt to the Fourth Amendment*, 37 CAL. W.L. REV. 427, 429 (2001).

65. *See, e.g.*, Thomas Y. Davies, *Denying a Right by Disregarding Doctrine: How* Illinois v. Rodriguez *Demeans Consent, Trivializes Fourth Amendment Reasonableness, and Exaggerates the Excusability of Police Error*, 59 TENN. L. REV. 1, 22 (1991) ("citizen's *own* privacy interests under the Fourth Amendment"(emphasis in original)); Craig S. Lerner, *The Reasonableness of Probable Cause*, 81 TEX. L. REV. 951, 993 (2003) ("privacy concerns of citizens"); Ellen S. Podgor, *International Computer Fraud: A Paradigm for Limiting National Jurisdiction*, 35 U.C. DAVIS L. REV. 267, 309 (2002) ("level of privacy afforded to citizens"); Timothy P. Terrell & Anne R. Jacobs, *Privacy, Technology, and Terrorism:* Bartnicki, Kyllo, *and the Normative Struggle Behind Competing Claims to Solitude and Security*, 51 EMORY L.J. 1469, 1482 (2002) ("privacy to which citizens are entitled").

66. *See, e.g.*, Yale Kamisar, *Trends and Developments with Respect to that Amendment "Central to Enjoyment of Other Guarantees of the Bill of Rights,"* 17 U. MICH. J.L. REFORM 409, 410 (1984); Robert H. Whorf, *Consent Searches Following Routine Traffic Stops: The Troubled Jurisprudence of a Doomed Drug Interdiction Technique*, 28 OHIO N.U. L. Rev. 1, 30, 35, 36, 53, 59 (2001).

67. 8 U.S.C. §§ 1401–1489 (2000 & Supp. 2005).

68. Will Kymlica & Wayne Norman, *Return of the Citizen: A Survey of Recent Work on Citizenship Theory*, 104 ETHICS 352, 352 (1994); LINDA BOSNIAK, THE CITIZEN AND THE ALIEN: DILEMMAS OF CONTEMPORARY MEMBERSHIP 17 (2006).

69. Kymlica & Norman, *supra* note 68, at 353.

citizen" if she, as a member of the community in which she lives, exhibits good civic behavior and civic virtues.[70] Nonetheless, Professor Bosniak has concluded that it makes sense to use citizenship as a political and, perhaps, legal boundary for individual rights.[71] "Citizenship" also may refer to one's expression of identity or membership in a community.[72] Judges using the term in opinions may be using the word to evoke this kind of concept; or to evoke, perhaps, the relationship between an individual and law enforcement officials (as in, perhaps, "police-citizen encounter,") not necessarily intending to convey the sense that the "citizen" in "police-citizen encounter" is actually required to *be* a citizen, in the legal sense of the word. While this use of the term is understandable, its use in legal opinions where the term is not material raises sufficient concerns to justify avoiding its use.

One problem with use of the word "citizen" in general Fourth Amendment discussions is that it facilitates identification of constitutional protections in both the civil and criminal context with citizens rather than persons, an identification which is not required by current Fourth Amendment law. Moreover, use of these words as if they are interchangeable may contribute to the derogation or weakening of continued application of the full panoply of constitutional or human fundamental rights to which persons residing in the territory of the United States have been entitled to enjoy.[73] When a judge or commentator intends to advocate for such a course use of the term is required. In other legal contexts, however, such as when describing the nature of the Fourth Amendment right as, for example, "the right of privacy of citizens" or "citizens' Fourth Amendment rights," the term becomes problematic. These descriptions of Fourth Amendment rights are not inaccurate; plainly, citizens have Fourth Amendment rights as well as privacy rights. The problem is that the circle of persons who are entitled to or accorded privacy rights under the Fourth Amendment is not bounded by citizenship status, at least within the territory of the United States.[74] Repeated use of the term "citizen," thus, creates an expectation that citizenship is or should be, in fact, a limiting principle to Fourth Amendment rights.

Substitution of the word "citizen" for the word "person" or "individual" erects a barrier between classes of persons which negates the basic humanity that is common to all.[75] Moreover, an emphasis on "citizenship" as a preferred or privileged status has

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70. BOSNIAK, *supra* note 68.

71. *Id.* at 77–101. As Bosniak acknowledges, her own thinking on the issue of citizenship has developed from questioning its use in grounding constitutional rights, to accepting citizenship as an appropriate basis for rights. *Id.* at 79. My purpose in this piece is to identify a particular practice that I suggest is problematic for the application and development of Fourth Amendment law, not to develop a theoretical basis for rejecting the idea that citizenship, not humanity, may appropriately provide the limits or boundaries of human or constitutional rights. My own thinking, however, has followed an opposite trajectory to Bosniak's.

72. Kymlica & Norman, *supra* note 68, at 369.

73. *See* Yick Wo v. Hopkins, 118 U.S. 356 (1886) (applying the protection of the Fourteenth Amendment to resident non-citizens).

74. In fact, citizenship may not provide the boundary to extraterritorial application of the Fourth Amendment. Whether an individual has "substantial connections" to the United States may. *See supra* note 39 and accompanying text.

75. *See* T. Alexander Aleinikoff, *Citizens, Aliens, Membership and the Constitution*, 7 CONST. COMMENT. 9 (1990); Linda S. Bosniak, *Exclusion and Membership: The Dual Identity of the Undocumented Worker Under United States Law*, 1988 WIS. L. REV. 955; Ngai, *supra*

adverse impacts on immigrant communities by making it less likely that they will view governmental actors and agencies as sources of service and protection, and more likely that they will view them as entities to be avoided and shunned.[76]

The issue is of particular importance because of the large number of non-citizens, authorized and unauthorized, residing in the country today and because immigrant groups include both citizens and non-citizens.[77] In the case of Latinas/os, and other large immigrant groups, the citizen and authorized immigrant population may be difficult to distinguish physically and linguistically from the unauthorized population. Thus, whatever bias arises in the population at large towards Latinas/os, is likely to affect both citizens and non-citizens. According to the United States Census Bureau, approximately thirteen percent (37,547,789) of the U.S. population (299,398,485) is foreign-born.[78] The 2006 American Community Survey reports five percent (15,767,731) of the foreign-born are U.S. citizens and seven percent (21,780,058) are non-citizens.[79] The Census Bureau's survey includes lawful permanent residents, temporary migrants, humanitarian migrants, and unauthorized migrants within the category of non-citizens.[80] Treating both Census (almost twenty-two million non-citizens) and DHS estimates (eleven million unauthorized/undocumented migrants) as accurate suggests that one-half of the non-citizens in the United States are here without authorization, either having entered without inspection (or with fraudulent documents) or overstaying the terms of their visas. Whether accurate or not, these numbers support the perception that unauthorized migration is not within the control of the federal government, or at least, that it is as strong a source of migration as the formal visa

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note 27; Victor C. Romero, *Domestic Fourth Amendment Rights of Undocumented Immigrants: On* Guitterez *and the Tort Law/Immigration Law Parallel*, 35 HARV. C.R.-C.L. L. REV. 57, 84–91 (2000) [hereinafter Romero, *On* Guitterez]; Michael Scaperlanda, *Partial Membership: Aliens and the Constitutional Community*, 81 IOWA L. REV. 707 (1996); Victor C. Romero, Note, *Whatever Happened to the Fourth Amendment?: Undocumented Immigrants' Rights After* INS v. Lopez-Mendoza *and* United States v. Verdugo-Urquidez, 65 S. CAL. L. REV. 999 (1992) [hereinafter Romero, *Whatever Happened?*].

76. *See* Orde F. Kittrie, *Federalism, Deportation, and Crime Victims Afraid to Call the Police*, 91 IOWA L. REV. 1449 (2006); Michael J. Wishnie, *Immigrants and the Right to Petition*, 78 N.Y.U. L. REV. 667 (2003).

77. Rubèn Rumbaut, Roberto G. Gonzales, Golnaz Komaie & Charlie V. Morgan, *Debunking the Myth of Immigrant Criminality: Imprisonment Among First and Second Generation Young Men*, MIGRATION INFO. SOURCE, June 2006, http://www.migrationinformation.org/Feature/display.cfm?id=403. This study found that the incarceration rate of the U.S. born (3.51%) was four times the rate of the foreign born (0.86%). *Id.* at 4. They noted that the lowest incarceration rates among Los Angeles immigrants are seen for the least educated groups. They further found that the longer immigrants stayed in the United States the higher the incarceration rates. *Id.* at 7–9.

78. U.S. Census Bureau, 2006 American Community Survey, Selected Characteristics of the Native and Foreign-Born Populations (Sept. 27, 2007), http://factfinder.census.gov/home/saff/main.html?_lang=en (follow "Data Sets" hyperlink; then follow "American Community Survey" hyperlink; then, making sure the 2006 American Community Survey is selected, follow the "Enter a table number" hyperlink; type in "S0501" and click "Go").

79. *Id.*

80. U.S. CENSUS BUREAU, AMERICAN COMMUNITY SURVEY, PUERTO RICO COMMUNITY SURVEY: 2006 SURVEY DEFINITIONS 33, http://www.census.gov/acs/www/Downloads/2006/usedata/Subject_Definitions.pdf.

system. This perception has exacerbated an already pronounced intermingling of immigration and criminal law at the national level.[81] Increasingly, this perception has generated substantial state and local government regulation of immigration-related offenses, and, in some cases, status offenses—that is, offenses directed at the status of being an unauthorized immigrant.[82] In addition to enacting new legislation, state and local law enforcement officials have stepped up enforcement efforts directed at unauthorized non-citizens.[83] These two trends—the increase in the number of foreign born persons in the U.S. and the increase in state regulation of immigration related offenses—are likely to increase the likelihood of immigrant/law enforcement interactions, irrespective of whether immigrants are "good citizens" (using the term here in its non-legal sense) or not.[84] Fourth Amendment protections, thus, and their general applicability to non-citizens, are likely to remain of critical importance in the criminal justice system, as well as in the context of immigration-related offenses.[85]

Further, emphasizing this distinction between citizens and non-citizens where it does not exist, as in the context of Fourth Amendment law, may foster racial and ethnic prejudices and tensions. An example of how emphasizing citizenship may result in heightened racial tension was evident in the dialogue that flowed out of the Hurricane Katrina-New Orleans catastrophe, when commentators suggested that the government's failure to respond promptly and effectively to assist persons stranded in the city was particularly tragic because most of those stranded were "citizens."[86] As history and numerous scholars have established, citizenship has proved a poor guarantor for protection against government abuse or misconduct, in particular, against persons of color.[87] Racial and ethnic minorities' interests in full participation and

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81. *See* Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE L.REV. 469 (2007); Maria Isabel Medina, *The Criminalization of Immigration Law: Employer Sanctions and Marriage Fraud*, 5 GEO. MASON L. REV. 669, 674–75; Teresa A. Miller, *Blurring the Boundaries Between Immigration and Crime Control After Sept. 11th*, 25 B.C. THIRD WORLD L.J. 81 (2005); Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367 (2006).

82. *See* Kristina M. Campbell, *Local Illegal Immigration Relief Act Ordinances: A Legal, Policy, and Litigation Analysis*, 84 DENV. U. L. REV. 1041 (2007); Michael A. Olivas, *Immigration-Related State and Local Ordinances: Preemption, Prejudice, and the Proper Role for Enforcement*, 2007 U. CHI. LEGAL F. 27.

83. James Pinkerton, *Localized Immigration Enforcement on Rise—Federal Inaction Means More than Ever, Nation's Law Agencies Take Issue into Own Hands*, HOUSTON CHRON., Oct. 9, 2007, at A1.

84. Rubèn Rumbaut has explored the myth that immigrants tend to be more involved in criminal activity than the native-born population (at least for first generation immigrants). Rumbaut et al., *supra* note 77.

85. *See* text at notes 91–118.

86. *See* Maria Isabel Medina, *Confronting the Rights Deficit at Home: Is the Nation Prepared in the Aftermath of Katrina? Confronting the Myth of Efficiency*, 43 CAL. W. L. REV. 9, 19 (2006).

87. *See, e.g*, Korematsu v. United States, 323 U.S. 214 (1944) (upholding exclusion of U.S. citizens of Japanese descent from the West Coast without individualized hearing, finding that they posed an imminent threat to national security); Juan F. Perea, *"Am I an American or Not?" Reflections on Citizenship, Americanization, and Race*, *in* IMMIGRATION AND CITIZENSHIP IN THE

equality may best be realized by collaborative action; citizenship, in this context, may serve more to distract focus from realizing equal membership in American society, to creating or justifying a feeling of more-deserving entitlement that is never quite met.[88]

II. ON FOURTH AMENDMENT LAW

The Fourth Amendment provides as follows:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.[89]

The Fourth Amendment protects against unreasonable searches and seizures primarily by preventing the admission of evidence seized illegally against a defendant to prove guilt.[90] The Supreme Court has made it clear, however, that the exclusionary rule is not constitutionally required, and, thus, may not apply in all instances where there is a Fourth Amendment violation.[91] Rather, the Court treats the exclusionary rule as a possible remedy for a Fourth Amendment violation, and since the mid-1970s, has viewed the actual admission of illegally obtained evidence as not working an additional or independent constitutional wrong.[92] Moreover, the exclusionary rule applies only in cases where the government chooses to institute further proceedings against a person. In the case of persons whose Fourth Amendment rights are violated but nonetheless are not subject to criminal prosecution, vindication of those rights may be pursued through civil remedies.[93] Unless there has been substantial damage, for example, torture or substantial destruction of property, this remedy may be somewhat illusory.[94] In the case of undocumented migrants, moreover, facing deportation or removal from the United States, this remedy is likely to be unrealized.[95]

TWENTY-FIRST CENTURY 49 (Noah M.J. Pickus ed., 1998).

88. *See, e.g.*, Kevin R. Johnson, *The Case for African American and Latina/o Cooperation in Challenging Racial Profiling in Law Enforcement*, 55 FLA. L. REV. 341 (2003).

89. U.S. CONST. amend. IV.

90. *See* Hudson v. Michigan, 547 U.S. 586, 590–91 (2006); Mapp v. Ohio, 367 U.S. 643 (1961); Weeks v. United States, 232 U.S. 382 (1914).

91. United States v. Leon, 468 U.S. 897, 906–08 (1984) (holding that the exclusionary rule does not apply when police act in objective good faith pursuant to a warrant based on probable cause); *see also* INS v. Lopez-Mendoza, 468 U.S. 1032 (1984) (holding that the exclusionary rule does not apply to deportation hearings unless police act egregiously); Stone v. Powell, 428 U.S. 465 (1976) (holding that the exclusionary rule may not be raised on federal habeas if state prisoners had a full and fair opportunity to raise in state proceedings); United States v. Janis, 428 U.S. 433 (1976) (holding that the exclusionary rule does not apply in federal civil tax assessment proceedings); United States v. Calandra, 414 U.S. 338 (1974) (holding that the exclusionary rule does not apply to grand jury proceedings).

92. *See supra* note 91.

93. *See Lopez-Mendoza*, 468 U.S. at 1045–46; Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971); Sissoko v. Rocha, 440 F.3d 1145 (9th Cir. 2006) (affirming denial of qualified immunity to INS agent who wrongfully detained non-citizen).

94. *See* Muehler v. Mena, 544 U.S. 93 (2005) (vacating and remanding suit brought under

Additionally, in the case of undocumented or unauthorized non-citizens who may be the object of government law enforcement efforts, removal or deportation of those non-citizens is an alternative to prosecution that may be increasingly attractive to state or federal law enforcement officers, particularly in the case of non-violent offenses. In these cases, removal or deportation presents an easy mechanism for dealing with unauthorized migrants without having to worry about constitutional protections that would play a role in criminal prosecutions. An even more troubling scenario involves permanent resident non-citizens who come to the attention of law enforcement authorities because they are materially or tangentially involved in criminal activity of some kind. If these non-citizens become deportable as a result of that involvement, then any illegally obtained evidence may be used by the government in a deportation proceeding.[96]

In determining whether Fourth Amendment protections apply to searches and seizures, the Court has looked to whether the person claiming the protection has a constitutionally protected reasonable expectation of privacy.[97] To determine that a person has a reasonable expectation of privacy, the Court requires "first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'"[98]

Fourth Amendment protections were applied to state prosecutions in *Mapp v. Ohio*.[99] Thus, federal and state law enforcement officers are held to the same standard.

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42 U.S.C. § 1983 by a permanent resident alien for a Fourth Amendment violation where plaintiff had been awarded $10,000 in actual damages and $20,000 per officer in punitive damages for a total of $60,000); Donald Dripps, *The Case for the Contingent Exclusionary Rule*, 38 AM. CRIM. L. REV. 1 (2001); Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345 (2000); Tracey Maclin, *When the Cure for the Fourth Amendment is Worse than the Disease*, 67 S. CAL. L. REV. 1, 61–62 (1994); *Report to the Attorney General on the Search and Seizure Exclusionary Rule*, 22 U. MICH. J.L. REFORM 573, 626–29 (1989). Akhil Amar has suggested that the exclusionary rule is unnecessary to deter police abuses because tort remedies will suffice. Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 785–800 (1994) [hereinafter Amar, *First Principles*]. As Professor Amar has noted, however, current doctrine on sovereign immunity makes the tort remedy problematic. Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1507–09 (1987). Moreover, it was the failure of tort remedies in checking police misconduct that, in part, led the Court to adopt the exclusionary rule and apply it to the states.

95. In the words of Justice White:

> The suggestion that alternative remedies, such as civil suits, provide adequate protection is unrealistic. Contrary to the situation in criminal cases, once the Government has improperly obtained evidence against an illegal alien, he is removed from the country and is therefore in no position to file civil actions in federal courts. Moreover, those who are legally in the country but are nonetheless subjected to illegal searches and seizures are likely to be poor and uneducated, and many will not speak English. It is doubtful that the threat of civil suits by these persons will strike fear into the hearts of those who enforce the Nation's immigration laws.

Lopez-Mendoza, 468 U.S. at 1055 (White, J., dissenting).

96. *See infra* text accompanying notes 109–16.

97. California v. Ciraolo, 476 U.S. 207, 211 (1986).

98. Katz v. United States, 389 U.S. 347, 360 (1967) (Harlan, J., concurring).

99. 367 U.S. 643 (1961).

Fourth Amendment protections require as a general matter that government officials have probable cause to believe that a person is about to commit or has committed a crime to search or seize the person. Government officials are allowed to stop briefly and frisk persons when they have individualized reasonable suspicion that the individuals have committed or are about to commit a crime.[100] Fourth Amendment protections are lessened in border areas, so that brief temporary stops and searches of vehicles may not require even reasonable individualized suspicion, but the different standards that apply at the border affect all persons crossing or traveling in border areas, including citizens.[101] Until 1990 few cases raised the issue of whether a non-citizen could be denied Fourth Amendment protections because of her status as a non-citizen.[102] A different issue, whether constitutional protections applied extraterritorially to actions of the federal government, received more attention in the literature and the cases.[103] In that context, courts grappled with the concept of citizenship to determine when constitutional protections attached to affirmative exercises of power by U.S. government or military officials over U.S. citizens and non-citizens.[104] But until the Supreme Court's decision in *Verdugo-Urquidez*, it appeared unquestioned that persons who resided in the United States, committed a crime in the United States, and were indicted and prosecuted in the United States would be accorded constitutional protections, regardless of their citizenship status.[105]

For example, an early twentieth century treatment of the Fourth Amendment covered the topic in one brief paragraph, noting that "[a]n alien may claim the right on the same footing as any other."[106] That this principle was well settled prior to *Verdugo-Urquidez* is apparent from its absence in scholarly discussions of Fourth Amendment

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100. *See* United States v. Arvizu, 534 U.S. 266, 273 (2002); Terry v. Ohio, 392 U.S. 1, 9 (1968).

101. *See* United States v. Flores-Montano, 541 U.S. 149, 152 (2004); United States v. Montoya de Hernandez, 473 U.S. 531, 538 (1985); United States v. Ramsey, 431 U.S. 606, 619 (1977).

102. *See* United States v. Verdugo-Urquidez, 494 U.S. 259 (1990) (holding that Fourth Amendment Warrants Clause does not apply extraterritorially to the search of a foreign residence owned by a foreign national being prosecuted in U.S. courts); United States v. Esparza-Mendoza, 265 F. Supp. 2d 1254 (N.D. Utah 2003).

103. Reid v. Covert, 354 U.S. 1 (1957) (discussing extraterritorial military trials of civilians); Johnson v. Eisentrager, 339 U.S. 763 (1950) (holding that a nonresident enemy alien did not have a right of access to U.S. courts).

104. *See, e.g.*, *Reid*, 354 U.S. at 1; *Eisentrager*, 339 U.S. at 763; United States v. Barona, 56 F.3d 1087 (9th Cir. 1995); United States v. Vilar, No. S3 05-CR-621, 2007 U.S. Dist. LEXIS 26993, at *1 (S.D.N.Y. Apr. 4, 2007); United States v. Bin Laden, 126 F. Supp. 2d 264 (S.D.N.Y. 2000); Roberto Iraola, *A Primer on Legal Issues Surrounding the Extraterritorial Apprehension of Criminals*, 29 AM. J. CRIM. L. 1 (2001); Sapna G. Lalmalani, *Extraordinary Rendition Meets the U.S. Citizen: United States' Responsibility Under the Fourth Amendment*, 5 CONN. PUB. INT. L.J. 1 (2005); Gerald L. Neuman, *Whose Constitution?*, 100 YALE L.J. 909, 914 (1991).

105. *See* INS v. Lopez-Mendoza, 468 U.S. 1032, 1040–41 (1984). *See generally* NELSON B. LASSON, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION 116 (1937); Amar, *First Principles*, *supra* note 95 (writing after the *Verdugo-Urquidez* opinion).

106. LASSON, *supra* note 106.

commentary.[107] While commentators discussed how the interest in apprehending unauthorized aliens affected Fourth Amendment protections, little commentary addressed the issue of whether a person's citizenship status should affect entitlement to the amendment's protection in the United States.[108]

III. DEPORTATIONS AND THE CIVIL/CRIMINAL DISTINCTION

In 1984 the Supreme Court drew a distinction between deportation and criminal proceedings for the purpose of applying the exclusionary rule.[109] In *INS v. Lopez-Mendoza*[110] the Court held that the exclusionary rule did not apply to deportation proceedings; thus, while evidence seized illegally or without probable cause could not be admitted to prove guilt against a defendant in a criminal proceeding, the same evidence could be admitted in a deportation proceeding to prove the deportability of an undocumented non-citizen.[111] The *Lopez-Mendoza* opinion distinguished between Fourth Amendment protections and application of the exclusionary rule. The Court's opinion recognized that the Fourth Amendment protected non-citizens in deportation proceedings. In balancing the costs and benefits of applying the exclusionary rule, the Court noted "the availability of alternative remedies for institutional practices by the INS that might violate Fourth Amendment rights."[112] Four of the five justices who made up the majority in *Lopez-Mendoza* suggested that "egregious violations of Fourth Amendment or other liberties that might transgress notions of fundamental fairness and undermine the probative value of the evidence obtained" could justify application of

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107. *See, e.g.*, Amar, *First Principles*, *supra* note 95 (writing after the *Verdugo-Urquidez* opinion). Professor Amar explored the issue of what "the people" in the context of the Fourth Amendment might mean in subsequent publications. AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 64–68 (1998).

108. *See* Bosniak, *supra* note 75, at 978–82; Austin T. Fragomen, Jr., *Searching for Illegal Aliens: The Immigration Service Encounters the Fourth Amendment*, 13 SAN DIEGO L. REV. 82 (1975); *Immigration Policy and the Rights of Aliens*, 96 HARV. L. REV. 1286, 1372–82 (1983); Ann M. Overbeck, Comment, *A Sobering Look at the Constitutionality of DUI Roadblocks*, 54 U. CIN. L. REV. 579, 602–04 (1985). *See generally* ELIZABETH HULL, WITHOUT JUSTICE FOR ALL: THE CONSTITUTIONAL RIGHTS OF ALIENS (1985).

109. *Lopez-Mendoza*, 468 U.S. at 1032. Professor Lasson pointed out that the Supreme Court in *Fong Yue Ting v. United States*, 149 U.S. 698 (1893), had concluded that the Fourth Amendment, as well as other Bill of Rights protections, did not apply to deportation proceedings. LASSON, *supra* note 106, at 116 n.30. The *Fong Yue Ting* view of deportation as civil proceedings is still used by the Court today, but not its view of due process. Zadvydas v. Davis, 533 U.S. 678 (2001); Landon v. Plasencia, 459 U.S. 21 (1982).

With regards to the Fourth Amendment, the modern distinction between civil and criminal proceedings was introduced by the Court in *United States v. Janis*, 428 U.S. 433 (1976). In *Janis*, the Court held that the exclusionary rule did not apply in a federal civil tax assessment proceeding. The Court used a cost benefit analysis, weighing the "likely social benefits of excluding unlawfully seized evidence against the likely costs." *Lopez-Mendoza*, 468 U.S. at 1041 (citing *Janis*, 428 U.S. 433). The *Lopez-Mendoza* Court did not rely on *Fong Yue Ting* but placed its holding squarely within the reasoning established in the *Janis* line of cases in which it had limited the reach of the exclusionary rule.

110. 468 U.S. 1032 (1984).

111. *Id.* at 1042–50.

112. *Id.* at 1045.

the exclusionary rule.[113] The *Lopez-Mendoza* opinion accepted without question the principle that the Fourth Amendment applied to undocumented persons in a criminal proceeding.[114] From the perspective of Fourth Amendment law, the *Lopez-Mendoza* opinion simply continued the curtailment of the exclusionary rule to cases where the Court determined the costs of applying the rule were outweighed significantly by its benefits in deterring police misconduct.[115]

There is a problem in the Court's analysis, however, when deportation becomes an alternative to a criminal prosecution in the criminal justice system/law enforcement context. The *Lopez-Mendoza* Court rested its reasoning in part on the presence of sufficient deterrents to immigration officers' misconduct in the immigration context to justify abandonment of the exclusionary rule in deportation proceedings. But in cases where the police engaging in unlawful searches and seizures are not immigration authorities but state or federal law enforcement officers, the *Lopez-Mendoza* rule not only frustrates the deterrent effect of the exclusionary rule but actually rewards unlawful conduct by state or federal officials. The *Lopez-Mendoza* rule allows law enforcement prosecutions compromised because of unlawful governmental conduct to be saved by deportation because in the deportation context, wrongfully obtained evidence will be admissible to effect the deportation. Law enforcement officers engaged in investigating non-citizens for immigration or other offenses (some of which may carry only civil penalties) may flout Fourth Amendment protections comfortable in the knowledge that any evidence seized will be admissible in a removal proceeding, absent egregious violations.

Lopez-Mendoza's reach goes beyond the deportation or removal proceeding. Increasingly, immigration enforcement and criminal investigations may be unitary processes as regulation of immigration has become more intertwined with law enforcement.[116] When criminal prosecution may be parallel or incident to deportation

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113. *Id.* at 1050–51. *See also* Judy C. Wong, *Egregious Fourth Amendment Violations and the Use of the Exclusionary Rule in Deportation Hearings: The Need for Substantive Equal Protection Rights for Undocumented Immigrants*, 28 COLUM. HUM. RTS. L. REV. 431 (1997).

114. The Court stated:

> Respondent Sandoval-Sanchez has a more substantial claim. He objected not to his compelled presence at a deportation proceeding, but to evidence offered at that proceeding. The general rule in a criminal proceeding is that statements and other evidence obtained as a result of an unlawful, warrantless arrest are suppressible if the link between the evidence and the unlawful conduct is not too attenuated. . . . The reach of the exclusionary rule beyond the context of a criminal prosecution, however, is less clear.

Lopez-Mendoza, 468 U.S. at 1040–41.

115. *See* United States v. Leon, 468 U.S. 897 (1984) (decided the same year as *Lopez-Mendoza* and holding that the exclusionary rule does not apply when police officers act in objective good faith pursuant to a warrant based on probable cause); Stone v. Powell, 428 U.S. 465 (1976) (Fourth Amendment violations may not be raised on federal habeas by state prisoners if they had a full and fair opportunity to litigate the Fourth Amendment violation in their state proceedings); United States v. Janis, 428 U.S. 433 (1976) (exclusionary rule does not apply in federal civil tax assessment proceeding); United States v. Calandra, 414 U.S. 338 (1974) (exclusionary rule does not apply to grand jury proceedings).

116. *See supra* note 82 and accompanying text; Bill Ong Hing, *The Immigrant as Criminal: Punishing Dreamers*, 9 HASTINGS WOMEN'S L.J. 79, 90–94 (1998).

or removal, the intermingling of criminal law enforcement and immigration enforcement increases the difficulties of ascertaining the standards that law enforcement officers and immigration officers should apply or observe in the context of raids, searches and seizures. Law enforcement officers operate with two standards in mind, and the incentive to operate within the more forgiving standard faced in removal proceedings must be great when investigations target non-citizens. If deterrence of police misconduct is the goal of the exclusionary rule, as opposed to vindication of one's Fourth Amendment rights, then it does not make sense to curtail application of the rule on the basis of status for the simple reason that police often won't know the status of a person when making searches or seizures.

IV. EXTRATERRITORIAL APPLICATION OF THE FOURTH AMENDMENT

In the 1990 *Verdugo-Urquidez* case Chief Justice Rehnquist noted in dicta that the Court had actually never held that undocumented aliens were protected by the Fourth Amendment in the context of a criminal prosecution; it had merely assumed the question without deciding it.[117] The case was one of several to result from the kidnapping and murder of the U.S. Drug Enforcement Administration (DEA) Special Agent Enrique Camarena Salazar.[118] Special Agent Camarena had been investigating US-Mexico narcotics trafficking rings when he was kidnapped, tortured and murdered in Mexico in February 1985.[119] After an investigation by DEA, the government obtained a warrant for Verdugo-Urquidez's arrest.[120] Verdugo-Urquidez, a Mexican citizen and resident, was arrested by Mexican authorities in Mexico, and transported to the U.S. Border Patrol station in Calexico, California where he was arrested by U.S. marshals.[121] He was incarcerated in the United States when DEA agents arranged with Mexican officials to search Verdugo-Urquidez's properties in Mexico.[122] DEA agents

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117. United States v. Verdugo-Urquidez, 494 U.S. 259, 272 (1990). *But see* Romero, *On* Guitterez, *supra* note 75, at 60–61 (suggesting that *Verdugo-Urquidez* does affect application of the Fourth Amendment to noncitizens facing prosecution in United States courts).

118. *Verdugo-Urquidez*, 494 U.S. at 262–63. Verdugo-Urquidez was convicted for his part in the kidnapping and murder of Enrique Camarena Salazar. United States v. Verdugo-Urquidez, No. CR-87-422-ER (C.D. Cal., Nov. 22, 1988). Humberto Alvarez-Machain, the physician accused of supervising Camarena's torture, was kidnapped in Mexico and forcibly brought to the United States where he was arrested by DEA agents. United States v. Alvarez-Machain, 504 U.S. 655, 657–58 (1992). He was ultimately acquitted. Sosa v. Alvarez-Machain, 542 U.S. 692, 796–98 (2004); *see also* Andreas F. Lowenfeld, *U.S. Law Enforcement Abroad: The Constitution and International Law, Continued*, 84 AM. J. INT'L. L. 444 (1990); Andreas F. Lowenfeld, Commentary, *Kidnapping by Government Order: A Follow-Up*, 84 AM. J. INT'L. L. 712 (1990).

119. The DEA web site contains a biography of Special Agent Enrique Camarena Salazar. Drug Enforcement Admin., Biographies of DEA Agents and Employees Killed in Action, http://www.usdoj.gov/dea/agency/10bios.htm#camarena. Camarena's murder inspired Red Ribbon Week, an event conducted in many public high schools to celebrate resistance to the use of narcotics. *Id.*

120. *Verdugo-Urquidez*, 494 U.S. at 262.

121. *Id.*

122. *Id.*

participated in the actual searches.[123] The searches yielded evidence that the government sought to use in its prosecution of Verdugo-Urquidez.[124] Verdugo-Urquidez moved to suppress on the grounds that the DEA agents had searched his premises without a warrant.[125] The district court granted the motion on the grounds that the Fourth Amendment applied to the DEA's search because it was a joint venture between DEA agents and Mexican police officers; a foreign national was entitled to seek suppression of evidence seized by American officers in a search conducted in a foreign country; the search was invalid because it was conducted without a warrant; and, even if the DEA and the Mexican police were allowed to proceed without a warrant, the search was unreasonable because it was conducted after midnight and the DEA agents did not leave an inventory of items seized.[126] The government appealed.[127]

The United States Court of Appeals for the Ninth Circuit affirmed the district court's decision; its opinion began with the proposition that the Constitution applied to affirmative government conduct overseas.[128] The court noted that early understandings of the Constitution were consistent with an understanding of territoriality as a limiting principle, but that twentieth century cases suggested that the Constitution's reach extended with the American government's reach.[129] The court then discussed social compact theory and the words "the people" as being the basis of the government's argument that Verdugo-Urquidez was not entitled to the protection of the Fourth Amendment.[130] The government argued that the Constitution was a reciprocal arrangement between the people and the federal government and since Verdugo-Urquidez was plainly not one of "the people," he could not avail himself of Fourth Amendment protections.[131] The Ninth Circuit rejected the argument, finding the historical evidence equivocal;[132] finding that many of the cases relying on social compact theory focused on federalism issues, not whether the Constitution applied extraterritorially;[133] and finding that more recent Supreme Court decisions limited application of social compact theory to the question of the extent of constitutional protections, because they extended these protections to non-citizens.[134] In discussing the extent of protections accorded foreign nationals in the United States, the Ninth Circuit stated:

> We do not read the phrase "The right of the people to be secure" as restricting the application of the fourth amendment to any special class of people. The

123. *Id.*

124. *Id.* at 262–63.

125. *Id.*

126. United States v. Verdugo-Urquidez, 856 F. 2d 1214, 1217–18 (9th Cir. 1988), *rev'd*, 494 U.S. 259 (1990).

127. *Verdugo-Urquidez*, 494 U.S. at 259.

128. *Verdugo-Urquidez*, 856 F.2d at 1218 (relying in part on Reid v. Covert, 354 U.S. 1 (1957)).

129. *Id.*

130. *Id.* (discussing "the people" as referenced in the preamble of the Constitution).

131. *Id.*

132. *Id.* at 1219–21.

133. *Id.* at 1220–21.

134. *Id.* at 1221–24.

> language of the amendment does not so limit "people," and we will not insert qualifying language into the amendment to limit its application in such a fashion. In the present case, Verdugo-Urquidez, an alien in the custody of our government awaiting trial in our country, seeks to assert the protection of the fourth amendment. He is not in this country "illegally;" he's here because our government wants him here to face criminal charges. He is being prosecuted for alleged violations of United States laws in a United States court. We can discern no conceivable reason why he should be denied the protection of the fourth amendment in connection with this prosecution.
>
> We find support for the proposition that *illegal* aliens have fourth amendment rights [in *Lopez-Mendoza*]. . . . Indeed, in the *Lopez-Mendoza* case, the Solicitor General of the United States conceded that illegal aliens have fourth amendment rights . . . .
>
> Given that in *Lopez-Mendoza* eight of nine Supreme Court justices, as well as the Solicitor General, took the position that illegal aliens possess fourth amendment rights, it is difficult to conclude that Verdugo-Urquidez lacks these same protections. . . . [I]t seems absurd to grant the protection of the fourth amendment to one whose presence in the country is voluntary although illegal, and yet deny it to Verdugo-Urquidez, whose presence in the United States, although legal, is plainly involuntary.[135]

On appeal, the Supreme Court reversed and held that the Fourth Amendment did not apply outside the territorial limits of the United States to the search of a non-citizen's properties in Mexico.[136]

In response to the reasoning of the court below, Chief Justice Rehnquist discussed what the phrase "the people" in the Fourth Amendment meant.[137] "The people," the Court noted, was a term of art employed throughout the Constitution in the preamble, the Second, Fourth, Ninth and Tenth Amendments, and in Article I, Section 2 of the Constitution itself, describing the election of the House of Representatives.[138] The Fourth Amendment extends its reach to "the people," not "persons,"[139] the Court noted, in contrast to the Fifth Amendment, and to the Sixth Amendment, which extends its reach to the "accused."[140] The Court stated:

> While this textual exegesis is by no means conclusive, it suggests that "the people" protected by the Fourth Amendment . . . refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community.[141]

The Court's review of the Framers' understanding of the Fourth Amendment's reach was solidly directed at its applicability to foreign nationals outside of the territorial limits of the United States.[142]

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135. *Id.* at 1223–24 (emphasis in original).
136. United States v. Verdugo-Urquidez, 494 U.S. 259, 274–75 (1990).
137. *Id.* at 265.
138. *Id.* at 265–66.
139. *Id.* at 265.
140. *Id.* at 264–66.
141. *Id.* at 265.
142. *Id.* at 267.

The opinion went on to explain why recent cases extending constitutional protections extraterritorially[143] and to non-citizens in the United States[144] did not justify extending constitutional protections to extraterritorial searches of a foreign national's residence, even if that foreign national was in the United States at the time of the search. It is in this context, Chief Justice Rehnquist noted, that the Court had never decided the issue of "whether the protections of the Fourth Amendment extend to illegal aliens in this country."[145] The Court sought to distinguish Verdugo-Urquidez's claim from that of undocumented non-citizens because he had not "voluntarily" entered the United States and had not established substantial connections with the United States, unlike most foreign nationals who enter the United States without authorization who, presumably, do so willingly.[146] It seems clear that the Court drew the distinction between persons with a substantial connection to the United States and those without to justify denying extraterritorial application of the warrants clause to extraterritorial U.S. law enforcement activity.

The Court also rejected the argument that treating foreign nationals differently from citizens with respect to the Fourth Amendment might violate the equal protection component of the Fifth Amendment.[147] Equal protection requires that all persons in the United States be accorded full protection of fundamental rights. The distinction the opinion made with regard to "citizens" in this context confuses matters, because it seemed to suggest that the Court was not limiting its analysis to extraterritorial applications of the Fourth Amendment; rather, the Court expanded its analysis to include domestic applications by referring to both types of cases.[148] But the domestic cases the Court referenced did not concern fundamental rights—they concerned entitlement to benefits and employment.[149] Thus, it is fair to conclude the Court found some distinctions between citizens and non-citizens within the United States permissible under the Constitution, and in the case of foreign nationals outside of the United States the Constitution did not ordinarily constrain governmental conduct.[150]

Five justices joined the *Verdugo-Urquidez* opinion with three justices in dissent and one justice concurring only in the judgment.[151] Justice Kennedy, one of the justices

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143. *Id.* at 269–70.

144. *Id.* at 270–74.

145. *Id.* at 272 ("The Court often grants certiorari to decide particular legal issues while assuming without deciding the validity of antecedent propositions . . . and such assumptions—even on jurisdictional issues—are not binding in future cases that directly raise the questions. . . . Our statements in *Lopez-Mendoza* are therefore not dispositive of how the Court would rule on a Fourth Amendment claim by illegal aliens in the United States if such a claim were squarely before us." (citations omitted)).

146. *Id.* at 273. ("The illegal aliens in *Lopez-Mendoza* were in the United States voluntarily and presumably had accepted some societal obligations; but respondent had no voluntary connection with this country that might place him among 'the people' of the United States.")

147. *Id.*

148. *Id.* at 273–74.

149. *Id.*

150. *Id.*

151. *Id.* at 261. Chief Justice Rehnquist's majority opinion was joined by Justices White, O'Connor, Scalia and Kennedy. Justice Stevens concurred in the judgment but, like Justice Kennedy, expressly disavowed the majority discussion about the "people." Instead, Justice Stevens concluded that the challenged search was reasonable because conducted with the

who joined the majority opinion, wrote a concurring opinion that expressly repudiated Chief Justice Rehnquist's thinking on "the people."[152] Justice Kennedy's opinion made it clear that "[i]f the search had occurred in a residence within the United States, I have little doubt that the full protections of the Fourth Amendment would apply. But that is not this case."[153] Justice Kennedy explained:

> In cases involving the extraterritorial application of the Constitution, we have taken care to state whether the person claiming its protection is a citizen . . . or an alien. . . . The distinction between citizens and aliens follows from 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. We should note, however, that the absence of this relation does not depend on the idea that only a limited class of persons ratified the instrument that formed our Government. Though it must be beyond dispute that persons outside the United States did not and could not assent to the Constitution, that is quite irrelevant to any construction of the powers conferred or the limitations imposed by it.[154]

As Justice Kennedy's concurrence and Justice Stevens's concurrence in the judgment made clear, the discussion of the term "the people" was unnecessary to resolution of the issue; it was hardly well-settled that the Fourth Amendment warrant requirement applied to searches of U.S. citizens' foreign residences conducted in accordance with foreign law and in conjunction with foreign law enforcement officials.[155] The Court's opinion ultimately rendered the critical issue in determining whether the Fourth Amendment applied to the search the fact that the property that was the subject of the search was located in a foreign country. As the Court noted, "The available historical data show, therefore, that the purpose of the Fourth Amendment was to protect the people of the United States against arbitrary action by their own Government; it was never suggested that the provision was intended to restrain the actions of the Federal Government against aliens outside of the United States territory."[156]

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approval and cooperation of Mexican authorities. Justice Stevens believed the Warrant Clause did not apply to searches of noncitizen's homes in foreign jurisdictions "because American magistrates have no power to authorize such searches." *Id.* at 279 (Stevens, J., concurring in the judgment). Justice Brennan, joined by Justice Marshall, wrote a dissenting opinion, as did Justice Blackmun.

152. *Id.* at 275–78 (Kennedy, J., concurring).

153. *Id.* at 278.

154. *Id.* at 275–76.

155. *See, e.g.*, United States v. Vilar, No. S3 05-CR-621, 2007 U.S. Dist. LEXIS 26993, at *1 (S.D.N.Y. Apr. 4, 2007); United States v. Bin Laden, 126 F. Supp. 2d 264 (S.D.N.Y. 2000); *see also* Reid v. Covert, 354 U.S. 1 (1957) (holding that a U.S. citizen arrested and accused by U.S. military authorities in a foreign country for the murder of her military spouse was entitled to the protection of the Fifth and Sixth Amendments and, thus, could not be subjected to military process). *Reid* was discussed at length in the *Verdugo-Urquidez* opinions. *Verdugo-Urquidez*, 494 U.S. at 269–70, 277–78; Corey M. Then, Note, *Searches and Seizures of Americans Abroad: Re-examining the Fourth Amendment's Warrant Clause and the Foreign Intelligence Exception Five Years after* United States v. Bin Laden, 55 DUKE L.J. 1059 (2006).

156. *Verdugo-Urquidez* , 494 U.S. at 266.

A substantial part of the opinion is directed at extra-territorial application of constitutional rights.[157] The problem that the *Verdugo-Urquidez* majority faced in denying Fourth Amendment protection to Mr. Verdugo-Urquidez as to the search of his Mexican home was that Mr. Verdugo-Urquidez was incarcerated in a correctional center in the United States when U.S. government officials conducted the search in Mexico. Strictly speaking, therefore, Mr. Verdugo-Urquidez was residing in the United States at the time of the search and his residence there was hardly an unlawful presence, as the Ninth Circuit had noted, since U.S. officials had forcibly brought him here.[158] It is in this factual context that the Court's discussion of "substantial connections" makes sense. The Court stressed the fact that Mr. Verdugo-Urquidez had "no previous significant voluntary connection with the United States," and had been in the United States at the time of the search for only "a matter of days."[159] The Court concluded: "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."[160]

Circuit courts have treated *Verdugo-Urquidez* as an opinion that speaks to extraterritorial application of the Fourth Amendment.[161] In fact, *Verdugo-Urquidez* may be read to secure stronger Fourth Amendment protections to non-citizens in the United States, because it suggests that non-citizens with a substantial connection to the United States may have extraterritorial Fourth Amendment protection.

As indicated earlier in the article, some lower courts read *Verdugo-Urquidez* as an invitation to re-examine the issue of status in the domestic application of Fourth Amendment rights.[162] The opinion also stimulated commentary. Victor Romero in two articles argued that *Verdugo-Urquidez*'s focus on "the people" and whether a non-citizen has established substantial or voluntary connections with the United States was problematic reasoning, not required by history or political theory, and ill-advised because it led to uncertainty and indeterminacy in Fourth Amendment law.[163] Moreover, he explained, using a "substantial or voluntary connections test" to unauthorized or undocumented non-citizens, to determine whether they enjoy Fourth Amendment protection in the United States, would shift focus under the Fourth Amendment from deterring unlawful government conduct, "to allocating rights to

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157. *Id.* at 264–75.

158. *Id.* at 271–72.

159. *Id.* at 271.

160. *Id.* at 272. However, this distinction, based on location/territoriality/geography, is precisely the distinction that traditionally has been used to determine whether or not the Constitution applies to government action.

161. United States v. Bravo, 489 F.3d 1, 9 (1st Cir. 2007); United States v. Zakharov, 468 F.3d 1171, 1179 (9th Cir. 2006); Wang Zong Xiao v. Reno, 81 F.3d 808, 816 (9th Cir. 1996); United States v. Barona, 56 F.3d 1087, 1093 (9th Cir. 1995); Lamont v. Woods, 948 F.2d 825, 834 (2d Cir. 1991); United States v. Castrillon, No. S2 05 Cr. 156 (CM), 2007 U.S. Dist. Lexis 61451, at *1, *7 (S.D.N.Y. Aug. 15, 2007); United States v. Lizarraga-Caceres, No. 8:07-cr-99-T-23TBM, 2007 U.S. Dist. Lexis 45107, at *1, *32 (M.D. Fla. June 8, 2007); United States v. Baboolal, 2006 U.S. Dist. Lexis 40645, at *1, *3 (E.D. Wis. June 16, 2006).

162. *See supra* text at notes 20–28.

163. Romero, *On* Guitterez, *supra* note 75, at 73–75; Romero, *Whatever Happened?*, *supra* note 66, at 1012–15.

individuals based on their relationship with the United States."[164] Professor Romero and other commentators writing in response to *Verdugo-Urquidez* made the case for territoriality as the basic principle for demarcation of Fourth Amendment protection within the territory of the United States, and to varying degrees, accepted the "voluntary or sufficient connections" analysis to extraterritorial application of Fourth Amendment protections.[165] Gerald Neuman, on the other hand, suggested the appropriate focus for extraterritorial application of constitutional protections was mutuality of obligations; in the context of the Fourth Amendment, Professor Neuman suggested it should apply to "those aliens on whom the United States seeks to impose legal obligations."[166] Professor Neuman's analysis reflects, to an extent, the views of the dissenting Justices in *Verdugo-Urquidez,*.[167] a view which has yet to garner a majority of justices on the Supreme Court but which the author finds persuasive.

V. "THE PEOPLE" AND "SUBSTANTIAL CONNECTIONS TO THE UNITED STATES"

Thus, we come to the *United States v. Esparza-Mendoza* decision.[168] It was not the first time that a district court had issued a decision interpreting the *Verdugo-Urquidez* opinion to require non-citizens to have substantial connections to the United States in order to avail themselves of Fourth Amendment protections,[169] but it is an opinion that fully developed the notion that the Fourth Amendment does not apply to unauthorized or undocumented non-citizens found in the United States.[170]

Mr. Esparza-Mendoza was apprehended when police responded to a domestic dispute between two sisters and asked Mr. Esparza-Mendoza, a bystander to the dispute (but boyfriend to one of the sisters), for identification.[171] When Mr. Esparza-Mendoza showed the police identification, the police checked his name, found him to be a deported felon, and arrested him.[172] Under the circumstances, Mr. Esparza-Mendoza had a strong argument that the police lacked probable cause or reasonable suspicion to question him, detain him, or even request identification from him, making any evidence seized from the encounter inadmissible because it violated the Fourth Amendment.[173]

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164. Romero, *On* Guitterez, *supra* note 75, at 74.

165. James Connell and Rene Valladares agree the voluntary presence analysis works for extraterritorial applications. James G. Connell, III & Rene L. Valladares, *Search and Seizure Protections for Undocumented Aliens: The Territoriality and Voluntary Presence Principles in Fourth Amendment Law*, 34 AM. CRIM. L. REV. 1293, 1339–52 (1997). Professor Romero seems to suggest that status may be one of several factors in determining whether protection applies. Romero, *On* Guitterez, *supra* note 75, at 63–64.

166. GERALD L. NEUMAN, STRANGERS TO THE CONSTITUTION, at ix, 103–17 (1996).

167. *See* United States v. Verdugo-Urquidez, 494 U.S. 259, 278–97 (1990) (Brennan, J., dissenting); *id.* at 297–98 (Blackmun, J., dissenting).

168. 265 F. Supp. 2d 1254 (D. Utah 2003), *aff'd on other grounds*, 386 F. 3d 953 (10th Cir. 2004).

169. *See* United States v. Guitterez, 983 F. Supp. 905, (N.D. Ca. 1998), *rev'd on other grounds*, No. 98-10170, 1999 U.S. App. Lexis 32230, at *1 (9th Cir. 1999).

170. *Esparza-Mendoza*, 265 F. Supp. 2d 1254.

171. *Id.* at 1256.

172. *Id.*

173. *Id.* at 1256–57.

Mr. Esparza-Mendoza had apparently first entered the United States without authorization in March 1997, was convicted in state court for possession of cocaine in April 1999, and was deported in May 1999.[174] He apparently re-entered the United States in October 2002 and was, at the time of his arrest, residing in Utah.[175]

A number of grounds were raised to justify denial of the motion to suppress, including that the search was consensual (the ground upon which the Tenth Circuit Court of Appeals ultimately affirmed the district court's denial of the motion to suppress); that what Mr. Esparza-Mendoza sought to suppress was his identity; and that Mr. Esparza-Mendoza lacked standing to challenge the search.[176] The district court denied the motion to suppress on the grounds that a previously deported unauthorized alien was not a member of the community of persons covered by the phrase "the people" in the Fourth Amendment.[177] Although the court emphasized the fact that Mr. Esparza-Mendoza was a previously deported felon, the opinion suggests that unauthorized aliens would not be entitled to any Fourth Amendment rights because they are not lawfully in the country.[178]

In explaining its reasoning, the court relied on *Verdugo-Urquidez*'s "sufficient connections" analysis, but went much further than *Verdugo-Urquidez* because it concluded that unauthorized or undocumented non-citizens could not have substantial connections to the United States, unless they were admitted lawfully to the United States.[179] The court expressly stated that it was adopting a categorical rule.[180] In going beyond *Verdugo-Urquidez* the court engaged in linguistic, historical, and political analysis and concluded that the Framers of the Fourth Amendment intended to restrict application of the Amendment to "the people" of the United States; although this might have included women and lawful non-citizens, it could not have included unauthorized non-citizens.[181]

In its discussion of history, political theory, text, and case law, the district court opinion included references to Professors Neuman and Amar's work but failed to acknowledge that the work of both of these scholars did not necessarily support its analysis, and, in some instances, directly contradicted it.[182] Professor Amar's analysis of the language "the people" in the Fourth Amendment led him to reject a reading of the words as "sounding solely in collective, political terms ... the language is broad enough to radiate beyond its core."183 In addition, much of the court's analysis had been refuted in the earlier Romero and Connell/Valladares articles.

One problem with the court's analysis is that the concept of an "unauthorized" or "illegal" alien or non-citizen to the Framers of the Fourth Amendment must have been something of an anomaly, since entry or immigration into the country was not as restricted as it is now. It was perfectly acceptable for persons to enter the country

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174. *Id.* at 1255.
175. *Id.*
176. *Id.* at 1257–59.
177. *Id.* at 1271–72.
178. *Id.*
179. *Id.*
180. *Id.* at 1272.
181. *Id.* at 1259–70.
182. *Id.* at 1262–64, 1268–70. *See* text at notes 166–68.
183 *See* Amar, THE BILL OF RIGHTS, *supra* note 107, at 67.

without formal permission from the government or without presenting themselves for inspection at a government office. Individual states may have restricted entry to certain classes of individuals, and in 1808 Congress prohibited the international slave trade, but federal regulation of immigration didn't begin until much later in the latter decades of the nineteenth century.[184] The Framers comprehended and used the distinction between citizens and aliens or non-citizens, but it is not so clear that they comprehended or utilized the concept of an unauthorized or illegal non-citizen in the way that we comprehend or use the term today.

A second problem is that this analysis dismissed the actual holding of *Verdugo-Urquidez* and its discussion concerning the fact that undocumented non-citizens might be protected as part of "the people" the Amendment was designed to protect because of their voluntary presence or voluntary connections to the United States.[185]

VI. OF WORDS

At least three different views of what "the people" might mean in the context of the Fourth Amendment were voiced in the *Verdugo-Urquidez* opinion. Chief Justice Rehnquist thought it meant to restrict application of the Fourth Amendment only to people who had a "substantial connection" with the United States.[186] Justice Kennedy thought the language "underscore[d] the importance of the right, rather than [restricted] the category of persons who may assert it."[187] Justice Brennan, joined by Justice Marshall in dissent, thought the term "better understood as a rhetorical counterpoint to 'the Government,' such that rights that were reserved to 'the people' were to protect all those subject to 'the Government.'"[188]

The language bears other constructions. For example, the term takes on a different meaning if we treat "people" as the operative term rather than "the people." Deprived of its article, "people" takes on a more inclusive and generic character. The impreciseness of the term, the lack of a historical basis to infuse the term with the particularized meaning urged by the *Verdugo-Urquidez* majority opinion, and the specter of a land once again admitting of sharply different treatment for basic rights on the basis of status perhaps explain the reluctance of a majority of the Court to adopt Chief Justice Rehnquist's view of "the people."[189]

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184. *See* NEUMAN, *supra* note 166, at 20–51.

185. *See* Romero, *On* Guitterez, *supra* note 75; Romero, *Whatever Happened?*, *supra* note 75.

186. United States v. Verdugo-Urquidez, 494 U.S. 259, 272–73 (1990).

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

188. *Id.* at 287 (Brennan, J., dissenting).

189. Chief Justice Taney also explored the meaning of the words "the people" in *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393, 404, 410–11 (1857) (holding the words "the people of the United States" refer to the political body who form the sovereignty, are synonymous with "citizens" and do not include slaves from Africa or their descendants). Alexander Bickel explored this use of the term in his book THE MORALITY OF CONSENT in which he contended that citizenship appropriately lacked meaningful legal significance. ALEXANDER BICKEL, THE MORALITY OF CONSENT 36–42, 52–54 (1975).

The power of words in the service of the law has been noted by many before me.[190] In the context of immigration, a number of scholars have noted the power of the term "alien."[191] As Kevin Johnson states:

> [T]he word alien immediately brings forth rich imagery. One thinks of space invaders seen on television and in movies, such as the blockbuster movie Independence Day. Popular culture reinforces the idea that aliens may be killed with impunity and, if not, "they" will destroy the world as we know it. Synonyms for alien have included "stranger, intruder, interloper, . . . outsider, . . . barbarian," all terms that suggest the need for harsh treatment and self-preservation. In effect, the term alien serves to dehumanize persons. We have few, if any, legal obligations to alien outsiders to the community, though we have obligations to persons. Persons have rights while aliens do not.[192]

Particularly with words or terms which have come to have legal significance, it behooves persons in the service of the law to use those words and terms with care and precision. The word "citizen" has legal significance in a variety of contexts. Citizens may not be deported, although their loved ones, children and spouses, may be.[193] Non-citizens may be deported for victimless crimes, for residing in the United States without documentation, or because they overstayed their permission to reside in the United States, regardless of the length of the residence and the significance of their ties to the United States community.[194] When facing deportation, non-citizens are deprived of most of the constitutional protections extended to persons who face criminal prosecution, including an attorney at the state's expense, for behavior they engaged in years prior to the deportation, without effective judicial review.[195] This difference alone justifies extreme care in using the term in a legal context.

Yet there are other distinctions that caution against use of the term in a legal context, where it is not the term that applies. Citizens appear to enjoy greater freedom from executive detention than persons who lack citizenship status.[196] The government

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190. *See, e.g.*, Lucinda M. Finley, *Breaking Women's Silence in Law: The Dilemma of the Gendered Nature of Legal Reasoning*, 64 NOTRE DAME L. REV. 886 (1989); Johnson, *supra* note 27.

191. *E.g.*, Johnson, *supra* note 27; Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 547 n.4 (1990); Gerald L. Neuman, *Aliens as Outlaws: Government Services, Proposition 187, and the Structure of Equal Protection Doctrine*, 42 UCLA L. REV. 1425, 1428 (1995); Gerald M. Rosberg, *The Protection of Aliens from Discriminatory Treatment by the National Government*, 1977 S. CT. REV. 275, 303; *see also* Teresa A. Miller, *Citizenship & Severity: Recent Immigration Reforms and the New Penology*, 17 GEO. IMMIGR. L.J. 611, 652 (2003) (noting use of the terms "criminal alien" and "aggravated felon" and the use of language in penology).

192. Johnson, *supra* note 27, at 272.

193. *See* Nguyen v. INS, 533 U.S. 53 (2001). The practice of deporting or banishing citizens has ancient roots. Deportation to another country was an accepted English method of dealing with convicts. *See* DANIEL KANSTROOM, DEPORTATION NATION: OUTSIDERS IN AMERICAN HISTORY 26 (2007); ROBERT HUGHES, THE FATAL SHORE 36–42 (1986).

194. 8 U.S.C. § 1227 (2000 & Supp. 2006).

195. *See* Detroit Free Press v. Ashcroft, 303 F.3d 681, 704 (6th Cir. 2002).

196. *Compare* Demore v. Kim, 538 U.S. 510 (2003), Zadvydas v. Davis, 533 U.S. 678

may not intentionally discriminate against citizens on the basis of their race, national origin, color, or religion, except in narrowly tailored ways necessary to achieve a compelling interest like remedying identifiable and specific past discrimination or ensuring a diverse student body in an institution of higher learning.[197] Non-citizens appear to be vulnerable to such discrimination, particularly in immigration-related areas.[198] Most important, perhaps, citizens can vote. They may affect the course of legislation and executive policy. Not so, non-citizens.[199]

The word "citizen" is a potent word full of meaning and rich in imagery, dualist in nature.[200] The word "citizen" generally evokes positive images and feelings. "Citizen" evokes images and feelings of patriotism, love of country, ties to one's homeland, courage, and bravery. "Citizen" is also aligned with that most basic of American political behaviors—voting and participation in the political process. The badge of citizenship, thus, establishes one's entitlement to participation, to belonging in not just the community marked by social, work, and geographical bonds, but to the political community. To some extent, then, references to "police-citizen" encounters and to "the rights of citizens" are understandable; they function not to demarcate the legal boundaries of who is protected from overzealous police enforcement tactics but as general markers of the community's principal values, principal actors, and the individuals most likely to be affected by the activity being discussed.

"Citizen" evokes strong images but the images do not always have positive connotations. As Chief Justice Marshall noted in *McCulloch v. Maryland*, "[s]uch is the character of human language, that no word conveys to the mind, in all situations, one single definite idea; and nothing is more common than to use words in a figurative

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(2001), *and* Carlson v. Landon, 342 U.S. 524 (1952) *with* Hamdi v. Rumsfeld, 542 U.S. 507 (2004), *and* Rumsfeld v. Padilla, 542 U.S. 426 (2004).

197. *See* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738 (2007); Grutter v. Bollinger, 539 U.S. 306 (2003). *But see* United States v. Whren, 517 U.S. 806 (1996); United States v. Martinez-Fuerte, 428 U.S. 543 (1976); United States v. Brignoni-Ponce, 422 U.S. 873 (1975); Bernard Harcourt, United States v. Brignoni-Ponce *and* United States v. Martinez-Fuerte*: The Road to Racial Profiling*, *in* CRIMINAL PROCEDURE STORIES 315–49 (Carol Streiker ed., 2006).

198. *See* Susan M. Akram & Kevin R. Johnson, *Race, Civil Rights, and Immigration Law After September 11, 2001: The Targeting of Arabs and Muslims*, 58 N.Y.U. ANN. SURV. AM. L. 295 (2002); Kevin R. Johnson, *Racial Profiling After September 11: The Department of Justice's 2003 Guidelines*, 50 LOY. L. REV. 67 (2004); Kevin Lapp, *Pressing Public Necessity: The Unconstitutionality of the Absconder Apprehension Initiative*, 29 N.Y.U. REV. L. & SOC. CHANGE 573 (2005).

199. For a defense of granting the suffrage to non-U.S. citizens, see Jamin B. Raskin, *Legal Aliens, Local Citizens: The Historical, Constitutional and Theoretical Meanings of Alien Suffrage*, 141 U. PA. L. REV. 1391 (1993).

200. Since the 1990's legal scholarship on citizenship has flourished. *See, e.g.*, BOSNIAK, *supra* note 68; HIROSHI MOTOMURA, AMERICANS IN WAITING: THE LOST STORY OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES (2006); NEUMAN, *supra* note 167; ROGERS M. SMITH, CIVIL IDEALS: CONFLICTING VISIONS OF CITIZENSHIP IN U.S. HISTORY (1997). Discussion of this scholarship is beyond the province of this piece. For Latcrit treatment of citizenship, see Raquel Aldana, *On Rights, Federal Citizenship, and the "Alien,"* 46 WASHBURN L.J. 263 (2007); Ruben J. Garcia, *Across the Borders: Immigrant Status and Identity in Law and Latcrit Theory*, 55 FLA. L. REV. 511 (2003); George A. Martinez, *Immigration and the Meaning of United States Citizenship: Whiteness and Assimilation*, 46 WASHBURN L.J. 335 (2007).

sense."[201] Citizenship has been used before to exclude in order to injure. The Court's *Dred Scott v. Sanford* decision is an example of the use of the concept of citizenship to allow continued enslavement of a significant number of persons within the society.[202] Even after adoption of the Fourteenth Amendment, citizenship continued to remain a concept empty of guarantees of equal treatment or full participation rights, as is evidenced in the Court's decision in *Minor v. Happersett* upholding state restrictions on women exercising the franchise.[203]

Repressive regimes at times have used citizenship, in part, to identify those who may be injured with impunity. For example, the word "citizen" is associated with the excesses of the French Revolution.[204] Although the term had egalitarian meaning, it evoked for some the violence of that Revolution.[205] Adolph Hitler used citizenship as the demarcating line between those who would be subject to detention and likely death in a concentration camp and those who would not.[206] These references are included not to suggest that citizenship as used in the American experience is analogous, but as a reminder that the word and concept carry a variety of connotations, not all of them positive.

In writing about the concept of citizenship, Alexander Bickel warned:

> A relationship between government and the governed that turns on citizenship can always be dissolved or denied. Citizenship is a legal construct, an abstraction, a theory. No matter what the safeguards, it is at best something given, and given to some and not to others, and it can be taken away. It has always been easier, it will always be easier, to think of someone as a noncitizen than to decide that he is a nonperson.[207]

Professor Bickel, of course, recognized that societies at times were and are willing to treat persons as nonpersons. That was, in fact, as he noted, the point of the *Dred Scott* case. Moreover, fundamental rights as a practical matter themselves may be no more than legal constructs and abstractions completely dependent upon the willingness of governments and others to respect them. Notwithstanding, Bickel's argument still has force today. Citizenship as a demarcation line for rights is ultimately less protective and defensible than personhood.

When it comes to fundamental human rights there appears to be little reason to demarcate between citizens and non-citizens, except to make it easier to deprive the latter of those same rights. When it comes to the Fourth Amendment, whose plain language avoids use of the term "citizen," there would similarly be little reason to demarcate between citizens and non-citizens and good reason not to. The distinction draws attention to itself and suggests a preferred status for citizens that is not warranted under current understandings of Fourth Amendment law. If one wishes to

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201. 17 U.S. (4 Wheat.) 316, 414 (1819).

202. 60 U.S. (19 How.) 393, 404, 410–11 (1857).

203. 88 U.S. (21 Wall.) 162 (1875) (holding that although women are citizens of the United States and they are members of its political community they do not have a right to vote).

204. *See* CHARLES DICKENS, A TALE OF TWO CITIES (Signet Classic 1997) (1859).

205. *See id.* at 249–51; 273–74.

206. *See* Kay Hailbronner, *Fifty Years of the Basic Law—Migration, Citizenship, and Asylum*, 53 SMU L. REV. 519, 529–30 (2000).

207. BICKEL, *supra* note 189, at 53.

latter of those same rights. When it comes to the Fourth Amendment, whose plain language avoids use of the term "citizen," there would similarly be little reason to demarcate between citizens and non-citizens and good reason not to. The distinction draws attention to itself and suggests a preferred status for citizens that is not warranted under current understandings of Fourth Amendment law. If one wishes to advocate for such a change, of course, the practice makes sense. But in the vast majority of cases and commentary evincing the practice that is the focus of this Article, the usage does not appear to reflect conscious advocacy of reduced protection for non-citizens. Thus, this author argues for a more conscious and intentional use of the word that reflects the actual relationship between the person and the degree of protection that person may be entitled to under the Fourth Amendment.

Appendix A

OPINIONS WHICH USE THE WORD CITIZEN IN CONNECTION WITH THE FOURTH AMENDMENT (TWO YEAR INTERVALS)					
TIME PERIOD			NUMBER OF OPINIONS		
1/1/2003	TO	1/1/2005	790	Out of	more than 3,000
1/1/2001	TO	1/1/2003	723	Out of	more than 3,000
1/1/1999	TO	1/1/2001	585	Out of	more than 3,000
1/1/1997	TO	1/1/1999	578	Out of	more than 3,000
1/1/1995	TO	1/1/1997	600	Out of	more than 3,000
1/1/1993	TO	1/1/1995	607	Out of	more than 3,000
1/1/1991	TO	1/1/1993	512	Out of	more than 3,000
1/1/1989	TO	1/1/1991	463	Out of	more than 3,000
1/1/1989	TO	1/1/1990	205	Out of	more than 3,000
1/1/1987	TO	1/1/1989	331	Out of	more than 3,000
1/1/1985	TO	1/1/1987	289	Out of	more than 3,000
1/1/1983	TO	1/1/1985	286	Out of	more than 3,000
1/1/1981	TO	1/1/1983	261	Out of	more than 3,000
1/1/1979	TO	1/1/1981	204	Out of	more than 3,000
1/1/1977	TO	1/1/1979	180	Out of	more than 3,000
1/1/1975	TO	1/1/1977	174	Out of	more than 3,000
1/1/1973	TO	1/1/1975	157	Out of	more than 3,000
1/1/1971	TO	1/1/1973	168	Out of	more than 3,000
1/1/1969	TO	1/1/1971	136	Out of	more than 3,000
1/1/1967	TO	1/1/1969	107	Out of	2737
1/1/1965	TO	1/1/1967	85	Out of	2243
1/1/1963	TO	1/1/1965	60	Out of	1809
1/1/1961	TO	1/1/1963	55	Out of	1436 (Mapp v. Ohio)
1/1/1959	TO	1/1/1961	46	Out of	1273
1/1/1957	TO	1/1/1959	60	Out of	1339
1/1/1955	TO	1/1/1957	39	Out of	1208
1/1/1953	TO	1/1/1955	40	Out of	1297
1/1/1951	TO	1/1/1953	25	Out of	1082
1/1/1949	TO	1/1/1951	28	Out of	840
1/1/1947	TO	1/1/1949	34	Out of	699
1/1/1945	TO	1/1/1947	31	Out of	643
1/1/1943	TO	1/1/1945	32	Out of	642
1/1/1941	TO	1/1/1943	14	Out of	609
1/1/1939	TO	1/1/1941	14	Out of	596
1/1/1937	TO	1/1/1939	18	Out of	575
1/1/1935	TO	1/1/1937	21	Out of	539
1/1/1933	TO	1/1/1935	20	Out of	597
1/1/1931	TO	1/1/1933	33	Out of	811
1/1/1929	TO	1/1/1931	10	Out of	865
1/1/1927	TO	1/1/1929	34	Out of	736
1/1/1925	TO	1/1/1927	50	Out of	820
1/1/1923	TO	1/1/1925	37	Out of	694