The Xenophobic Fourth Amendment: How Racism has Influenced the Discriminatory Application of the Fourth Amendment to Non-Citizens

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“These [Fourth Amendment rights], I protest, are not mere second-class rights but belong in the catalog of indispensable freedoms. Among deprivations of rights, none is so effective in cowing a population, crushing the spirit of the individual and putting terror in every heart. Uncontrolled search and seizure is one of the first and most effective weapons in the arsenal of every arbitrary government.”\(^1\) – Justice Jackson

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This article illustrates how racism continues to color judge-made immigration law in the United States, specifically with respect to federal jurisprudential analysis and application of the

right to freedom from unreasonable search and seizure under the Fourth Amendment as it is applied to non-citizens residing in the United States. The result is a different set of rules and reduced freedoms under the Fourth Amendment for non-citizens as compared to citizens – a xenophobic Fourth Amendment.

Part I, A Brief History of Judicial Racism and Non-Citizens, outlines the influence that xenophobic-racist ideas and notions have had over the formation of judge-made immigration policy in the United States in the past.

Part II, the Constitution and Non-Citizens, identifies the settled precedent of federal court decisions that have established rather conclusively that the constitution, and in particular the Fourth Amendment, applies to all people that are physically residing within U.S. territory regardless of their citizenship or immigration status and thus, should apply to all noncitizens with equal force as it is applied to citizens.

Part III, Denying Non-Citizens the Protection of the Fourth Amendment by Carving Out Exceptions to that Amendment and Thereby Permitting Racial Profiling, surveys three ways in which racism animates Fourth Amendment jurisprudence in the U.S. so as to deny non-citizens the more robust protection from unreasonable search and seizure that citizens enjoy. Namely, by denying non-citizens the protection of the exclusionary rule, full protection from unreasonable search and seizure at the border and its “equivalent,” and by denying that the Fourth Amendment protects non-citizens at all.

Part IV, Denying Non-Citizens the Protection of the Fourth Amendment by Permitting Racial Profiling in Immigration Enforcement Despite the Amendment’s Application, surveys two ways the courts have found to sneak racial profiling through the Fourth Amendment’s backdoor even when the Amendment applies, namely by refusing to find a seizure even when
there was a legal seizure, and by explicitly permitting racial profiling as one-among-multiple factors for finding reasonable suspicion.

Part V concludes with a brief discussion of how this judicial bias has affected the enforcement of immigration policy on the proverbial streets and why it is so dangerous.

I show how racist ideas, as they did in the case-law of earlier centuries, are guiding the creation of Fourth Amendment jurisprudence as applied to non-citizens. This racism has deprived non-citizens of a protection under the Fourth Amendment equal to that of citizens, creating in the process a xenophobic Fourth Amendment – one that discriminates on the basis of alienage.

I. A Brief History of Judicial Racism and Non-Citizens

Lest we forget the harsh reality of the *Dredd Scott* and *Plessy v. Ferguson* decisions, upholding slavery and racial segregation, respectively, it is axiomatic to say that in the past federal courts have upheld virulently racist and unconstitutional precepts. Judge-made immigration law has been no exception. Immigration issues first went before the courts following the passage of the Chinese Exclusion Acts, the first of which was passed on May 6, 1882, which barred all people of Chinese descent from entry into the United States solely on the basis of race.  

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2 *Dredd Scott v. Sandford*, 60 U.S. 393 (1856) (upholding the practice of slavery in the U.S. and holding that people of African descent were not protected by the Constitution and were not U.S. citizens); *Plessy v. Ferguson*, 163 U.S. 537 (1896) (upholding the practice of racial segregation in the U.S.).


4 *Chae Chan Ping*, 130 U.S. at 597.
The racist impetuous and character of this act was upheld in 1884 by the Supreme Court in *Chew Heong v. U.S.*, and then again in 1889 in *Chae Chan Ping v. U.S.* In *Ping* a citizen of China and resident of the U.S. challenged the Act, but the Supreme Court declined to strike it down.\(^5\) Chinese immigrants, the Court said, "remained strangers in the land, residing apart by themselves, and adhering to the customs and usages of their own country. It seemed impossible for them to assimilate with our people . . . [and]the people of the coast saw . . . great danger that at no distant day that portion of our country would be overrun by them..."\(^6\) Steeped in this stereotyped sinophobic fear of being “overrun” by immigrants from China, and citing to the plenary powers of Congress to exclude anyone they wished from the country, the Court upheld exclusion from the U.S. on the basis of race, stating "If, therefore, the government of the United States, through its legislative department, considers the presence of foreigners of a different race in this country . . . to be dangerous to its peace and security, their exclusion is not to be stayed..."\(^7\) Here a correlation is established between a “foreigners’” race and their dangerousness, marking a notable episode in the influence of racism upon judge-made immigration law.

Incidentally, Justice Stephen Johnson Field, who wrote the opinion for *Chae Chan Ping*, also joined the majority in *Plessy v. Ferguson*\(^8\) and dissented in *Strauder v. West Virginia*, arguing that the Fourteenth Amendment did not protect African-Americans from being excluded from juries.\(^9\) In fact, for one of the most spectacularly racist and xenophobic dissenting opinions of all time, one can read Justice Field's dissent in *Chew Heong v. U.S.*:

\(^{5}\) *Id.* at 606-7.  
\(^{6}\) *Id.* at 595.  
\(^{7}\) *Id.* at 606.  
\(^{8}\) *Plessy, 163 U.S.* at 552.  
\(^{9}\) *Strauder v. State of West Virginia*, 100 U.S. 303, 312 (1879) (Field, J. dissenting).
The [Chinese immigrants] . . . proved to be valuable domestic servants, and were useful in constructing roads, draining marshes, cultivating fields, and, generally, wherever outdoor labor was required. . . as their numbers increased they . . . soon came into competition, not only with white laborers in the field, but with white artisans and mechanics. They interfered in many ways with the industries and business of the state. Very few of them had families, not 1 in 500, and they had a wonderful capacity to live in narrow quarters without injury to their health . . . They were perfectly satisfied with what would hardly furnish a scanty subsistence to our laborers and artisans . . .

Obviously Justice Field was not the first and would not be the last racist judge.

This racism of Supreme Court Justices also appears in Justice Horace Gray’s 1893 opinion in *Fong Yue Ting v. United States*. In reviewing three challenges to the newest exclusion act of 1892, the majority not only reaffirmed Congress's plenary right to exclude anyone, such as "vast hordes of its people crowding in upon us," it also upheld a new provision in the law. That provision required that, if a Chinese national was brought before what would now be termed a removal hearing, they would be required to prove "by at least one credible white witness that he was a resident of the U.S. at the time of the passage of this act," a fact which under the law would have rendered the Chinese national a legal resident. The Court considered this requirement "quite analogous" to the provision that an alien applying for citizenship requires them to prove their residence by the oath or affirmation of citizens of the U.S.

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12 *Fung Yue Ting*, 149 U.S. at 732.
13 Id. at 729.
14 Id. at 730.
the 1892 act, and the Supreme Court opinion that upheld it, clearly equates citizenship with whiteness, and thus conversely, non-whiteness with non-citizenship – structuring the immigration law according to race and building a tradition of racist xenophobia.

Even in Justice Brewer's dissent in *Fong Yue Ting*, where he argues this provision violated the respondent’s due process right, he refers to the act as being directed against "the obnoxious Chinese." As if *Plessy* were a litmus test for identifying racist adjudicators, Justice Gray too joined the majority in *Plessy* to uphold racial segregation.

The Chinese exclusion acts were accompanied by a number of other laws and measures similarly excluding people of other “races” from the U.S. territory. Federal and Supreme Court cases during the era before the Chinese exclusion acts were repealed, lay bear explicitly racist language and ideas conspicuously relied upon in the courts’ reasoning – which should come as no surprise in a nation where racial apartheid was still legal and racist, xenophobic rants were made publically by state officials. These laws were upheld by federal courts for decades, in decisions such as the one in *Takao Ozawa v. U.S.*, where the majority upheld the immigration statute of the time which denied petitioner U.S. citizenship because he was not “white” and was instead "of the Japanese race," and because "white" did not include "the brown and yellow races of Asia." Even Harlan's famous dissent in *Plessy v. Ferguson* actually noted that Chinese nationals were not permitted to become naturalized citizens of the U.S., describing immigrants

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15 *Id.* at 743 (Brewer, J., dissenting).
16 *Plessy* at 552.
17 *See* statements by California commissioner of state labor statistics who in 1920 said “the Hindu is the most undesirable immigrant in the state. His lack of personal cleanliness, his low morals and his blind adherence to theories and teachings, so entirely repugnant to American principles, make him unfit for association with American people.” Bill Ong Hing, Symposium: *The Evolving Definition of the Immigrant Workers: The Intersection Between Employment, Labor and Human Rights Law, Institutional Racism, ICE Raids, and Immigration Reform*, 44 U.S.F. L. Rev. 307, at 337 (2009).
from China as "a race so different from our own that we do not permit those belonging to it to become citizens . . . persons belonging to it are, with few exception, absolutely excluded from our country." 20

In her book, “The New Jim Crow,” author and associate professor of law Michelle Alexander presents a compelling case for the conclusion that the current disproportionate incarceration of people of color in the U.S. has the same impact on those people’s freedom and economic status as earlier systems of racial segregation and slavery, and the same racist roots.21 The only difference between earlier systems of racial oppression and contemporary mass incarceration, Alexander notes, was the rhetoric in which they were couched; while policies and court opinions during slavery and segregation openly gave explicitly race-based reasons to justify racist outcomes, today’s system deploys ostensibly race-neutral policy and law enforcement but with an identical effect of generating a racial caste system.22

This note asserts that a similar process is playing out with contemporary immigration law and policy, and specifically with respect to Fourth Amendment jurisprudence. While older judicial opinions, such as the Chinese Exclusion Act cases, openly cite race-based reasons to justify racist policies – contemporary opinions compelling identically disparate outcomes in the area of Fourth Amendment law provide ostensibly race-neutral justifications for conclusions which are just as racist and disproportionally harmful as those in centuries and decades past.

With respect to the language used in judicial opinions, in the mid and later twentieth century the move away from explicitly racial language gave way to ostensibly race-neutral language – a shift that mirrors the move away from explicitly racial language in the law as

20 Plessy at 561 (Harlan, J. dissenting).
22 ALEXANDER, supra at note 21, at 119, 187.
applied to African Americans\textsuperscript{23} following the civil rights movement of the same period. In both cases, while the system removed explicitly racist language, the effect of the policy on the ground remained racially discriminatory, resulting in a mere re-naming of the system of racial oppression. Thus, where once there was segregation, today there is mass incarceration, and where once there were Chinese Exclusion Acts, today there is xenophobic Fourth Amendment jurisprudence.

Then as now the racism of judicial opinions had its roots in old and deeply embedded biases. In the late 19\textsuperscript{th} century, not unlike today, U.S. citizen workers (typically white citizen workers) felt threatened by the number of immigrants, at that time from China, working in the United States.\textsuperscript{24} Defense of the Chinese Exclusion Acts by the courts was motivated by racist anxiety of what tabloid journalism of the time coined "the yellow peril," which spread the fear that Japanese and Chinese "hordes," as Justice Gray put it, would overwhelm white Americans and ultimately destroy American civilization.\textsuperscript{25}

Today the vast majority of people coming to the United States are Spanish-Speaking, and thus the vast majority of judicial opinions discussed below address the migration of Spanish-Speaking respondents. Thus an Hispanophobic attitude has replaced the Sinophobia of years past. Antipathy against Spanish-speaking people, in fact, is older than the United States itself and finds its roots in inter-European rivalry for economic and political control of Southern Europe and the Western Hemisphere as far back as the Sixteenth Century.\textsuperscript{26} “La leyenda negra,” or "the

\textsuperscript{23} E.g., Jim Crow segregation laws and the progeny of the \textit{Plessy} decision.

\textsuperscript{24} Freddy Funes, \textit{Beyond the Plenary Power Doctrine: How Critical Race Theory can help move us past the Chinese Exclusion Case}, 11 Scholar 341, 352-3 (2009).


black legend” is the term historians give to this original hispanophobia, which portrayed Spanish-speaking people as more "rapacious, cruel and lascivious" than their western European neighbors.\(^{27}\)

The bias survives today in a number of specific, viciously racist stereotypes prevalent in American culture which characterize Spanish-speaking people as morally deficient, as criminals, \(^{28}\) or as less productive, intelligent and more physically violent than people of western-European descent.\(^{29}\) One author has proposed as many as six distinct Hispanic stereotypes prevalent in American media and culture, including the “shifty el bandido,” an inarticulate, vicious bandit who is often presented as disheveled, with inarticulate speech and “oily hair,” or the over-sexualized and hot-tempered “harlot” or prostitute who preys upon white males.\(^{30}\)

It should be noted that deeply held beliefs of racial bias are often subconscious in many people who hold them, even while exerting a very real influence over their decision making. A great deal of empirical research has demonstrated as much.\(^{31}\) Thus where the reader finds the author making strongly worded accusations about the views and decisions of certain judges, that reader should note that the author makes no assumptions that these were consciously racist decisions on the part of judges (although some may have been). Rather based on the aforementioned research, this author assumes most judges in contemporary American society

\(^{27}\) Keen, supra note 27, at 713.
\(^{30}\) Berg, supra note 29 at 104-120.
make these decisions, as indeed most of us do, with entirely racially tolerant efforts that were nonetheless under an entirely racist, albeit subconscious, influence.

These beliefs about racial differences and inferiorities, as entrenched as they are erroneous, continue to influence the judge-made immigration law of the present as they have in the past. Throughout our examination of ostensibly race-neutral language which is racist upon further inspection, the reader will observe stereotyped ideas about Spanish-Speaking people shaping judicial opinions reminiscent of how similarly racist ideas espoused in the Chinese Exclusion Act cases guided the outcome in those opinions as well.

II. The Constitution and Non-Citizens

The protection of the Constitution shields all human beings who are residing inside the territory of the United States – citizen or not. Perhaps the seminal case that stands for this principle was the 1886 decision of *Yick Wo v. Hopkins*. The holding in *Yick Wo* was not ambiguous – clarifying that “the fourteenth amendment to the constitution is not confined to the protection of citizens . . . [t]hese provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws.”\(^{32}\) *Yick Wo* has thus been cited to as authority for the assertion that the Constitution applies to all human beings residing in the territory of the United States.\(^{33}\)

Other cases both before and since *Yick Wo* have echoed its holding. In 1892 the Supreme Court stated in *Lau Ow Bew v. United States* that “By general international law, foreigners who

\(^{32}\) *Yick Wo v. Hopkins*, 118 U.S. 356, at 369 (1886).

\(^{33}\) See *Wong Wing v. United States*, 163 U.S. 228, at 242 (1896) (citing to *Yick Wo*).
have become domiciled in a country other than their own, acquire rights and must discharge
duties in many respects the same as possessed by and imposed upon the citizens of that country.
. . and are entitled to exercise . . . all other rights, privileges, and immunities enjoyed in this
country by the citizens” 34 Yick Wo was subsequently followed in Wong Wing v. United States in
1896 when that Court said:

The term ‘person,’ used in the Fifth Amendment, is broad enough to include any and
every human being within the jurisdiction of the republic. A resident, alien born, is
entitled to the same protection under the laws that a citizen is entitled to. He owes
obedience to the laws of the country in which he is domiciled, and, as a consequence, he
is entitled to the equal protection of those laws. 35

The holding in Ross v. McIntyre, articulated not only where the Constitution did not
apply, but also where it had full force; the Court noted that the Constitution applied to “citizens
and others within the United States (emphasis added).” 36 Similarly, Rassmussen v. United States
stands for the principal that constitutional protection attaches to the territory of the United States
and by derivation all of those within it, and not to individuals in that territory based on their
status. 37 The Court in Rassmussen explained “where territory was a part of the United States the
inhabitants thereof were entitled to constitutional protection.” 38

34 Lao Ow Bew v. United States, 144 U.S. 47, at 61-2 (1892).
35 Wong Wing, 163 U.S. at 242 (citing to Yick Wo).
38 Rassmussen, 197 U.S. at 526-7.
While cases like these are easily read as applying the entirety of the Constitution to all persons residing within the territory of the United States regardless of citizenship, opinions since then have restricted their holdings to cover only those Amendments applied in those cases. So, for example, while *Yick Wo* has been cited to as authority for the assertion that that Constitution applies to all people in U.S. territory, it has also been cited more narrowly as merely applying the Fourteenth Amendment to non-citizens. The Supreme Court typically takes this later position, but in doing so has since held that non-citizens enjoy the protection of the First Amendment, the Fifth Amendment, and the Sixth Amendment in addition to the Fourteenth Amendment as held in *Yick Wo*. Many of these cases, in fact, have extended these rights to respondents who were not documented or authorized to be in the U.S., reaffirming the spirit of *Yick Wo*, that the Constitution does not see citizenship status.

The Fourth Amendment also protects all people who enter the territory of the United States, as evidenced by the many times the Supreme Court has ruled upon the Fourth Amendment claims non-citizens have brought before it with the presumption that the petitioners were under the protection of that Amendment. In *Almeida-Sanchez v. U.S.*, for example, the Supreme Court held that the Fourth Amendment applied in full force to searches authorized under section 287 of the INA of automobiles by the border patrol. In doing so, the immigration status of the defendant was not considered in the Court’s analysis. In *Torres v. Commonwealth of Puerto Rico* the court concluded that the Fourth Amendment was in full force in the territory

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41 *American-Arab Anti-Discrimination Committee v. Reno*, 70 F.3d 1045 (9th Cir. 1995).
42 *Wong Wing at 242*.
43 Id.
46 *United States v. Tuscanino*, 500 F.3d 267, 280 (2d Cir. 1974).
of Puerto Rico.\textsuperscript{47} Again, in doing so the court never examined the citizenship status of the defendant, and in fact does not note or mention the citizenship of the defendant at all.\textsuperscript{48} The Second Circuit in \textit{U.S. v. Tuscanino} declared that “it is beyond dispute that an alien may invoke the Fourth Amendment ‘s protection against an unreasonable search and seizure conducted in the U.S.” \textsuperscript{49}

The position taken in this note is that while the Fourth Amendment applies to non-citizens, and while this application should be applied equally to them as it is to citizens, regardless of their status, courts have since erred by failing to apply it equally. Instead, the federal courts, motivated by a racist animus, have twisted the Fourth Amendment when applying it to non-citizens to reduce its protection of this population.

The federal courts have essentially two methods of denying non-citizens full protection of the Fourth Amendment. Each of these ways facilitates racial profiling, which is tantamount to the exclusion based upon race, an exclusion akin to the decisions upholding the Chinese Exclusion Acts. These methods of denying protection under the Amendment include carving out various exceptions to the Fourth Amendment which apply exclusively to non-citizens and thereby permitting racial profiling or, when one of these exceptions does not apply, finding ways to permit racial profiling anyway despite the Amendment’s application.

\section*{III. Denying Non-Citizens the Protection of the Fourth Amendment by Carving out Exceptions to that Amendment and Thereby Permitting Racial Profiling}

\textsuperscript{48} \textit{Torres}, 442 U.S. at 475.
\textsuperscript{49} \textit{Tuscanino}, 500 F.3d at 281.
Despite what seems a clear mandate that the Fourth Amendment of the constitution applies to all persons within U.S. territory, in the last few decades the courts have begun rolling back that equal protection by way of carving out new exceptions to the right in order to facilitate the exclusion of non-citizens based upon their race. The Courts have carved out at least three discernible categories of such exceptions. These three approaches, discussed below, include (A) denying non-citizens the right to exclude evidence procured in violation of the Fourth Amendment, (B) denying non-citizens full protection from unreasonable search and seizure at or near the border, and (C) denying that the Fourth Amendment protects non-citizens at all.

A critical examination of the reasoning and rational, and sometimes simply the language employed by judges in their opinions in these cases reveals the old twisted racism against Spanish-speaking people at work today in the adjudication of Fourth Amendment claims of non-citizens.

A. Denying Non-Citizens the right to Exclude Evidence Procured in Violation of the Fourth Amendment.

The Fourth Amendment is enforced through the exclusionary rule. The exclusionary rule is a judicially created protection of our Fourth Amendment rights which permits a court to exclude inculpatory evidence that has been procured in violation of the Amendment itself.\textsuperscript{50} The policy behind the remedy, put simply, is to discourage law enforcement officials from procuring evidence in violation of the Fourth Amendment.\textsuperscript{51}

However, in 1984, the Supreme Court held in *INS v. Lopez-Mendoza* that the exclusionary rule does not apply to respondents in immigration proceedings.\(^\text{52}\) Thus, the judicially created deterrent that has been deemed necessary to protect citizens from the Fourth Amendment violations of police is simply not available to protect non-citizens in immigration proceedings from identical violations by police and Immigration and Customs Enforcement (ICE) agents.

Justice O’Connor’s majority opinion in *Lopez-Mendoza* articulates several justifications for reducing the extent to which unlawfully procured evidence should or should not be excluded for a respondent in immigration proceedings. O’Connor argues that the exclusionary rule is of limited use in deportation proceedings for five reasons and that the societal costs of applying the rule in deportation proceedings are high for four reasons. The majority arrive at their decision by weighing the first five reasons against the latter four leading the court to believe that the costs outweighed the benefits, and bringing it to its destructive conclusion.\(^\text{53}\)

First, the exclusionary rule was deemed to be of “[reduced] value” in immigration proceedings because the action is civil instead of criminal.\(^\text{54}\) Second, that the identity of the respondent is never itself suppressible (more on this later).\(^\text{55}\) Third, that few aliens arrested request deportation hearings, and even “few[er] challenge the circumstances of their arrests,” so an “arresting officer is most unlikely to shape his conduct in anticipation of the exclusion of evidence at a formal deportation hearing.”\(^\text{56}\) Fourth, that the INS has its own rules and


\(^{53}\) *Lopez-Mendoza*, at 1043-5.

\(^{54}\) *Lopez-Mendoza*, at 1042.

\(^{55}\) *Id.* at 1043.

\(^{56}\) *Id.* at 1044.
regulations which prohibit unlawful arrests. And Fifth, that respondents can always seek relief in tort for violations of their rights.

This “usefulness” of the exclusionary rule was weighed against the costs of the rule. The cost include: that an undocumented person’s continuing presence in the U.S. constitutes a crime, that the exclusionary rule would slow down the deportation system, that documenting every arrest would be unduly burdensome to ICE, and that the “crowded and confused circumstances” in which immigration officers apprehend a large number of aliens could result in the suppression of large amounts of evidence.

As noted below, these arguments are not just poor in their composition, but are in fact so irrational as to imply ulterior motives in the Justices’ decision. Since the decision removes almost wholly the most significant barrier to racial profiling, the Fourth Amendment itself, it is reasonable to conclude that the true aim of the justices was to so remove this barrier for the purpose of facilitating racial profiling. This aim is easily motivated by the goal of expelling Spanish-speaking people from the U.S., a goal itself motivated by perceptions of Spanish-speaking people as dangerous and harmful to society. The unreasonableness of the arguments made by the justices in *Lopez-Mendoza* is thus a Chinese-exclusion act-like attempt to expel people based on nothing more than their race, despite the fact that this attempt is veiled in non-racial language and reasoning.

Perhaps the most absurd of these arguments is the idea that respondents could seek civil relief in tort. It is irrational to expect that a non-citizen deported to Mexico, who may be

57 Id. at 1044-5.
58 Id. at 1045.
59 Id. at 1046.
60 Id. at 1048.
61 Id. at 1049.
62 Id.
burdened by a poverty that is crushing even by central American standards, and who speaks little or no English, is able to bring a civil suit against the United States Department of Homeland Security, or for that matter, the Phoenix Police Department, in an American federal court. Indeed, Justice White points out the same in his dissent, calling the majority opinion "unrealistic" in this regard, because these linguistic, economic and geographic barriers means the deported individual is "in no position to file civil actions in federal courts."\(^{63}\)

The majority’s other arguments feel no less contrived. Even if, *arguendo*, the exclusionary rule slows down the deportation process and results in the suppression of large amounts of evidence subsequent to apprehending a “large number of aliens,” then it is doing exactly what it is supposed to do. The whole point of the need for a warrant is to make law enforcement inconvenient – it is the inconvenience that ensures protection of the right in face of state power. The Amendment is supposed to make depriving a person of their freedom a little arduous and resource-consuming for the state so that the state’s ravenous maw remains leashed by the constitution. To sacrifice this protection for procedural efficiency is an unbalanced mistake, or as Justice White put it, “we neglect our duty when we subordinate constitutional rights to expediency . . .”\(^{64}\)

Moreover, Justice White points out, "[i]f the pandemonium attending immigration arrests is so great that violations of the Fourth Amendment cannot be ascertained for the purpose of applying the exclusionary rule, there is no reason to think that such violations can be ascertained for purposes of civil suits or internal disciplinary proceedings."\(^{65}\) Justice White also adds, further highlighting the nonsense of O’Conner’s arguments, that enforcing the exclusionary rule does

\(^{63}\) *Id.* at 1055.  
\(^{64}\) *Id.* at 1060.  
\(^{65}\) *Id.* at 1059.
not slow down the immigration system because the BIA established in a recent report that "there were ‘fewer than fifty’ BIA proceedings since 1952 in which motions had been made to suppress evidence on Fourth Amendment grounds."\(^6\)

The extent to which this claim both ignores the obvious factual circumstances of non-citizens and the exclusionary rule itself should raise red flags in light of how the opinion removes barriers to racial profiling. The shoddy arguing and obvious racial impact suggests a purposeful attempt to remove barriers to racial profiling and facilitate the deportation of non-citizens of color. O’Conner’s rational is merely masquerading as a race-neutral reasoning. This charge, after all, is not inconsistent with Justice O’Conner’s historical treatment of racial minorities, whom she has been accused of issuing opinions against more often than she has in their favor.\(^7\)

It is important to note that the majority in *Lopez-Mendoza* identified an exception to its holding which excludes evidence where it was procured as a result of “widespread violations” which have constituted an “egregious constitutional violation” that is “fundamentally unfair.”\(^8\) Nevertheless, even with the exception, the ruling constitutes less Fourth Amendment protection than is afforded to citizens in contravention of the principal that the constitution applies equally to all people, citizen or not, documented or not, residing in U.S. territory.

One review of the federal Court of Appeals cases following *Lopez-Mendoza* observes that each court relying on the case have also relied on its unfounded arguments, stressing the civil nature of immigration proceedings, the supposed reliability of ICE’s internal regulations and a

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\(^6\) *Id.* at 1058-9.

\(^7\) Herman Schwartz, *O'Connor as a ‘Centrist’? Not When Minorities Are Involved*, LOS ANGELES TIMES, April 12, 1988.

\(^8\) *Lopez-Mendoza* at 1050-51.
reliance on the respondent’s purported ability to seek relief in tort. In relying on Lopez-Mendoza’s bogus rationale for what seems to be an attempt to facilitate racial profiling of non-citizens of color, several courts have espoused even less-veiled threats based on race.

For example, while the rule in Lopez-Mendoza was limited to the admission of evidence in a civil immigration hearing and was not to be carried over into the criminal context as the dissent points out in U.S. v. Ortiz-Hernandez, the majority in that case misread Lopez-Mendoza and, motivated by the urge to give license to agents to racially profile, extended the rule to include a criminal proceeding: In that case, the majority held that Ortiz-Hernandez’s identity could not be suppressed even in the context of Ortiz-Hernandez’s criminal trial, where “it is Ortiz-Hernandez’s insuppressible identity, along with his continued illegal presence in this country, that connect him to the charged crime.”

Generally, to make an arrest or a search, an agent of the state must be able to identify a probable cause that the suspect is or has just committed a crime. Respondent Jose Luis Ortiz-Hernandez was arrested and detained without probable cause when he was given a drug charge even where no drugs were found on his person or anyone else associated with him at the time. Subsequent to this illegal arrest, the Police Department of Portland, Oregon took his finger prints and used them to discover his undocumented status. He was then convicted of illegally re-entering the country following a deportation, which is a crime. The Majority excluded the

70 U.S. v. Ortiz-Hernandez, 427 F.3d 567, 582 (9th Cir.) (Fletcher, J., dissenting) (“the [Lopez-Mendoza] Court was explicit in saying that the evidence . . . would have been properly suppressed if it had been a criminal proceeding”).
71 Ortiz-Hernandez, 427 F.3d at 578.
73 Ortiz-Hernandez at 573.
74 Id. at 572-3.
75 Id.
76 Id. at 573.
fingerprints, but not respondent’s identity – even though it was through the fingerprints that his identity was acquired. Yet with knowledge of the respondent’s identity, the fingerprints themselves could simply be acquired through a motion to compel.77

The decision, as Justice Fletcher points out, merely goes to remove all barriers to racial profiling. The effect, Justice Fletcher correctly surmises, is that "law enforcement officers may arrest without probable cause any . . . Hispanic-looking person [they suspect of being] an illegal immigrant . . . [i]n practical effect, the Fourth Amendment and the exclusionary rule would be rendered meaningless."78 The respondent and his companion were stopped because they were “Hispanic-appearing men,” driving a truck in an area where drugs are sometimes dealt.79

Thus, by creating exceptions that allow law enforcement to target them based upon race, Lopez-Mendoza and its progeny make Spanish-speaking non-citizens exceedingly more vulnerable than citizens to police and ICE abuses of power.

B. Denying Non-Citizens Protection by the Fourth Amendment at the Border and its Equivalent

The Supreme Court has held that the Fourth Amendment simply does not apply at the border itself because all searches that occur there are per se reasonable.80 This so-called “border search doctrine,”81 permits searches made at the border “pursuant to the longstanding right of the sovereign to protect itself by stopping and examining persons and property crossing into this...

77 Id. at 579.
78 Id. at 585.
79 Id. at 570.
country, are reasonable simply by virtue of the fact that they occur at the border.\textsuperscript{82} This rule is so sacrosanct that even the removal of a car's gas tank, as long as it's at the border, does not require so much as reasonable suspicion.\textsuperscript{83} When non-citizens have come before the court, judges have found ways to extend this suspension of the Fourth Amendment beyond the border itself.

Take for example \textit{U.S. v. Martinez-Fuerte}, where the Court held that “stops and questioning . . . [which] may be made in the absence of any individualized suspicion at reasonably located checkpoint,” were per se reasonable under the Fourth Amendment.\textsuperscript{84} This effectively extended the per se reasonableness of stops\textsuperscript{85} at the U.S. border to any stationary “fixed checkpoint” – literally any location, however far from the border, where law enforcement agents pick a spot on the road, plant themselves there permanently, and start pulling people over as they pass that location.\textsuperscript{86}

The Court’s intentions were not ambiguous when it deemed acceptable the ordering of inspections without reasonable suspicion of unlawful conduct at such checkpoints, even if “made largely on the basis of apparent Mexican ancestry.”\textsuperscript{87} The court added, “we hold today that such stops are consistent with the Fourth Amendment. We also hold that the operation of a fixed checkpoint [to stop vehicles] need not be authorized in advance by a judicial warrant.”\textsuperscript{88}

\begin{itemize}
\item \textsuperscript{82} \textit{United States v. Ramsey}, 431 U.S. 606, 616 (1977).
\item \textsuperscript{83} \textit{U.S. v. Flores-Montano}, 541 U.S. 149 (2004).
\item \textsuperscript{84} \textit{U.S. v. Martinez-Fuerte}, 428 U.S. 543, 562 (1976).
\item \textsuperscript{85} While a stop can be made at the border or at a fixed checkpoint without reasonable suspicion, a search at a fixed checkpoint, unlike at the border, still requires probable cause that the vehicle contains undocumented persons, \textit{Martinez-Fuerte}, 428 U.S. at 555.
\item \textsuperscript{86} \textit{Martinez-Fuerte} at 547 (in \textit{Martinez-Fuerte} the “fixed checkpoint” consisted of uniformed officers and their vehicles camped out at a permanent Border Patrol building on Interstate 5, between San Diego and Los Angeles, some 66 miles north of the Mexican border).
\item \textsuperscript{87} \textit{Id.} at 563.
\item \textsuperscript{88} \textit{Id.} at 545.
\end{itemize}
Much like Justice Gray's sinophobic rant about "vast hordes crowding in upon us" expressed in the Chinese Exclusion case above, the court in *Martinez-Fuente* makes similarly fear-mongering statements rooted in phobias of Spanish and Spanish-American culture entering the United States. The court warned that “[a] conservative estimate in 1972 produced a figure of about one million, but the Immigration and Naturalization Service now suggests there may be as many as 10 or 12 million aliens illegally in the country. It is estimated that 85% of the illegal immigrants are from Mexico,” 89 and that “... maintenance of a traffic-checking program in the interior is necessary because the flow of illegal aliens cannot be controlled effectively at the border.” 90

This is a common concern spelled out in many of the cases discussed in this note and the reader should notice how often the mere number of undocumented persons is regarded by judges as cause enough to give the state a weighty interest in excluding them. Here, as in other opinions where the court alludes to “hordes” coming to “crowd us out,” it engages in no discussion about why that is a problem. The reader is left guessing; perhaps the court is saying that the number of undocumented persons is a problem because of their economic impact (although research shows that impact to be a positive one91). The court merely shows us the large numbers of people of Mexican heritage and per se holds this out to be a problem.

Large number of immigrants from Mexico, the statement therefore implicitly expresses, are bad because Mexicans are bad – a conclusion that follows from a belief in the racist

89 Id. at 551.
90 Id. at 556.
conceptualization of Spanish-speaking persons as “bandits” and “harlots.” In other words, it is a conclusion that follows from the ancient “black legend” perception of Spanish-speaking people as inherently more violent or rapacious and less intelligent or productive than other people. Thus a large number of such persons is per se a problem to the extent that it requires no further explanation, by either the court or the government, as to why it is a problem.

One argument made by the court has, upon further consideration, terrifying implications as an endorsement of racial apartheid. The court goes on to say “[m]oreover, selective referrals (pulling selected cars over and asking the occupants to produce proof of their legal status) rather than questioning the occupants of every car tend to advance some Fourth Amendment interests by minimizing the intrusion on the general motoring public.”92 The intrusion upon the Fourth Amendment rights of the “referrals” serve to insulate the rest of the motorists from a similar intrusion, or the rights of the non-referred, privileged motorists are borne only on the backs of those pulled over and interrogated. A well strategized recipe for creating first and second class people, with the first class person’s right (here, those not pulled over because they were not racially profiled) dependant upon the second class person not having the same rights (here, the person pulled over because of their identifiable racial features, such as skin color). The reader who is mindful of the connection between racism and discrimination against non-citizens will see here the shadow of Plessy’s separate but equal doctrine, endorsed as it has been by Justices such as Rehnquist,93 who incidentally joined the majority’s opinion in this case.94

92 Martinez-Fuerte at 560.
93 See William Rehnquist, A Random Thought on the Segregation Cases, 1952, Supreme Court History, Expanding Civil Rights, The Public Broadcasting Corporation, available at: http://www.pbs.org/wnet/supremecourt/rights/sources_document7.html (containing the full text of a memo in which then Supreme Court clerk Rehnquist expressed support for the decision in Plessy v. Ferguson); For further discussion on this point, see Part III(C) of this note.
94 Id. at 567.
Justice Brennen’s dissent in *Martinez-Fuerte* calls a spade a spade and his candid opinion is telling with respect to how obvious the majority’s racial animus really is. “Standing alone,” Brennan responds, “Mexican appearance does not justify stopping all Mexican-Americans to ask if they are aliens.”95 He continues:

“Since the objective is almost entirely the Mexican illegally in the country, checkpoint officials, uninhibited by any objective standards and therefore free to stop any or all motorists without explanation or excuse, wholly on whim, will perforce target motorists of Mexican appearance. The process will then inescapably discriminate against citizens of Mexican ancestry and Mexican aliens lawfully in this country for no other reason than that they unavoidably possess the same “suspicious” physical and grooming characteristics of illegal Mexican aliens.”96

Note the suspicious “physical and grooming” characteristics of “illegal Mexican aliens” to which Brennan here refers, presumably argued as cause for reasonable suspicion by the government in this case (although the opinion itself is silent on whether or not they did). “Physical and grooming” characteristics is merely the disheveled “el bandito” stereotype shining through the government’s argument, and by extension the majority’s endorsement of it. Brennan stops short at explaining that the discriminatory consequence for people who appear Hispanic is exactly what the majority, consciously or subconsciously, means to enforce here.

But extending the suspension of the reasonable suspicion requirement from the border to any “fixed checkpoint” is no more horrendous a decision than dragging the border itself 25 miles

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95 *Martinez-Fuerte* at 571 (Brennan, J., dissenting).
96 *Id.* at 572.
inland as the Court left open the possibility for in *Almeida-Sanchez*. In that case the Border Patrol agent, during a “roving patrol,” had searched the vehicle of a Mexican citizen 25 miles from the border without probable cause or reasonable suspicion. While the Court held that agents engaging in a “roving patrol” are required to have probable cause that the vehicle has undocumented persons inside in order to *search* that vehicle, the opinion was curiously silent on whether or not agents would require reasonable suspicion 25 miles from the border to *stop* that vehicle.

The government’s argument that it had the right to make such a warrantless search was based upon section 287(a) (3) of the Immigration and Nationality Act, which provides for warrantless searches of automobiles and other conveyances “within a reasonable distance from any external boundary of the United States,” a standard which had been interpreted by the Attorney General as within 100 air miles of the border.

Without saying more about reasonable suspicion under this statute the Court appeared to leave it open to such stops at least within 25 miles of the border. It was not until *Brignoni-Ponce* when the Court finally held that regardless of what 287 contends, “[e]xcept at the border and its functional equivalents,” officers on roving patrol may stop vehicles only if they have reasonable suspicion that those vehicles contain undocumented persons. That cars could be stopped willy-nilly on the bases of race was thus left open for the several years between these two cases.

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97 *Almeida-Sanchez*, 413 U.S. at 267-8.
98 See *Almeida-Sanchez generally* (holding the search was unlawful because there was no probable cause, but making no mention of whether a mere stopping of the vehicle would have been permitted without reasonable suspicion).
100 8 CFR s 287.1, defines ‘reasonable distance’ as ‘within 100 air miles from any external boundary of the United States.’
While Almeida-Sanchez may have restricted what the ACLU has appropriately referred to as the “constitution-free zone” authorized by the INA statute, this standard for deciding which areas create spaces where the Fourth Amendment does not protect non-citizens (and, incidentally, citizens who may appear to agents of the state as non-citizens) is lax enough to cause widespread civil rights violations of non-citizens (and citizens as well). Almeida-Sanchez stated, and Brignoni-Ponce reaffirmed, that border searches “in certain circumstances [may] take place not only at the border itself,” where, recall, not even reasonable suspicion is required to stop and search a vehicle, “but at its functional equivalents as well.”

With respect to what constitutes a “functional equivalent of the border,” the Court gave as examples “an established station near the border, at a point marking the confluence of two or more roads that extend from the border, ... [and] at a St. Louis airport after a nonstop flight from Mexico City....” Although even by this definition it seems conceivable that “a point marking the confluence of two or more roads that extend from the border,” could easily be many miles from that border, leaving open to this Fourth Amendment suspension a frightening variety of locations.

Since Almeida-Sanchez and Brignoni-Ponce, federal courts have added to this list of places that are “functional equivalents” of the border and in doing so have expanded the number of places and circumstances under which the Fourth Amendment rights of non-citizens and persons suspected of being non-citizens can be suspended. In one such example, the district court

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102 But See, U.S. v. Gonzalez, 2005 WL 3448027, at 7 (rejecting the notion that 1357(a)(3) does not require border agents to have reasonable suspicion to stop a vehicle within 25 miles of the border because allowing such a rule would “allow search for aliens indiscriminately anywhere” in Puerto Rico, “except for some limited patches in the center rural and mountain area,” given the island’s small size of 35 miles by 100 miles).

103 Almeida-Sanchez at 272.

104 Id. at 273.
of New Hampshire found the Dover Post Office to be the “functional equivalent or an extension of the border....”\textsuperscript{105}

Note that the dissenting opinion in \textit{Almeida-Sanchez} joined by four of the justices, would have upheld the INA statute extending the border 100-miles inland, "[g]iven the large number of illegal entries across the Mexican border at other than established ports of entry . . . the stop of petitioner's car was reasonable."\textsuperscript{106} Again the dissenting judges were espousing the "hordes crowding in upon us," concerns mirrored in \textit{Martinez-Fuerte}, and seemingly making the argument that the large number of these “hordes” is per se a problem and thus justifies the statute that would have suspended the Fourth Amendment’s application to \textit{any and all} vehicles within 100 miles of the border. Again behind the phrase “large numbers,” the mythical, ancient terror of the black legend, and the army of violent and unintelligent “banditos” it portends, in the mind of judges harboring racist ideas, appears to be instructing these dissenting opinions.

Justice Douglas points out the seemingly obvious consequences to decisions like \textit{Almeida-Shanchez}, in his concurring opinion in \textit{Brignoni-Ponce}, namely that “[t]he suspicion test has indeed brought a state of affairs where the police may stop citizens on the highway on the flimsiest of justifications,”\textsuperscript{107} such as stopping a station wagon that was riding too low to the ground or simply because it had a spare tire in the backseat.\textsuperscript{108} While Justice Douglas points out the danger posed to the rights of owners of station wagons, he seems to omit the danger just as obviously posed to owners of brown skin. The omission itself, on the part of every justice including Douglas, speaks to a bias against people of Hispanic descent, and indeed perhaps it

\textsuperscript{106} \textit{Almeida-Sanchez} at 299.
\textsuperscript{107} \textit{Brignoni-Ponce} at 890 (Douglas, J., concurring).
\textsuperscript{108} \textit{Id.} at 889 (citing to \textit{U.S. v. Wright}, 476 F.2d 1027 (CA5 1973)).
speaks to the Justices merely failing in the moment to be cognizant of the fact that many U.S. Citizens are of Hispanic descent, not just non-citizens.

C. Denying that the Fourth Amendment Protects Non-Citizens at All

In 1990 the Supreme Court held in *U.S. v. Verdugo-Urquidez* that the Fourth Amendments does not protect a non-citizen *only when* that non-citizen is searched or seized outside of U.S. territory by a U.S. state official. The decision, tragically granting U.S. officials greater power to invade the homes and lives of any non-citizen living outside the country, nonetheless seemed innocuous to non-citizens inside the U.S.

However, dicta by Justice Rehnquist has proven incredibly destructive to Fourth Amendment protections for non-citizens inside the U.S. as well. In that case Rehnquist, in contravention to stare decisis on the matter, and in a comment completely unnecessary to resolve the case at bar, questioned whether the Fourth Amendment protected undocumented aliens inside the U.S. at all. Justice Rehnquist noted "[e]ven assuming such [undocumented] aliens - who are in this country voluntarily and presumably have accepted some societal obligations - would be entitled to Fourth Amendment Protections, their situation differs from that of respondent..." In doing so Rehnquist potentially re-set the case law that began with *Yick Wo* and gave the world the notion that Fourth Amendment protection of undocumented residents is an unanswered question – making a mystery of hitherto clearly established law.

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110 *Verdugo-Urquidez*, 494 U.S. at 260; Rehnquist also added, “Lopez-Mendoza did not address the question of whether the Fourth Amendment applies to illegal aliens in the U.S.” On this he is correct, but of course the reason it did not address it expressly is because the case is assuming that it does. Rehnquist even notes earlier in his opinion that the majority in Lopez-Mendoza “assumed that illegal aliens in the United States have Fourth Amendment rights,” *Verdugo-Urquidez* at 263.
In his thinly veiled attempt to dismantle the constitutional protection of non-citizens, Rehnquist shoots down an equal protection argument by explaining that the term "people" simply wasn't intended to include non-citizens when the Constitution was written, and thus cannot include them under its protection now.\textsuperscript{111} Dispelling respondent’s equal protection argument based upon what the authors of the bill of rights intended "people" to mean is a problematic rationale when one considers that "people", as it was originally intended, was not just meant to exclude non-citizens, but anyone of African or Native American descent as well. Thus the argument, perhaps hiding behind the perceived legitimacy of originalism, is nonetheless rooted in a racist definition of “people.”

The reader who concludes that finding a racist motivation for Rehnquist’s opinion is specious should consider Rehnquist’s track record on race. As a student at Stanford he was infamous for telling racist and anti-Semitic jokes.\textsuperscript{112} As a law clerk he wrote a memorandum entitled "A Random Thought on the Segregation Cases," in which he defended the separate-but-equal doctrine embodied in \textit{Plessy v. Ferguson}, stating, presumably without any sense of shame, that "Plessy was right and should be reaffirmed."\textsuperscript{113} Neither did his racism stop at the U.S. border. Between 1958 and 1962, Rehnquist was the director of "operation Eagle Eye," an association of conservative attorneys that would descend upon polls during election season and intimidate minority voters and voters with “accents.”\textsuperscript{114}

\textsuperscript{111} \textit{Id.} at 265-6.
\textsuperscript{113} See Rehnquist, \textit{supra} at note 91.
Put simply, if it walks like a duck and quacks like a duck…; the outcome and conclusions reached by Rehnquist’s opinion in Verdugo-Urquidez are exactly those we would expect of a Justice who would favor a return to an apartheid of second-class status for non-whites and non-citizens. Thus given his history and the views he has expressed, there is little reason to suppose any other animus is at work in Rehnquist’s opinion. Moreover, history has shown us how often the same judges that upheld the abhorrent arguments in Plessy were later responsible for the exclusion of non-citizens on the basis of race in Chinese Exclusion Act cases that followed; recognizing this makes Rehnquist’s decisions on the rights of non-citizens predictable.

Since Rehnquist’s reckless dicta, courts have cited Verdugo-Urquidez as support for the notion that the Fourth Amendment does not protect undocumented U.S. residents even if the search and seizure of them took place inside the United States. The Ninth Circuit in United States v. Barona, citing to Rehnquist’s opinion, questioned whether non-citizens, both outside and inside the U.S., “are entitled to receive any Fourth Amendment Protection whatsoever.”115 Another reliance upon Rehnquist’s xenophobic rant was made in a Texas appellate court case in Torres v. State, in which Rehnquist’s dicta in Verdugo-Urquidez was used to hold that respondent’s undocumented status precluded him from receiving Fourth Amendment protections.116 Or as that court put it, “[we do] not believe that the protections of the Fourth Amendment to the United States Constitution … appl[ies] to such illegal aliens, unless they have developed sufficient connection with this country to be considered a part of the community.”117

115 United States v. Barona, 56 F.3d 1087, at 1094 (9th Cir. 1995).
117 Torres, 818 S.W.2d at 143 (FN 1).
These opinions would allow agents of the state to search and seize Spanish-speaking people on any grounds they please, be it their race, their language, or anything at all. Thus, just as mass incarceration accomplishes what segregation used to vis-à-vis the ostensibly race-neutral “war on drugs,” so Rehnquist’s opinion and the courts that have followed it accomplish what the Chinese Exclusion Acts used to vis-à-vis the ostensibly race-neutral dicta in Verdugo-Urquidez – an exclusion of people from the U.S. based upon race.

IV. Denying Non-Citizens the Protection of the Fourth Amendment by Permitting Racial Profiling in Immigration Enforcement Despite the Amendment’s Application

When none of the above exceptions above can be identified, the courts have developed a more subtle way of denying Fourth Amendment protection to non-citizens, that is, by allowing law and immigration enforcement agents to engage in racial profiling anyway despite the Amendment’s application. Two of these strategies for permitting racial profiling of non-citizens, articulated below, include (A) refusing to find a seizure even when there was indeed a seizure by every legal measure of the word, thereby never reaching the question of racial profiling and (B) explicitly permitting racial profiling as one-among-multiple factors for justifying reasonable suspicion. Once again, one sees similarly racist notions and racially disparate outcomes present in the language and reasoning of the opinions.

A. Permitting Racial Profiling by Refusing to call a Seizure a Seizure

\[118\] ALEXANDER, supra at note 21, at 53, 59, 60.
Intuitively, one’s Fourth Amendment freedom from unreasonable seizure is not implicated unless the agent of the state actually “seizes” them.\textsuperscript{119} A police officer seizes someone when, “by means of physical force or show of authority,” in some way restrains the liberty of that person.”\textsuperscript{120} Whether or not the use of physical force or show of authority constitutes seizure depends upon whether “under the particular circumstances presented, a reasonable person would have believed that he was not free to leave if he did not respond to the questions put to him.”\textsuperscript{121} Factors that courts find compelling of the conclusion that the purported seizure satisfies this objective test include “the display of a weapon, physical touching of the person by the officer and language or tone indicating a show of authority that may compel compliance with the officer's request.”\textsuperscript{122}

Recall that under \textit{Terry v. Ohio}, the police must have reasonable suspicion to seize a person.\textsuperscript{123} Normally, reliance upon race alone is an impermissible means of acquiring that reasonable suspicion.\textsuperscript{124} But if the actions engaged in by the enforcement agents do not constitute a seizure, then those actions are permitted without any suspicion and the court will never inquire into the reason for the seizure.\textsuperscript{125} Therefore, where the facts can be twisted or ignored to erase the seizure from history, immigration enforcement agents are free to racially profile those they stop – and in this way the federal courts have effectively permitted the racial-profiling of non-citizens even where the Fourth Amendment still applies.

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\textsuperscript{119} \textit{Terry v. Ohio}, 392 U.S. 1, 13 (1968)
\textsuperscript{120} \textit{Terry}, 392 U.S. at 37.
\textsuperscript{121} \textit{Pinto–Montoya v. Mukasey}, 540 F.3d 126, 131 (2d Cir.2008)
\textsuperscript{122} \textit{United States v. Sugrim}, 732 F.2d 25, 28 (2d Cir.1984).
\textsuperscript{123} \textit{Terry} at 37.
\textsuperscript{124} \textit{Whren v. U.S.}, 517 U.S. 806, at 813 (1996) (“We of course agree with the petitioners that the Constitution prohibits selective enforcement of the law on considerations such as race”).
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The Forerunner to the line of cases in which the federal courts deny the existence of a seizure in order to permit racial profiling is *INS v. Delgado*, another case in which Justice Rehnquist delivered the majority opinion. In *Delgado* Rehnquist (predictably) upheld a raid of a factory by INS agents in which they posted agents at every exit of the building and, moving through the workers systemically, questioned every employee about their citizenship status and regularly demanded paperwork proving permission to be in the U.S. Counter-intuitively, the Supreme Court held in this instance that a reasonable person would not have believed they were not free to leave the factory under these circumstances, and thus no actual seizure had been made in this instance, making any discussion of what motivated that non-seizure, legally moot, and thus permissible.

The *Delgado* Court reasoned that the officer’s position at every exit merely put the workers on notice that they would be questioned if they tried to leave and not seized, despite the fact that the workers testified to the contrary. Since the workers could have feared only being questioned and not detained, the positioning of the agents at every exit was not a seizure. The Court relied here on the reasoning articulated in *U.S. v. Martinez-Fuente*, which was that the substantial governmental interest to control the “flow of illegal aliens into the interior of the country,” outweighed the “minimal” intrusion on motorists to be stopped and questioned at a fixed checkpoint. Powell analogizes in his concurring opinion, stating that the government’s interest in factory surveys is similar in the importance of policing the border, “because such [factory] surveys account for one-half to three-quarters of the illegal aliens identified and

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126 *Delgado*, 466 U.S. at 219.
127 *Dalgado* at 212.
128 *Id.* at 219.
129 *Id.* at 220.
130 *Id.*
131 *Id.* at 222.
arrested away from the border every day in the Los Angeles district. . . “132 and because “recent estimates of the number of illegal aliens in this country range between 2 and 12 million . . . clearly the government interest in this enforcement technique is enormous.”133 Again we can hear the racist argument that it is per se bad to have “hordes” of Spanish-speaking people inside the country because such people are violent, bandits, etc., etc. For Powell, even if there had been a seizure, *Terry* should not apply in the seizure of a “factory survey.” Why? Because, Powell’s racism echoes, there are “hordes” of Spanish-speaking people “crowding in upon us” and, since these people are bad, their presence inside the United States is per se a problem. Again pursuant to “the black legend” roots of Hispaniphobia, Powell perceives Spanish-speaking people, consciously or subconsciously, as inherently more dangerous and troublesome than other people, and thus the government interest in being rid of them is “enormous.”134

In *Dalgado* Brennan’s dissent once again shows clearly how the standard articulated here differs from the standard applied to Fourth Amendment cases generally, producing a discrimination that renders the Fourth Amendment rights of immigrants something less than citizens: First, Justice Brennan noted that a seizure had indeed taken place, saying “Although none of the respondents was physically restrained by the INS agents during the questioning, it is nonetheless plain beyond cavil that the manner in which the INS conducted these surveys demonstrated a “show of authority” of sufficient size and force to overbear the will of any reasonable person. Faced with such tactics, a reasonable person could not help but feel compelled to stop and provide answers to the INS agents' questions.”135 Justice Brennan is not the only one to notice the glaring inconsistencies in the majority’s reasoning. At least one author

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132 *Id.*
133 *Id.* at 223.
134 *Id.*
135 *Id.* at 229 (Brennan, J., dissenting).
has already noted the ways in which the analysis in *Delgado* ignores the appropriate standard for the kind of warrant used in that case.  

Brennan then noted the recklessness of Justice Powell’s concurring opinion. Brennan reminds us that the only reason the court permitted the ruling in the fixed checkpoint case was because stopping a vehicle and questioning the occupants was such a brief and inconsequential intrusion into someone’s privacy. But unlike *Martinez-Fuentez*, there was widespread fear and anxiety in *Dalgado*. “In light of these circumstances,” he continues, “it is simply fantastic to conclude that a reasonable person could ignore all that was occurring throughout the factory and, when the INS agents reached him, have the temerity to believe that he was at liberty to refuse to answer their questions and walk away”  

Brennan also adds, correctly, that this decision “visits all of the burdens of this jury-rigged enforcement scheme on the privacy interests of completely lawful citizens and resident aliens who are subjected to these factory raids solely because they happen to work alongside some undocumented aliens.” In Brennan’s opinion, the majority were “pronouncing the Fourth Amendment a dead letter in the context of immigration enforcement.” Much like the holes the dissent easily poked in the civil relief argument presented in *Lopez-Mendoza*, Brennan’s opinion points out how obviously fallacious the majority’s reasoning is in *Dalgado*. As in *Lopez-Mendoza*, these blatantilly silly justifications throw credit behind the notion that the real reason behind the holding is to permit racial profiling in these circumstances. The decision effectively allows ICE to seize and question an entire work force without being subject to the Fourth

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137 *Dalgado* at 226.
138 *Id.* at 230.
139 *Id.* at 242 (Brennan, J., dissenting).
Amendment, even though the Court in *Terry v. Ohio* clearly stated that an agent of the state must have reasonable suspicion to detain an individual.

Federal courts have followed *Delgado’s* lead and used its reasoning to get around racial profiling of immigrants by way of denying that a seizure ever took place, obviating the need for reasonable suspicion and thus for an inquiry into what prompted the seizing non-seizure. The Ninth Circuit, in *Martinez v. Nygaard*, followed *Dalgado* in another “factory survey” case. This time immigration agents acquired a search warrant after receiving tips that a factory was employing undocumented immigrants. While the warrant covered entry into the factory, it did not permit any seizure of its occupants. Despite having a warrant to enter the factory, what they did not have, the court held, was reasonable suspicion that any of the occupants therein were in fact undocumented immigrants. No matter, the Ninth Circuit said following *Dalgado*, plaintiffs were not seized.

Again just as in *Delgado*, the conclusion here that no seizure occurred is patently ridiculous. One plaintiff was even grabbed by the shoulder by one agent in order to get him to answer questions, but the *Nygaard* Court said this was not a seizure because the individual was held by the shoulder “too briefly.” Yet one of the factors that courts are supposed to find compelling of the conclusion that the purported seizure satisfies the test that a seizure has taken place is “the physical touching of the person by the officer and language or tone indicating a show of authority that may compel compliance with the officer's request.” Here the non-citizen was not only touched, but touched for the purpose of being compelled to answer a

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141 Nygaard, 831 F.2d at 824.
142 Nygaard at 824.
143 Id. at 827.
144 Id. at 826.
145 Id. at 827-8.
question. The contradictory conclusion drawn lends credence to the argument that the court set out to find no seizure in this case in order to permit racial profiling and is twisting the meaning of the facts for the purpose of satisfying that racist agenda.

In *U.S. v. Mendieta-Garza*, the Fifth Circuit held that no seizure occurred when Border Patrol Agents boarded a bus and announced to all of the passengers that they were going to be inspected and were going to produce their identification papers, all while blocking the aisle, stationing agents at the front and rear of the bus, interrogating each passenger about his citizenship and even questioning one petitioner twice by two different officers.\(^{147}\) Although the issue of racial profiling was never raised in the case, it certainly could have been. The bus, traveling from Matamoros Mexico to Houston Texas, had already undergone immigration inspection at the Los Tomates Bridge border crossing.\(^{148}\) The agents that boarded the bus did so speaking Spanish, demonstrating their perception that the bus was occupied solely by Spanish-Speaking persons, and thus demonstrating that the choice to stop the bus and conduct an immigration inspection was clearly a racially motivated one.\(^{149}\) But the court did not have to analyze any racial profiling issue even if one had been raised because the Fifth Circuit was unconvinced that the petitioner or anyone else on the bus had been seized.\(^{150}\)

As in *Dalgado*, we see the court in *Mendieta-Garza* straining to find no seizure in order to protect the practice of racial profiling. No seizure occurred, the Court held, because the agents did not "brandish [their] weapon, make a threat, or speak in an authoritative tone of voice."\(^{151}\)

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\(^{147}\) *United States v. Mendieta-Garza*, 254 Fed. Appx. 307, 312 (5th Cir. 2007).


\(^{149}\) *Mendieta-Garza* at 315 (Dennis, J., concurring) (incidentally, the concurring opinion of Judge Dennis is not any more helpful - that Judge concluded that, even if a seizure had taken place, it would be permitted as reasonable under the fixed checkpoint exception of *Martinez-Fuerte*).

\(^{150}\) *Id.* at 314.

\(^{151}\) *Id.* at 312.
Despite citing to a Supreme Court case, *Drayton*, which states explicitly that a command is a show of authority that would constitute a seizure, the majority found the phrase “If you are not a U.S. citizen, please have your papers ready,” was not a command because it did not involve the use of an authoritative tone of voice and would not move a reasonable person to conclude that they were not free to deny the request.\(^\text{152}\)

First, the standard for determining seizure has never been making threats - rather merely restricting freedom in the form of displaying a weapon, physical touching or language or tone indicating a show of authority.\(^\text{153}\) Second, it is hard to imagine how it could be possible to tell, not ask, a passenger to produce documents without rendering the voice of the one making the demand anything other than authoritative.

Thirdly, even if the command hadn’t been given in an authoritative way, the Fifth Circuit reads *Drayton* incorrectly. The Supreme Court in *Drayton* does not say that the command must be made with an authoritative tone of voice, rather it lists them together as separate factors thusly: “[there was no seizure because there was] . . . no command, not even an authoritative tone of voice,” \(^\text{154}\) meaning a seizure takes place where there is either a command or an authoritative tone of voice, and not that a command must be made in an authoritative tone of voice; a command itself, in any tone of voice, is a sufficient show of authority. “If you are not a U.S. citizen, please have your papers ready to produce them,” \(^\text{155}\) is certainly understood by anyone as a command when coming out of the mouth of an armed, uniformed officer and is therefore language that shows authority under *Drayton*. *Mendieta-Garza* merely glazes over the

\(^{152}\) *Id.*  
\(^{153}\) *Id.*  
\(^{154}\) *Id.*  
\(^{155}\) *Id.* at 309.
incongruency between its conclusions and the Drayton opinion in a desperate effort to allow racial profiling to sneak in under the fence of the Fourth Amendment.

But the Fifth Circuit has not been the only Court to misread Drayton in order to insulate racial profiling. The Eighth Circuit followed the same rationale in U.S. v. Angulo-Guerrero, again finding no seizure whilst citing to Drayton incorrectly.\(^{156}\) Once again, the immigration enforcement agents that boarded the bus commanded in Spanish and in English "...when I approach you state whether you're a United States citizen or not. And if [you are] not please have [your] immigration documents ready for inspection." While the Court in Angulo-Guerrero cited to Drayton as authority for the rule that merely boarding the bus and questioning passengers is not a seizure, they failed to mention that no officer in Drayton gave any commands to the bus passengers as the agents did in this case, and that a command was specifically articulated by Drayton as reason for the court to deduce that a seizure had taken place.\(^{157}\)

In Pinto-Montoya v. Mukasey, a little cited-to case from the Second Circuit Court of Appeals, the court lays out an unusually clear explanation of how refusing to find a seizure insulates the practice of racial profiling by state agents. Pinto-Montoya, a citizen of Guatemala and his brother were arriving at JFK airport on flight from Los Angeles to New York, when they were approached by plain-clothes immigration enforcement officers who blocked their path and asked what their immigration status was.\(^{158}\) The brothers responded that they were not in the country with permission, and were detained immediately.\(^{159}\) The Court notes that immigration officers "after 'observing various trends in the routes taken by [non-citizens illegally smuggled into the country] had developed a protocol for identifying and questioning suspected smugglers


\(^{157}\) Angulo-Guerrero, 328 F.3d at 451.

\(^{158}\) Pinto-Montoya v. Mukasey, 540 F.3d 126, 127 (2d Cir. 2008).

\(^{159}\) Pinto-Montoya, 540 F.3d at 128.
and their clients.”\textsuperscript{160} This protocol dictated, among other things, that “agents look for passengers typically of Mestizo physical appearance . . . who would be inappropriately dressed in light of the season (i.e., they would not be wearing or carrying cold weather coats in the winter),” would be without baggage, have airplane food with them and would have arrived on a flight “known to be used for alien smuggling.”\textsuperscript{161} Mr. Pinto-Montoya and his brother, however, were both wearing jackets, had checked luggage, and were carrying no food, and thus argued that they were stopped for no other reason than their race.\textsuperscript{162}

But the Second Circuit implies that even if, \textit{arguendo}, they were stopped solely on the basis of their race, this did not matter because no seizure had taken place and thus no reasonable suspicion was required, stating ”[B]ecause we conclude that petitioners were not seized within the meaning of the Fourth Amendment, we need not consider what role petitioners' racial characteristics played in the agents' decision to approach them for questioning.”\textsuperscript{163}

Citing to \textit{Delgado}, the court insisted that, despite the fact that the plain clothes officers were blocking the path of Mr. Pinto-Montoya and his brother, a reasonable person would have known they did not have to answer the questions asked of them.\textsuperscript{164} Just as in \textit{Dalgaard}, this conclusion is belied by petitioner’s testimony in which he stated that he answered the questions rather than walking away because the individual asking the questions was standing in front of him and “could have pulled [him] back,”\textsuperscript{165} implying that he interpreted the act of blocking his path not just as a show of force but as a threat of additional force in the future if petitioner refused to answer the questions asked of him. Efraulio Pinto-Montoya, petitioner’s brother,

\begin{footnotesize}
\textsuperscript{160} \textit{Id.} at 128.
\textsuperscript{161} \textit{Id.}
\textsuperscript{162} \textit{Id.} at 127-8.
\textsuperscript{163} \textit{Id.} at 133.
\textsuperscript{164} \textit{Id.} at 131-2.
\textsuperscript{165} \textit{Id.} at 129.
\end{footnotesize}
additionally stated that he agreed to speak with the agent because other passengers from the 
plane-all of whom were described by the Pinto-Montoyas as “Spanish”- were being questioned at 
the same time. Of course without any record of the citizenship status of these other passengers, 
we can only assume that the agents in this case were simply blocking the path of every person 
that appeared “Mestizo” – citizen or not, documented or not, in a brazen display of racial 
profiling that is permitted by the Second Circuit under the Fourth Amendment because of yet 
another strained interpretation of what constitutes a seizure.

Not to be outdone by its sister Court, the Fifth Circuit has used the “there was no seizure” 
backdoor to overlook perhaps even more egregious displays of racial targeting. In *U.S. v. 
Vandyck-Aleman*, ICE agents, together with the Forest, Mississippi Police Department took 
part in “an operation” to “identify gang members, felons, fugitives, and people who had been 
deported, in the local Hispanic community,” (emphasis added). Note that they looked for these 
individuals in the *Hispanic* community, specifically – and perhaps only. They specifically 
targeted a community of color for the purpose of seeking out fugitives and felons of Hispanic 
descent only. And in the town of Forest, Mississippi, where police and ICE agents openly and 
admittedly (and probably routinely) target the Hispanic community, the police argued that they 
had reasonable suspicion where residents of that community fled upon seeing their “caravan of 
vehicles” enter the neighborhood. Upon questioning these persons, lo and behold, the state 
agents found undocumented persons of Hispanic descent in the Hispanic community, for the 
same reasons one would find tall undocumented persons if one only questioned tall people about

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166 Id.
169 Id.
170 Id.
their immigration status. No doubt this approach left the undocumented persons in the Irish and Chinese communities unscrutinized.

Like the plaintiff in Pinto-Montoya, Vanduck-Aleman argued, not surprisingly, that he was questioned solely on the basis of his ethnicity. And like the Second Circuit in that case, the Fifth Circuit in this case found the use of racial profiling more than acceptable. \footnote{Id. at 217.} Again citing to Dalgado, the Court reasoned that merely asking someone a question, such as what their immigration status is, does not constitute a seizure under the Fourth Amendment, making any racial profiling irrelevant. Apparently the Second Circuit could not recognize the intimidation and show-of-authority inherent in an entire caravan of law enforcement officials showing up in a neighborhood for the purpose of interrogating each of its Spanish-speaking families.

The Vanduck-Aleman court, arguably going much further than the Second or Ninth Circuits have, added that while race cannot be the sole motivating factor, it is a “proper factor to consider,” explaining that:

\footnote{Id. at 218.} [a]lthough ethnicity generally may play no role in the enforcement of criminal laws of this country, enforcement of the immigration laws demands that the officials focus on individuals most likely to violate those laws. In the poultry-producing region of Scott County, Mississippi . . . the population of illegal aliens is predominantly Hispanic, not (non-Hispanic) white. Accordingly, the district court did not err by finding that the officers' decision to approach Vandyck's house and to question him when he came to the door was justified. \footnote{Id. at 218.}
Here the court is explicitly encouraging law enforcement agents to target people of color for immigration purposes. Also, prior to making this statement the court in fact found no reasonable suspicion, which makes this last paragraph vague as to its application. Was the court saying that race is a proper factor to consider when conducting a seizure incident to having reasonable suspicion, or was the court saying that race is a proper factor to consider when conducting a mere questioning that did not rise to the level of a seizure and lacked reasonable suspicion? The opinion seems to imply the former since the later would seem to extend more significant protection in contravention to the federal courts’ habit in these cases.

B. Permitting the Consideration of Race as a Factor in Finding Reasonable Suspicion

In *Whren v. U.S.*, the Supreme Court held that a police officer may stop a vehicle for any reason as long as the ostensible reason the officer identifies is legal. In arriving at this holding, the majority noted that “[w]e of course agree with the petitioners that the Constitution prohibits selective enforcement of the law on considerations such as race.” There appears to be some ambiguity after *Whren* however, whether the rule is that race may not be relied on at all to establish reasonable suspicion, or whether it may be relied on only as one of multiple factors in establishing it. That ambiguity has resulted in some lower court decision which seem to hold the latter, and others which seem to find the former.

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174 *Whren* at 813.
175 Reginald Shuford, *Civil Rights in the Next Millennium: Any Way You Slice It: Why Racial Profiling is Wrong*, 18 St. Louis U. Pub. L. Rev. 371, 375 n. 20 (1999) (discussing various federal court decisions which have reached conflicting results regarding the constitutionality of stops based solely on race or national origin).
176 *United States v. Harvey*, 16 F.3d 109 (6th Cir. 1994) (affirming the denial of motion to suppress evidence despite the fact that officers admitted to relying on race, among other factors, in stopping defendant's car); *United States v.*
In particular, *U.S. v Brignoni-Ponce* has been cited to for the explicit proposition that race, while it cannot be relied upon as the sole factor, can be looked to as one of multiple factors in establishing reasonable suspicion. If the officer has reasonable suspicion that the person is an alien illegally in the country, “he may stop the car briefly and investigate . . . the officer may question the driver and passengers about their citizenship and immigration status, and he may ask them to explain suspicious circumstances.” Some of these “suspicious circumstances” include, “certain station wagons” and heavily load vehicles with large compartments for fold-down seats or spare tires, frequently used, the majority alleges, for transporting “concealed aliens.” Other suspicious circumstances includes “mode of dress and haircut.” Note that among those characteristics identified as composing the image of the “el bandito” stereotype is a particular style of dress and haircut. It is thus likely that the court’s intention is to give agents license to apprehend individuals who match the description of the stereotype in their head, such as a person with “oily hair.”

The Court in *Brignoni-Ponce* justified this use of race as a factor by calling upon the now familiar black legend/el bandito-motivated “hordes” argument, stating that “[t]he government makes a convincing demonstration that the public interest demands effective measures to prevent the illegal entry of aliens at the Mexican border . . . estimates between 10 and 12 million . . .,” but this time added a telling piece that comes closer than other courts in revealing the argument’s

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Varela-Andujo, 746 F.2d 1046, 1047 (5th Cir. 1984) (noting that the passengers “were obviously Mexican-American” constituted one among several factors that together gave the agent a reasonable suspicion).

177 *U.S. v. Coe*, 4th Cir. 2012, 2012 WL 3106761 (finding “race is not an appropriate factor in the reasonable suspicion analysis); *United States v. Montero-Camargo*, 208 F.3d 1122, 1135 (9th Cir. 2000) (“given the continuing changes in our ethnic and racial composition, Hispanic appearance is, in general, of such little probative value that it may not be considered as a relevant factor where particularized or individualized suspicion is required”).

178 *US v. Meza-Meza*, 213 F.3d 644 (9th Cir. 2000) (citing to *Brignoni-Ponce* at 887).

179 *Brignoni-Ponce* at 881-82.

180 Id. at 885.

181 Id.

182 Id. at 878.
Hispaniphobic roots. “Whatever the number,” the Court continued, “these aliens create significant economic and social problems, competing with citizens and legal resident aliens for jobs, and generating extra demand for social services.”

It’s hard to say what significant “economic” problems are being referred to here because the court points to no data on how much non-citizens do or do not contribute to the economy, and for that matter, no data supporting the notion that citizens compete with legal resident aliens for jobs. To the contrary, multiple authoritative sources identify the enormous economic contribution of immigrants to the United States, such as the 660 million plus dollars in taxes New York State reaps annually just from undocumented residents alone.

Just as judges once blamed Chinese-speaking people for taking the jobs of U.S. Citizens, here we can see the Court echoing the same belief about Spanish-speaking people today. The xenophobic rhetoric about non-citizens “taking” the jobs that citizens would otherwise be eligible for ignores the fact that immigrants, like the rest of the general population, create jobs and bring employment to the United States too – either by establishing their own business or contributing to the growth of established ones. In New York State, for example, foreign born

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183 Id. at 878-9.
persons contribute 22 percent of the GDP of the state. This realization makes one wonder about the jobs that the U.S. would lose if more non-citizens were excluded from the economy.

The belief that non-citizens create “extra” demand for social services is simply erroneous. Since undocumented persons do not qualify for social services, unless the legislature of a state or municipality specifically intends to make them a qualifying group— it is difficult to see how the “extra demand for social services” is anything but an uninformed scare tactic, one reminiscent of the sinophobic fears of job loss that prompted the Chinese Exclusion Acts.

Nor is it easy to discern what the court means by “social problems.” Certainly it cannot be referring to criminal activity because research shows that, not only is there no evidence crime is related to the presence of non-citizens, but that in fact non-citizens commit less crime than citizens. Thus it points to no data showing that immigrants commit crime or cause “social problems,” more often than citizens do because no such data exists. Rather the court is likely referring to the erroneous and racist perceptions of Spanish-speaking people as criminals and degenerates that Justice Powell evidently harbors; a cloaked reference to the hispaniphobic “black legend,” and a fearful characterization of Hispanic people as violent, dangerous and amoral. “Social problems” thus smacks of the “obnoxious Chinese” comment in Harlen’s Plessy dissent, or fears of an immigrant community’s failure to conform to U.S. culture common in

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188 8 USC 1611(a), 8 USC 1621(d).
several of the Chinese exclusion cases above. Thus “Social problems,” is merely ostensibly race-neutral language meant to endorse the stereotyped profiles of Spanish-speakers.

*Brignoni-Ponce* does not just take the permission of racial profiling further because if allows race to be considered when making such a stop – rather it also creates fodder for any court in the future to find reason to deny any Fourth Amendment protection to non-citizens in the face of racial profiling. In his concurring opinion, Justice Rehnquist argues that “a strong case may be made” for allowing stops of travelers on the highway without even reasonable suspicion “in order to determine whether they have met the qualifications prescribed by applicable law for such use.”\(^{190}\) This presumably means that Rehnquist would not even afford people of Hispanic ancestry (or people driving station wagons and sporting certain haircuts) reasonable suspicion from being stopped by ICE.

Rehnquist also regarded such immigration related situations as similar to “highway road blocks to apprehend known fugitives.”\(^{191}\) So for Rehnquist, there is little difference between a person of Spanish-speaking ethnicity and a known fugitive with respect to their culpability – thinking that reflects the racist “black legend” notion of Spanish-speaking people as criminals and amoral people. For Rehnquist, one class of persons (Spanish-speaking persons) should be presumed guilty until proven innocent, while the other (everyone else) enjoys the privilege of the opposite; thus once again Rehnquist’s preference for first and second classes of citizens cut along racial lines pursuant to *Plessy* is laid bare.

Predictably, *Brignoni-Ponce* has opened the door to racial profiling, not just by judging skin color or haircuts, but also by other traits, such as names. In *Oehorhaghe v. INS*, the plaintiff’s Nigerian sounding name, did not by itself provide a rational basis for believing that

\(^{190}\) *Brignoni-Ponce* at 887.

\(^{191}\) *Id.* at 887-8.
Orhorhaghe was an undocumented person rather than a legal alien or a United States citizen. When added to other factors however, the Ninth Circuit, citing to Brighoni-Ponce, held that reasonable suspicion could be found: “Although a subject's foreign-sounding name, like his foreign-looking appearance, may in some cases be “a relevant factor” in determining whether immigration officers were justified in making an investigatory seizure, it is clearly insufficient standing alone.”\(^{192}\)

It is notable as well that in some of the cases in which racial profiling is embraced as a legitimate factor building toward reasonable suspicion, that the Courts often point to the “dirty” and “disheveled” appearance of individuals of Latin American descent. For example, the Fifth Circuit in United States v. Varela-Andujo, noted that at least two of the passengers who were “obviously Mexican-American” were also “disheveled, tired, and wearing dirty clothes,”\(^{193}\) and in U.S. v. Salazar-Martinez, the Court noted that the passengers in the vehicle stopped were "unkempt,” “unwashed,” “uncombed,” and “shabbily dressed."\(^{194}\)

The reader must guess what the Court is implying from these “dirty” descriptions, and one might guess the Court is deducing that a trek across the desert to enter surreptitiously across the border leaves one dirty, thus making the passenger’s “unkempt” appearance relevant to their undocumented status in the U.S. and thus relevant to reasonable suspicion. However, the court does not typically articulate this connection between “dirty” appearances and reasonable suspicion, raising the reader’s suspicion that what is really going on here is a conclusion based upon the “el bandito” stereotype of the law-breaking Spanish-speaker who appears “disheveled,” and with “oily hair,” as the stereotype instructs. Thus these descriptions are yet another way the

\(^{192}\) Oehorhaghe v. INS, 38 F.3d 488, at 498 (9th Cir. 1994).

\(^{193}\) United States v. Varela-Andujo, 746 F.2d 1046, 1047 (5th Cir. 1984).

\(^{194}\) U.S. v. Salazar-Martinez, 710 F.2d 1087, at 1088 (5th Cir. 1983).
courts are permitting racial profiling and stereotyping to result in a finding of reasonable suspicion.

**V. Conclusion**

The racist impact of these Fourth Amendment decisions upon contemporary judge-made immigration policy is even more obvious when examining their on-the-ground impact upon the enforcement of the immigration code.

The impact of Justice O’Conner’s opinion in *Lopez-Mendoza* means ICE now has little disincentive to procure evidence against non-citizens in all manner of unconstitutional ways, including the most widely used unconstitutional method of evidence procurement in immigration cases – racial profiling. To no one’s surprise, twenty years after *Lopez-Mendoza* was decided, there was no shortage of evidence of targeting of non-citizens for apprehension by ICE on the basis of race alone.195

The wheels of racial profiling that target Spanish-speaking people by law and immigration enforcement have clearly been greased by cases like *Delgado, Brignoni-Ponce* and their progeny. In one all-too-perfect example, agents involved in the raid of a garment factory on November 16, 1998 no doubt relied on the free reign granted them by these cases. That raid resulted in litigation between the Union of Needletrades, Industrial and Textile Employers (UNITE), AFL-CIO and the INS in a Southern District of NY Case of the same name.196

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requests by UNITE acquired over 13,000 pages of documents. Analysis of these documents revealed that in thirty-five of the thirty-seven raids conducted during a two year period (95%), INS agents relied on “explicit ethnic criteria to justify a raid, including hearing the ‘Spanish language’ or ‘Spanish music,’ or observing ‘Hispanic appearance’ or clothing ‘not typical of North America.” No doubt “Hispanic appearance” and clothing is merely a subtle reference to the disheveled stereotype shaping many of the judicial opinions discussed above.

With respect to ICE arrests generally, the analysis of the numbers shows that Spanish-speaking people were being arrested disproportionately far more often than people of European descent relative to their percentage of the undocumented population. ICE raids and border enforcement primarily target immigrants of Latin American and Asian descent, while leaving immigrants of European descent largely unbothered. This pattern becomes appallingly clear when one considers that ICE raids involving Spanish-speaking people often segregate and interrogated them, while many undocumented Canadians, Polish or Irish immigrants go largely ignored by the same agency.

Michelle Alexander’s thesis of how racism continues to impact drug law enforcement is instructive on the mechanics of how it also impacts immigration law. Alexander shows how the grossly disproportionate enforcement of drug laws against people of color versus people of European-descent has created an underclass of people who are disproportionately incarcerated or otherwise under the thumb of the state. Racist judge-made law has similarly allowed

\[197\] Union of Needletraders, Industrial and Textile Employers, AFL-CIO, CLC , 202 F.Supp.2d at 266.
\[198\] For an extraordinarily thorough analysis of the data, of which these statistics are only a small part, see Wishni, supra at note 182, at 1113.
\[199\] Wishni, supra note 182, at 1109-1113.
\[200\] Id. at 1109-1113.
\[201\] Hing, supra at note 17, at 2.
\[202\] ALEXANDER, supra at note 21, at 119, 187.
population from unreasonable search and seizure, and this status is based solely on their perceived race. In that way the race-based exclusion of the Chinese Exclusion Acts is alive and well inside the exceptions and subtle denials to protection by the Fourth Amendment in judge-made law.

The Fourth Amendment is the strongest and often the only shield each of us has to insulate our person and space from the awesome power of intrusion by the state. As Justice Jackson points out in his quote at the beginning of this note, governments (and it can be added, courts) that forget the importance of this truth risk becoming arbitrary in their enforcement of the law, that is, tyrants that betray Humanity’s sense of justice. Thus it cannot be overstated that depriving non-citizens of equal protection by the Fourth Amendment also necessarily threatens every American citizen’s freedom under the Constitution and therefore the legitimacy of the Constitution itself. Citizen or not, documented or not, we are each of us brothers and sisters in our vulnerability to arbitrary law.