INSIDE THE BORDER, OUTSIDE THE LAW: UNDOCUMENTED IMMIGRANTS AND THE FOURTH AMENDMENT

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ABSTRACT

As states enact immigration-related laws requiring local law enforcement officers to identify and detain undocumented immigrants, the Fourth Amendment rights of aliens are becoming critically important. In United States v. Verdugo-Urquidez*, a divided Supreme Court suggested that aliens in the United States do not have Fourth Amendment rights unless they have established "substantial connections" to the United States. Lower courts have relied on* Verdugo's *holding to categorically deny Fourth Amendment rights to certain classes of undocumented immigrants. Commentators have criticized the "substantial connections" test as an isolated misinterpretation of Court precedent regarding the rights of aliens within the United States.*

This Article, however, takes a new approach. It analyzes Verdugo *in the context of the Supreme Court's treatment of aliens' constitutional rights both inside and outside the United States. In doing so, this Article identifies the Supreme Court's evolving approach to membership and highlights* Verdugo's *pivotal role in the development of that approach. This Article suggests that the Court's increasing extension of membership rights to aliens outside the United States and denial of membership rights to aliens*

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within the United States is evidence of an emerging "post-territorial" approach to membership that rejects territorial presence as an accurate measure of membership. Rather, the post-territorial approach looks to more substantive indicators of membership, including community ties and mutuality of obligation, to afford rights. Ultimately, this Article examines Verdugo's *progeny through a post-territorial lens and concludes that lower courts that categorically deny certain classes of undocumented immigrants Fourth Amendment rights violate* Verdugo's *post-territorial mandate by failing to evaluate the claimant's substantive indicators of membership.*

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I. INTRODUCTION

When a federal district court in California began the trial of René Martín Verdugo-Urquidez,[1] few would have guessed that the case would ultimately affect the constitutional rights of the almost twelve million[2] undocumented immigrants living in the United States. After all, there were no undocumented immigrants involved in the case, which centered on the 1985 torture and murder of a U.S. Drug Enforcement Agency officer in Mexico.[3] The defendants, including Verdugo, were Mexican citizens living in Mexico.[4] The events at issue took place in Mexico. The case bore no apparent connection to undocumented immigrants in the United States.[5] However, when Verdugo claimed that U.S. federal agents' warrantless search of his home in Mexico was a violation of his Fourth Amendment rights,[6] the full contours of the Fourth Amendment—and perhaps the U.S. Constitution—took the spotlight. Did the Fourth Amendment protect a

1. *See Trial Opens in Death of Tortured Drug Agent*, N.Y. TIMES, Jul. 31, 1988, at 25.

2. Because of the obvious difficulty of counting undocumented immigrants, estimates vary. *See, e.g.*, JEFFREY S. PASSEL & D'VERA COHN, A PORTRAIT OF UNAUTHORIZED IMMIGRANTS IN THE UNITED STATES 1 (Pew Hispanic Ctr., 2009). *See also* MICHAEL HOEFER, NANCY RYTINA, & BRYAN C. BAKER, ESTIMATES OF THE UNAUTHORIZED IMMIGRANT POPULATION RESIDING IN THE UNITED STATES: JANUARY 2009 2 (Dep't of Homeland Sec., Office of Immigration Statistics, 2009) (estimating 10.8 million unauthorized immigrants present in January 2009, down from 11.6 million in January 2008).

3. United States v. Verdugo-Urquidez, 494 U.S. 259, 262 (1990).

4. *Id.*

5. There is some evidence that Verdugo was in possession of a valid U.S. resident card at the time he was apprehended. *See* David Stewart, *The Drug Exception*, A.B.A. J., May 1990, at 42, 46. However, because none of the opinions mention this or rely on this, I ignore that evidence here.

6. *Verdugo-Urquidez*, 494 U.S. at 263.

Mexican citizen's home from unreasonable search by U.S. agents? Did Verdugo's presence in the United States matter? Who or what, exactly, *does* the Fourth Amendment protect?

Ultimately, the issue would land in the Supreme Court, where the Court held, in a plurality opinion, that the search at issue was not in violation of the Fourth Amendment.[7] In the Court's opinion,[8] Justice Rehnquist reasoned that the U.S. Constitution did not extend beyond U.S. borders to protect Verdugo's property in Mexico.[9] In response to Verdugo's argument that he was entitled to Fourth Amendment protection by virtue of his presence within the United States (where the Constitution clearly remained in effect), Justice Rehnquist concluded that Verdugo had not established "substantial connections" with the United States such that he could claim the protection of the Fourth Amendment: aliens in the United States only "receive constitutional protections when they have come within the territory of the United States and developed substantial connections with this country."[10]

This was the first mention of the term "substantial connections" in relation to the Fourth Amendment, and commentators could only speculate as to what that language would mean for the millions of aliens, both authorized and unauthorized, present in the United States.[11] It seemed that

7. *Id.* at 274–75.

8. Justices Kennedy, White, O'Connor, and Scalia joined Justice Rehnquist's opinion. *See id.* at 261. However, because Justice Kennedy's concurrence diverged substantially from the reasoning of the Court (as described below in this Part II), even rejecting the fundamental line of reasoning employed by the Court, commentators and courts have referred to the Court's opinion as a plurality opinion. *See, e.g.*, Lamont v. Woods, 948 F.2d 825, 835 & n.7 (2d Cir. 1991) (explaining that a "plurality of the Court" subscribed to Justice Rehnquist's definition of "the people"); Martinez-Aguero v. Gonzalez, No. EP-03-CA-411(KC), 2005 U.S. Dist. LEXIS 2412, *14 (W.D. Tex. Feb. 2, 2005) ("Justice Kennedy's concurrence has caused some to question whether the majority decision is in fact a majority decision in adopting its definition of 'the people' for purposes of Fourth Amendment analysis."); Randall K. Miller, *The Limits of U.S. International Law Enforcement After* Verdugo-Urquidez*: Resurrecting* Rochin, 58 U. PITT. L. REV. 867, 867 n.3 (1997); Gerald L. Neuman, *Whose Constitution?*, 100 YALE L.J. 909, 972 (1991) ("Rehnquist seemed to be really speaking for a plurality of four."); Michael J. Wishnie, *Immigrants and the Right to Petition*, 78 N.Y.U. L. REV. 667, 681 (2003) ("Somewhat bafflingly, Justice Kennedy disagreed with Chief Justice Rehnquist's analysis but nonetheless joined the majority opinion in full, providing the fifth vote for the Court's opinion.").

9. *Verdugo-Urquidez*, 494 U.S. at 268–72 (explaining that prior case law sometimes afforded constitutional protection to *citizens* outside of U.S. territory but that there was no authority requiring the Court to extend constitutional protections to aliens outside of the United States).

10. *Id.* at 271.

11. In addition to the almost twelve million undocumented immigrants in the United States, another 12.1 million legal permanent residents and millions of nonimmigrant (temporary) alien visitors to the United States, all of whom would presumably be impacted by *Verdugo*'s reference to "aliens." *See* NANCY RYTINA, ESTIMATES OF THE LEGAL PERMANENT RESIDENT POPULATION IN 2006 1 (Dep't of Homeland Sec., Office of Immigration Statistics, 2006). *See also* RANDALL MONGER & MACREADIE

Verdugo had two faces, and commentators took sides. Some forecasted that there would be—or at least should be—no change in the way the Constitution applied to aliens in the United States, arguing that *Verdugo* was strictly decided on the basis of geography: Verdugo's searched property lay outside the United States, putting the search beyond the reach of the Fourth Amendment.[12] Others predicted an erosion of Fourth Amendment rights for aliens in the United States based on the "substantial connections" language used by the Court.[13] After all, never before had the Court qualified what had previously appeared to be vast constitutional protection for aliens within United States territory.[14] Until *Verdugo*,

BARR, NONIMMIGRANT ADMISSIONS TO THE UNITED STATES: 2008 1 (Dep't of Homeland Sec., Office of Immigration Statistics, 2009) (estimating 175 million nonimmigrant admissions in 2008 alone).

12. *See, e.g.*, James G. Connell, III & René L. Valladares, S*earch and Seizure Protections For Undocumented Aliens: The Territoriality and Voluntary Presence Principles in Fourth Amendment Law*, 34 AM. CRIM. L. REV. 1293, 1295 (1997) (characterizing the "substantial connections" test as "clearly not necessary for the purpose of deciding the narrow issue" of "whether the Fourth Amendment applies to the search and seizure by United States agents of property that is owned by a nonresident alien and located in a foreign country" and applying only to the determination of rights outside the United States); Michael Scaperlanda, *The Domestic Fourth Amendment Rights of Aliens: To What Extent Do They Survive* United States v. Verdugo-Urquidez*?*, 56 MO. L. REV. 213, 240–41 (1991) (lamenting that application of the "substantial connections" language test would be a "travesty of justice" and calling for courts to limit *Verdugo* as a decision involving foreign policy and extraterritorial application of U.S. law).

13. *See, e.g.*, Janet E. Mitchell, *The Selective Application of the Fourth Amendment*: United States v. Verdugo-Urquidez, 41 CATH. U. L. REV. 289, 318–19 (1991) (arguing that *Verdugo* "reduces the reach of the Fourth Amendment" and "ignores . . . the values and ideals upon which it is based"); Victor C. Romero, *Whatever Happened to the Fourth Amendment?: Undocumented Immigrants' Rights After* INS v. Lopez-Mendoza *and* United States v. Verdugo-Urquidez, 65 S. CAL. L. REV. 999, 1003–04 (1992) (warning that *Verdugo* and *Lopez*, combined, "expressly curtail Fourth Amendment protections for undocumented immigrants" and arguing that the cases ignore the normative purpose of the Fourth Amendment).

14. In fact, the Supreme Court had explicitly and repeatedly afforded aliens constitutional protections based exclusively on their territorial presence in the United States. *See, e.g.*, Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886) (holding that the protections of the Fourteenth Amendment "are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality"). *See also* Plyler v. Doe, 457 U.S. 202, 211–12 (1982) (confirming the "territorial theme" of the Equal Protection clause's application to aliens, including undocumented aliens); Kwong Hai Chew v. Colding, 344 U.S. 590, 601 (1953) ("While it may be that a resident alien's ultimate right to remain in the United States is subject to alteration by statute or authorized regulation . . . , it does not follow that he is thereby deprived of his constitutional right to procedural due process. His status as a person within the meaning and protection of the Fifth Amendment cannot be capriciously taken from him."); Johnson v. Eisentrager, 339 U.S. 763, 770–71 (1950) (suggesting that constitutional protections extend to all those within U.S. territory (but only to U.S. citizens abroad): "in extending constitutional protections beyond the citizenry, the Court has been at pains to point out that it was the alien's presence within its territorial jurisdiction that gave the Judiciary power to act"); Wong Wing v. United States, 163 U.S. 228, 238 (1896) (holding that four aliens who had been found unlawfully present in the United States were entitled to indictment and a jury: "Applying [the reasoning of *Yick Wo*] to the Fifth and Sixth amendments, it must be concluded that all persons within the territory of the United States are entitled to the protection guaranteed by

commentators and courts had assumed that aliens in the United States, whether authorized or not, enjoyed many constitutional protections, including those of the Fourth Amendment,[15] merely because they were in the United States. But now the Court suggested that territory was of reduced importance.

For a decade after the *Verdugo* decision, it seemed that those who had dismissed the "substantial connections" language as unlikely to affect aliens within the United States were largely right. Many courts continued to assume that aliens within U.S. borders were the beneficiaries of constitutional rights, either by characterizing the "substantial connections" test as mere dictum in a divided opinion or by assuming that an alien voluntarily within the United States automatically had such connections.[16] Ten years after its inception, however, the "substantial connections" test was taking hold, with courts evaluating aliens' affiliations to people and institutions within the United States as a prerequisite for the assertion of a Fourth Amendment claim.[17]

those amendments.").

15. In *INS v. Lopez-Mendoza*, the Supreme Court itself had expressly suggested that the Fourth Amendment applied to undocumented immigrants within the United States. INS v. Lopez-Mendoza, 468 U.S. 1032 (1984). There, the Court considered whether the exclusionary rule, under which evidence gathered during an unconstitutional search is inadmissible, applied in deportation proceedings. Although the Court concluded that the exclusionary rule did not apply to deportation proceedings because they are civil, rather than criminal, proceedings, *id.* at 1038, eight of the nine Justices took the position that undocumented immigrants nonetheless were protected by the Fourth Amendment. *Id.* at 1050 ("We do not condone any violations of the Fourth Amendment that may have occurred in the arrests of [the defendants] . . . . Our conclusions concerning the exclusionary rule's value might change, if there developed good reason to believe that Fourth Amendment violations by INS officers were widespread."). *See also id.* at 1051 (Brennan, J., dissenting); *id.* at 1055 (White, J., joined by Stevens, J., dissenting); *id.* at 1060 (Marshall, J., dissenting). In fact, even the Immigration and Naturalization Service ("INS"), represented by the Solicitor General, assumed that illegal aliens are covered under the Fourth Amendment. *See* Brief for Petitioner at 10, INS v. Lopez-Mendoza, 468 U.S. 1032 (1984) (No. 83-491) ("The determinative question, therefore, is not whether the protections of the Fourth Amendment extend to deportable aliens discovered in this country—a proposition we do not contest—but whether it is appropriate to permit illegal aliens to invoke the exclusionary rule in civil deportation proceedings . . . ."). *See also* United States v. Cortes, 588 F.2d 106, 110 (5th Cir. 1979) ("Once aliens become subject to liability under United States law, they also have the right to benefit from [Fourth Amendment] protection.").

16. *See, e.g.*, United States v. Guitterez, 983 F. Supp. 905, 915 (N.D. Cal. 1998) (stating that there is no obligation to prove substantial connections to the country in order for an alien to receive Fourth Amendment protections), *rev'd on other grounds*, 203 F.3d 833 (9th Cir. 1999) (unpublished opinion); United States v. Iribe, 806 F. Supp. 917, 919 (D. Colo. 1992) (rejecting the substantial connection test for application of constitutional protection against unreasonable searches and seizures), *rev'd in part on other grounds*, 11 F.3d 1553 (10th Cir. 1993).

17. *See, e.g*, Martinez-Aguero v. Gonzalez, 459 F.3d 618, 625 (5th Cir. 2006) (declining to determine whether *Verdugo*'s substantial connection language is controlling precedent, but finding that defendant, an excludable alien, had sufficient connections to the U.S. for purposes of the *Verdugo* test

Harder to predict, however, was that *Verdugo* would lead some courts to find that certain undocumented immigrants are categorically outside the protection of the Fourth Amendment, regardless of ties to the surrounding community.[18] A federal district court in Utah took that very position in *United States v. Esparza-Mendoza* when it held that previously deported alien felons are categorically barred from Fourth Amendment rights.[19] Other courts subsequently adopted the reasoning in *Esparza-Mendoza*, and one court applying *Verdugo*'s "substantial connections" test held that an alien may establish connections to the United States only upon lawfully crossing its borders.[20]

In effect, *Verdugo* has become a wild card of sorts; it takes on a new identity each time it is played. In the hands of some courts and commentators, *Verdugo* stands for the proposition that territory is the ultimate determinant of constitutional rights. For others, it represents a move away from a territory-based model and toward an approach that values human connections and ties. Still others, however, find support in *Verdugo* for an approach that affords protections only to those with legal status, regardless of their presence within or ties to the United States.

On a more abstract level, *Verdugo*'s multiple incarnations serve as a useful case study in the evolution of membership theory in the United States, especially as it affects undocumented immigrants. Membership, or the concept of belonging, is a familiar idea that we encounter on a daily basis; much of our human ordering of the world relies on sorting members from nonmembers.[21] We routinely allocate privileges on the basis of membership: fitness club members enjoy the privilege of using the club's

by virtue of her prior entries into the United States); United States v. Atienzo, No. 2:04-CR-00534, 2005 U.S. Dist. LEXIS 31652, at *14–18 (D. Utah Dec. 6, 2005) (holding that an undocumented immigrant who had been employed, paid taxes, and had family within the United States had sufficient connections to the United States).

18. *See, e.g.*, United States v. Gutierrez-Casada, 553 F. Supp. 2d 1259, 1272 (D. Kan. 2008) (holding that a previously deported alien felon is "not entitled to the same Fourth Amendment protections as [are] ordinary citizens"); United States v. Ullah, No. 04-CR-30A(F), 2005 U.S. Dist. LEXIS 12419, at *99 (W.D.N.Y. Mar. 17, 2005) ("[I]t is only upon 'lawfully' entering the United States that an alien may begin to establish the substantial connections necessary . . . ."); United States v. Esparza-Mendoza, 265 F. Supp. 2d 1254, 1271 (D. Utah 2003) ("[A]n individual previously deported alien felon is not free to argue that, in his particular case, he possesses a sufficient connection to this country to receive Fourth Amendment coverage (unless, of course, he could prove he was in this country lawfully)."), *aff'd on other grounds*, 386 F.3d 953 (10th Cir. 2004).

19. *Esparza-Mendoza*, 265 F. Supp. 2d at 1271.

20. *Ullah*, 2005 U.S. Dist. LEXIS 12419, at *99.

21. *See* GERALD L. NEUMAN, STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW 7 (1996); Linda Bosniak, *Being Here: Ethical Territoriality and the Rights of Immigrants*, 8 THEORETICAL INQ. L. 389, 396 (2007).

fitness equipment, and food co-op members have the right to buy co-op food at discounted prices. As I explain in this Article, legal rights, including Fourth Amendment rights, are likewise privileges of membership or belonging.[22] Just as the use of fitness club equipment is a privilege of membership in that club, the right against unreasonable search and seizure is a privilege of membership in another, more amorphous, "club." Because determining who is a member is as much about exclusion as it is about inclusion[23]—after all, it is the fact that not everyone can be a member that makes membership desirable—how to determine who is a member is a volatile issue for courts and legislatures. The question of who gets Fourth Amendment protection is no exception, and the varying approaches to *Verdugo* (as well as the sharp division in the Supreme Court's opinion) evidence the controversy inherent in sorting members from nonmembers.

My purpose in this Article is to analyze *Verdugo* and its progeny in the context of membership theory. While scholars have deconstructed and analyzed *Verdugo* and its predecessors to predict lower court reactions to its "substantial connections" test, here I use hindsight to plot *Verdugo* and its progeny onto the broader trajectory of U.S. courts' development and incorporation of membership theory in U.S. law. I argue that the Supreme Court's opinion in *Verdugo*, when analyzed in the context of cases about the meaning and significance of territorial presence, is a pivotal alienage law[24] decision evidencing a trend in membership theory. *Verdugo* rejects the use of territorial presence as an indicator of membership in favor of looking directly at the characteristics that suggest belonging to the community, including community ties. In that sense, *Verdugo* is a paradigmatic example of what I have elsewhere called a "post-territorial" approach[25] to membership that distributes rights according to more fundamental indicators of membership, including an individual's ties to the surrounding community and her sense of obligation to the United States. *Verdugo* strips the membership inquiry of the preoccupation with geography because territorial presence is no longer an adequate proxy for these substantive indicators of membership. However, *Verdugo* preserves

22. In fact, this is exactly what the Court in *Verdugo* was trying to determine when it analyzed whether the term "people" in the Fourth Amendment's text included aliens.

23. Bosniak, *supra* note 21, at 396.

24. By "alienage law," I refer to the body of law (outside of immigration and naturalization law) governing foreign nationals on U.S. soil. Alienage law encompasses the distribution of benefits and rights to, as well as the obligations imposed upon, aliens in the U.S. *See* Linda S. Bosniak, *Membership, Equality, and the Difference that Alienage Makes*, 69 N.Y.U. L. Rev. 1047, 1087 (1994) (describing alienage law as "law governing the treatment of aliens in the United States").

25. D. Carolina Núñez, *Fractured Membership: Deconstructing Territoriality to Secure Rights and Remedies for the Undocumented Worker*, 2010 WIS. L. REV. 817, 870 (2010).

an interest in the factors that territorial presence once represented.

I contend that the lower courts that have relied on *Verdugo* to categorically deny certain classes of undocumented immigrants the protections of the Fourth Amendment have unwittingly and inappropriately reverted to a proxy —legal status—to evaluate membership and belonging in the United States. That is, the very notion rejected by *Verdugo*—that a single proxy can adequately account for the complex idea of belonging—underlies these status-based decisions. Moreover, these courts have misinterpreted *Verdugo* as a complete rejection of territoriality as a membership model, when, in reality, *Verdugo* preserves the underlying rationales of territoriality.

Not only is a categorical bar on the assertion of Fourth Amendment rights a gross misapplication of *Verdugo*, but it also illustrates the pitfalls courts are likely to encounter in other areas of alienage law as U.S. law increasingly moves from a territory-dominated membership approach to a more principled post-territorial approach. In fact, this dynamic of courts adopting legal status as a new proxy for membership is materializing in other contexts, including labor and employment law,[26] tort law,[27] and education law,[28] where undocumented immigrants are increasingly finding that status forecloses access to privileges and benefits. This trend highlights the need for courts, legislatures, and commentators to recognize that while territorial presence may no longer be an adequate proxy for membership, a rejection of territoriality need not be a de facto adoption of an approach that values legal status over community ties and mutuality of obligation, among

26. *See, e.g.*, Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137, 151–52 (2002) (holding that undocumented workers may not recover backpay—wages for work that would have been performed if the employee had not been illegally terminated—in a claim under the National Labor Relations Act).

27. *See, e.g.*, Rosa v. Partners in Progress, Inc., 868 A.2d 994, 1000 (N.H. 2005) (holding that because "an illegal alien may not recover lost United States earnings," immigration status is relevant to a claim of lost earnings in a tort case).

28. A recent Arizona state senate proposal—SB 1611—to ban undocumented immigrants from state universities and community colleges, as well as the rhetoric surrounding the opposition of the Development, Relief, and Education for Alien Minors ("DREAM") Act are examples of this dynamic. S.B. 1611, 50th Leg., 1st Reg. Sess. (Ariz. 2011). *See also* Memorandum from Alison P. Landry, Assistant Att'y Gen. of Va., to Presidents, Chancellor, Rectors, Registrars, Admissions Dirs., Domicile Officers, and Foreign Student Advisors, and the Executive Dir., State Council for Higher Educ. In Va. (Sept. 5, 2002), *available at* http://www.schev.edu/AdminFaculty/ImmigrationMemo9-5-02APL.pdf (opining that "Illegal or undocumented aliens should not be enrolled in Virginia public institutions of higher education"). But see California AB 131, the "California Dream Act," which makes undocumented immigrants eligible for financial aid to state universities and colleges. Patrick McGreevy & Anthony York, *Gov. Jerry Brown Signs Dream Act for State's Illegal Immigrants*, L.A. TIMES (Oct. 8, 2011, 12:27 PM), http://latimesblogs.latimes.com/california-politics/2011/10/gov-jerry-brown-announces-he-has-signed-bill-allowing-illegal-immigrants-access-to-college-aid.html.

other things. Rather, the inadequacy of territorial presence and status as proxies for membership stems from their inability to account for the complexity of membership and belonging. Ultimately, I argue that, in order for the realm of Fourth Amendment law to coincide with *Verdugo*'s directive and the broader trajectory of U.S. membership theory, Fourth Amendment rights should be allocated to undocumented immigrants with direct reference to their membership in the United States, rather than through evaluation of inadequate proxies such as territorial presence or legal status.

To reach my conclusions, I begin in Part II with a summary of *Verdugo*, as well as scholars' reactions to the "substantial connections" test. Then I discuss the effects of *Verdugo* on the lower court adjudication of undocumented immigrants' Fourth Amendment claims, using several cases to illustrate the three general approaches to Fourth Amendment rights that have developed from *Verdugo*. I especially focus on several courts that have used *Verdugo*'s "substantial connections" test to decide that undocumented immigrants (or at least certain classes of undocumented immigrants) are, as a rule, outside the protection of the Fourth Amendment.

Part III analyzes *Verdugo* and its progeny under the lens of membership theory. First, I briefly introduce the concept of membership and the various approaches to membership identifiable in U.S. law, including the territorial and status-based approaches. I illustrate how these approaches manifest themselves in current U.S. law and then categorize the various interpretations of *Verdugo* into each of the three membership approaches. I then plot *Verdugo* on a membership theory trajectory to show that *Verdugo* is a pivotal case in the movement toward a post-territorial approach.

Verdugo marks a weakening in the traditional territorial approach to membership. By requiring an alien within the country to have "substantial connections" to the United States, the Court rejected the notion that territory serves as an adequate indicator of membership and pushed Fourth Amendment law toward a post-territorial model. Although that may not have been apparent to courts and commentators interpreting *Verdugo* immediately after the Supreme Court issued its decision, a bird's eye view of *Verdugo*'s predecessors and subsequent Supreme Court developments, confirms *Verdugo*'s pivotal role in the trend toward a rejection of strict territoriality and a move toward post-territoriality.

In Part IV, I argue that courts employing the "substantial connections" test to categorically deny undocumented immigrants' Fourth Amendment

rights have allowed a status-based approach to displace the post-territorial approach identifiable in *Verdugo*. In effect, those courts have filled the vacuum left behind by the Supreme Court's abandonment of a predictable, easily applied territory-based rule with a new status-based bright line rule that violates *Verdugo*'s underlying principles.

Part V concludes this Article by calling on commentators, courts, and legislators to recognize the trend toward post-territoriality and prevent the encroachment of a status-based approach into the distribution of membership rights.

II. THE SURPRISINGLY PLIABLE FOURTH AMENDMENT

Verdugo is only one of many criminal cases that sprung out of the highly publicized murder of Enrique Camarena, a U.S. Drug Enforcement Administration ("DEA") agent working undercover in Guadalajara, Mexico, to unearth the operations of a drug trafficking organization led by Rafael Caro Quintero.[29] Camarena had successfully helped Mexican authorities locate and destroy over 10,000 tons of marijuana owned by the drug trafficking ring.[30] On February 7, 1985, Camarena was kidnapped and never seen nor heard from until his tortured body was discovered a month later.[31] A former U.S. Marine, firefighter, and police officer, Camarena enjoyed widespread respect within the DEA and had received several awards during his eleven-year service there.[32] Camarena's murder sparked public outrage and launched the largest homicide investigation ever undertaken by the DEA.[33] Against a backdrop of already strained relations between the United States and Mexico resulting from Mexican officials' lack of cooperation in the investigation,[34] U.S. investigators claimed that Mexican law enforcement officials had been involved in Camarena's death.[35] U.S. investigators encountered continued resistance to their investigation of the crime and ultimately gained custody of two suspects,

29. Philip Shenon, *U.S. Charges 9 in Mexico Death of a Drug Agent*, N.Y. TIMES, Jan. 7, 1988, at A1.

30. *Id*.

31. *Id*.

32. *Biographies of DEA Agents and Employees Killed in Action*, U.S. DRUG ENFORCEMENT ADMIN., http://www.justice.gov/dea/agency/10bios.htm (last visited Oct. 31, 2011).

33. *Id*.

34. Interview by PBS Frontline with Jack Lawn, Former Adm'r, DEA (2000), *available at* http://www.pbs.org/wgbh/pages/frontline/shows/drugs/interviews/lawn.html#kiki.

35. *See Central Figure is Convicted in '85 Killing of Drug Agent*, N.Y. TIMES, Aug. 1, 1990 at A10 [hereinafter *Central Figure Convicted*]. DEA investigators also believed a brother-in-law of former Mexican president Luis Echeverría Alvarez had been involved. *Id.*

René Martín Verdugo Urquidez[36] and Humberto Alvarez Machain,[37] only after bounty hunters and Mexican police officers abducted the suspects and delivered them to U.S. Marshalls at the U.S. border.[38]

After U.S. officials placed Verdugo in a California correctional center, the DEA conducted searches of Verdugo's homes in Mexico and seized incriminating documents, including a tally sheet cataloguing the shipments of marijuana Verdugo had smuggled into the United States.[39] At trial, Verdugo moved for the suppression of the documents found during the search on the basis that the search was unconstitutional under the Fourth Amendment.[40] The issue was a novel one that straddled two very different areas of law. On one hand, the location of the search outside United States borders suggested that this was a question of the extraterritorial application of the U.S. Constitution. On the other hand, since Verdugo was now being held and tried in the United States, the question seemed to implicate the constitutional rights of aliens in the United States.

A. FORMULATING THE ISSUE

As any first-year law student knows, the way an issue is framed may have a significant impact on the outcome of the case. More importantly, in *Verdugo*, the framing of the issue would have a significant impact on the case's future applicability. When *Verdugo* reached the Ninth Circuit, a divided panel took a bifurcated approach to formulating the issue.[41] First, the court analyzed the extraterritorial applicability of the Fourth Amendment, determining that the U.S. Constitution applied whenever the U.S. government acted abroad.[42] The government, the Ninth Circuit

36. Investigators believed Verdugo was Quintero's "top lieutenant" in the drug ring. Shenon, *supra* note 29.

37. Alvarez was a Mexican doctor suspected of aiding in Camarena's torture. Philip Shenon, *U.S. Says It Won't Return Mexican Doctor Linked to Drug Killing*, N.Y. TIMES, Apr. 21, 1990, *available at* http://www.nytimes.com/1990/04/21/world/us-says-it-won-t-return-mexican-doctor-linked-to-drug-killing.html.

38. *See Central Figure Convicted*, *supra* note 35; United States v. Verdugo-Urquidez, 494 U.S. 259, 262 (1990). The abduction of the two suspects drew criticism from Mexican officials, with the president of Mexico threatening to end Mexico's cooperation in anti-drug efforts. *Central Figure Convicted*, *supra* note 35.

39. *Verdugo-Urquidez*, 494 U.S. at 262–63.

40. *Id.* at 263.

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

42. *Id.* at 1218. The Ninth Circuit relied on *Reid v. Covert*, in which the Supreme Court had held that two U.S. citizens living abroad and convicted by a U.S. military court for the murder of their husbands were protected by the Bill of Rights and enjoyed the right to a trial by jury after indictment by a grand jury. *See* Reid v. Covert, 354 U.S. 1, 5–6 (1957). During the government's appeal of the grant

reasoned, could only act to the extent permitted by the Constitution.[43] Thus, if the government reached across territorial boundaries to punish a citizen abroad, the Bill of Rights must limit the government in its actions.[44]

Second, the court addressed the applicability of the Fourth Amendment to aliens within United States territory.[45] Drawing on Supreme Court precedent that had explicitly extended constitutional protections to aliens based solely on their presence within U.S. boundaries,[46] the court held that an alien within the United States enjoys the same Fourth Amendment rights that citizens do.[47] With both lines of reasoning leading to the same conclusion, the Ninth Circuit held that Verdugo was indeed protected by the Fourth Amendment and affirmed the trial court's grant of his motion to exclude the evidence at issue.[48]

Notably, the Ninth Circuit's conclusion relied heavily on the Supreme Court's opinion in *INS v. Lopez-Mendoza*, in which a majority of the Supreme Court assumed that the Fourth Amendment applied to undocumented aliens within U.S. territory.[49] In *Lopez-Mendoza*, the Supreme Court faced the question of whether the exclusionary rule, which allows trial courts to exclude evidence derived from an illegal search or seizure, applied in deportation proceedings.[50] Although the Court ultimately decided that the exclusionary rule did not apply to deportation proceedings because they are civil (rather than criminal) proceedings in which a cost-benefit analysis weighs against the application of the rule, the

of Verdugo's motion, the Supreme Court would later distinguish *Reid* on the basis that it extended constitutional rights to citizens abroad, not aliens. *Verdugo-Urquidez*, 494 U.S. at 270.

43. *Verdugo-Urquidez*, 856 F.2d at 1218 (stating that "From these cases, a proposition of enormous vitality may be drawn: The Constitution imposes substantive constraints on the federal government, even when it operates abroad.").

44. *Id*.

45. *Id.* ("Having concluded that the Constitution limits the government's authority when it acts abroad, we must address the key question in this case: May a nonresident alien challenge the reasonableness of the federal government's actions under the fourth amendment?").

46. *See, e.g*., Plyler v. Doe, 457 U.S. 202, 211 (1982) (finding that under the Fourteenth Amendment, undocumented immigrant children are entitled to the same free public education that citizen children are entitled to); Mathews v. Diaz, 426 U.S. 67, 77 (1976) (confirming the applicability of the Fifth and Fourteenth Amendments to all aliens within the United States); Wong Wing v. United States, 163 U.S. 228, 238 (1896) (extending the protections of the Fifth and Sixth Amendment to "all persons within the territory of the United States"); Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886) (holding that aliens within the United States are entitled to the protections of the Fourteenth Amendment by virtue of territorial presence: its "provisions are universal in their application, to all persons within the territorial jurisdiction [of the United States]").

47. *See Verdugo-Urquidez*, 856 F.2d at 1218.

48. *Id.* at 1230.

49. *See id.* at 1223.

50. INS v. Lopez-Mendoza, 468 U.S. 1032, 1034 (1984).

Court suggested that undocumented immigrants are nonetheless protected by the Fourth Amendment.[51] Specifically, the Court's plurality decision lamented any violation of the undocumented immigrant claimants' Fourth Amendment rights and implied that the result in *Lopez-Mendoza* might have differed if the Fourth Amendment violations at issue had been more pervasive.[52] In addition, four dissenting justices expressly opined that undocumented immigrants enjoy Fourth Amendment rights,[53] and the Immigration and Naturalization Service ("INS"), represented by the Solicitor General, joined in that sentiment.[54]

On appeal of the Ninth Circuit's decision in *Verdugo*,[55] Justice Rehnquist, writing for a plurality of the Court,[56] dismissed *Lopez-Mendoza*'s implied recognition of Fourth Amendment rights for the undocumented as an unlitigated and undecided issue with no bearing on the outcome of Verdugo's motion.[57] The Court then treated each of the Ninth Circuit's arguments—that the Fourth Amendment applies abroad and that

51. *Id*. at 1038–39.

52. *See id.* at 1050 ("We do not condone any violations of the Fourth Amendment that may have occurred in the arrests of respondents . . . . Our conclusions concerning the exclusionary rule's value might change, if there developed good reason to believe that Fourth Amendment violations by INS officers were widespread.").

53. *See id*. at 1051 (Brennan, J., dissenting); *id.* at 1055 (White, J., joined by Stevens, J., dissenting); *id*. at 1060 (Marshall, J., dissenting). The assumption that all aliens within the United States enjoy Fourth Amendment rights was widespread. *See* United States v. Cortes, 588 F.2d 106, 110 (5th Cir. 1979) ("Once aliens become subject to liability under United States law, they also have the right to benefit from [Fourth Amendment] protection."); Almeida-Sanchez v. United States, 413 U.S. 266, 273 (1973) ("In the absence of probable cause or consent, [the] search violated the petitioner's Fourth Amendment right to be free of 'unreasonable searches and seizures.' It is not enough to argue, as does the Government, that the problem of deterring unlawful entry by aliens across long expanses of national boundaries is a serious one."); Abel v. United States, 362 U.S. 217, 237 (1960) ("Searches for evidence of crime present situations demanding the greatest, not the least, restraint upon the Government's intrusion into privacy; . . . it was at these searches which the Fourth Amendment was primarily directed. We conclude, therefore, that government officers who effect a deportation arrest have a right of incidental search analogous to the search permitted criminal law-enforcement officers.").

54. Brief for Petitioner at 10, INS v. Lopez-Mendoza, 468 U.S. 1032 (1984) (No. 83-491) ("The determinative question, therefore, is not whether the protections of the Fourth Amendment extend to deportable aliens discovered in this country—a proposition we do not contest—but whether it is appropriate to permit illegal aliens to invoke the exclusionary rule in civil deportation proceedings . . . .").

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

56. *See supra* note 8.

57. *Verdugo-Urquidez*, 494 U.S. at 272 ("The question presented for decision in *Lopez-Mendoza* was limited to whether the Fourth Amendment's exclusionary rule should be extended to civil deportation proceedings; it did not encompass whether the protections of the Fourth Amendment extend to illegal aliens in this country."). For a critique of the *Verdugo* Court's abandonment of the implied recognition of Fourth Amendment rights in *Lopez-Mendoza*, see Stella Burch Elias, "*Good Reason to Believe": Widespread Constitutional Violations in the Course of Immigration Enforcement and the Case for Revisiting* Lopez-Mendoza, 2008 WIS. L. REV. 1109, 1151–53 (2008).

aliens in the United States are entitled to the protections of the Fourth Amendment—separately.

With respect to the extraterritorial application of the Constitution, the plurality rejected the Ninth Circuit's statement that the United States is bound by the Constitution wherever and whenever it acts, even extraterritorially.[58] Justice Rehnquist placed great weight on the *Insular Cases*,[59] a series of decisions in which the Supreme Court limited the application of the Constitution in unincorporated territories of the United States.[60] If the Constitution's application is limited in territories owned and governed by the United States, Justice Rehnquist argued, "respondent's claim that the protections of the Fourth Amendment extend to aliens in foreign nations is even weaker. And certainly, it is not open to us in light of the *Insular Cases* to endorse the view that every constitutional provision applies wherever the United States Government exercises its power."[61] In essence, if the Constitution did not follow the U.S. flag,[62] it certainly did not follow the Mexican flag.

With respect to the question of whether Verdugo, by virtue of his forced presence in the United States, enjoyed Fourth Amendment protections, Justice Rehnquist concluded that he did not.[63] Beginning with a textual analysis of the Fourth Amendment, Justice Rehnquist noted that it safeguards the "right of *the people* to be secure . . . against unreasonable searches and seizures" as opposed to "persons," as used in many other parts of the Constitution.[64] For Justice Rehnquist, this difference suggested that the individuals protected by the Fourth Amendment are members of a "class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be

58. *Verdugo-Urquidez*, 494 U.S. at 267–69.

59. *Id.* at 268. *See, e.g.*, Balzac v. Porto Rico, 258 U.S. 298 (1922) (declining to extend Sixth Amendment right to jury trial to Puerto Rico); Ocampo v. United States, 234 U.S. 91 (1914) (no Fifth Amendment right to grand jury in the Philippines); Dorr v. United States, 195 U.S. 138 (1904) (jury trials not guaranteed in the Philippines); Hawaii v. Mankichi, 190 U.S. 197 (1903) (no right to indictment by grand jury or jury trial in Hawaii). For an examination of the *Insular Cases*, see Pedro A. Malavet, *The Inconvenience of a "Constitution [that] Follows the Flag . . . But Doesn't Quite Catch Up with It": from* Downes v. Bidwell *to* Boumediene v. Bush, 80 MISS. L.J. 181 (2010).

60. *Verdugo-Urquidez*, 494 U.S. at 268.

61. *Id.* at 268–69.

62. For an interesting discussion of the situations in which the Constitution "follows the flag" extraterritorially, see KAL RAUSTIALA, DOES THE CONSTITUTION FOLLOW THE FLAG? (2009).

63. *Verdugo-Urquidez*, 494 U.S. at 271.

64. *Id.* at 265 (emphasis added) (quoting U.S. CONST. amend. IV) (distinguishing the Fourth Amendment's use of the term "the people" from the Fifth and Sixth Amendments' use of the word "person" and "accused").

considered part of that community."[65]

When Verdugo argued that the Supreme Court had previously explicitly granted aliens broad constitutional protection by virtue of their territorial presence within the United States, Justice Rehnquist dismissed the cases as standing for the unremarkable proposition that "aliens receive constitutional protections when they have come within the territory of the United States and developed substantial connections with the country."[66] Verdugo, Justice Rehnquist argued, had no such connections.[67]

Justices Kennedy and Stevens concurred in the judgment but wrote separately to note some important disagreements with Justice Rehnquist's reasoning. Justice Kennedy took issue with Justice Rehnquist's reliance on the term "the people" in the Fourth Amendment as a way to restrict its protections. Rather, he argued, the applicability of the Fourth Amendment in the realm of foreign relations depends on the practicability of enforcing it.[68] Notably, Justice Kennedy opined that the same search within the United States would undoubtedly be covered by the Fourth Amendment.[69] Justice Stevens wrote separately to note that aliens lawfully within U.S. borders are among "the people" covered by the Fourth Amendment and that Verdugo, having been brought into the United States by government officials, was legally within U.S. territory.[70] He reserved the question of

65. *Id.* at 265.

66. *Id.* at 271. Verdugo pointed to a line of cases that had based the protection of aliens within the United States exclusively on their territorial presence (rather than their status as legal or illegal aliens or permanent or temporary residents) within the United States. Scholars have referred to this territorial approach to constitutional rights as the "*Yick Wo* tradition" after the first in this line of cases, in which the Supreme Court applied the Fourteenth Amendment to protect a resident alien, reasoning that the Fourteenth Amendment's protections "are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality." Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886). *See also* Plyler v. Doe, 457 U.S. 202, 211–12 (1982) (confirming the "territorial theme" of the Equal Protection Clause's application to aliens, including undocumented aliens); Kwong Hai Chew v. Colding, 344 U.S. 590, 601 (1953) ("While it may be that a resident alien's ultimate right to remain in the United States is subject to alteration by statute or authorized regulation . . . , it does not follow that he is thereby deprived of his constitutional right to procedural due process. His status as a person within the meaning and protection of the Fifth Amendment cannot be capriciously taken from him."). Interestingly, Justice Rehnquist forfeited the opportunity to distinguish these cases based on the constitutional provisions being applied. None of the cases cited implicates the Fourth Amendment; in fact, *Yick Wo* and its progeny almost exclusively apply provisions that explicitly protect "persons" rather than "the people," a distinction Justice Rehnquist had already found meaningful. *See supra* note 64 and accompanying text.

67. *Verdugo-Urquidez*, 494 U.S. at 271.

68. *Id.* at 278 ("The conditions and considerations of this case would make adherence to the Fourth Amendment's warrant requirement impracticable and anomalous.").

69. *Id.* ("If the search had occurred in a residence within the United States, I have little doubt that the full protections of the Fourth Amendment would apply.").

70. *Id.* at 279.

whether undocumented immigrants within the United States would likewise be protected.[71] Justice Stevens nonetheless joined the Court's judgment because he opined that the search was not "unreasonable" and therefore not violative of the Fourth Amendment.[72]

Three Justices dissented. Justice Blackmun agreed with Justice Stevens' conclusion that Verdugo was within the United States legally and therefore entitled to Fourth Amendment protections, but he would have remanded the case for further proceedings on the question of whether the search was reasonable.[73] Justices Brennan and Marshall dissented from the judgment on the basis that U.S. law did not require "substantial connections" to the U.S. in order for the Fourth Amendment to attach, and, in any event, Verdugo had such connections by virtue of the United States' investigation and prosecution for violations of U.S. law.[74] The United States, the dissenters argued, could not impose its obligations on Verdugo without also extending its constitutional protections.[75]

B. *VERDUGO*'S THREE INCARNATIONS

Given the bifurcated approach the Ninth Circuit and the Supreme Court plurality took in determining whether Verdugo possessed Fourth Amendment rights—each court analyzed separately the questions of whether the Fourth Amendment applied extraterritorially and whether the Fourth Amendment applied to aliens within the United States—subsequent court decisions and scholarship diverge on *Verdugo*'s ultimate meaning. Of course, the Supreme Court's sharply divided opinion only compounds the seeming discrepancies in its reasoning. Speaking broadly, the cases discussing *Verdugo*'s applicability to the rights of aliens within the United States fall into three categories: (1) cases that find *Verdugo* irrelevant to the rights of aliens within the United States; (2) cases interpreting *Verdugo* to require a case-by-case analysis of an alien's "substantial connections" to the United States before applying the Fourth Amendment; and (3) cases that use *Verdugo* to hold that certain classes of undocumented immigrants are categorically excluded from Fourth Amendment protection regardless

71. *Id.* at 279 n.*.

72. He further argued that the warrant clause of the Fourth Amendment was inapplicable to "searches of noncitizens' homes in foreign jurisdictions because American magistrates have no power to authorize such searches." *Id.* at 279.

73. *Id*. at 297–98.

74. *Id.* at 283 (Brennan, J., joined by Marshall, J., dissenting) ("What the majority ignores, however, is the most obvious connection between Verdugo-Urquidez and the United States . . . . The 'sufficient connection' is supplied not by Verdugo-Urquidez, but by the Government.")

75. *See id.*

of any alleged connection to the United States.

1. *Verdugo* as Irrelevant to the Fourth Amendment Rights of Aliens Within the United States

Verdugo practically invites courts and commentators to treat it as bearing only on the Fourth Amendment's application to *extraterritorial* searches by the U.S. government and wholly irrelevant to the rights of aliens within the United States. The lack of consensus on the Court, the seemingly superfluous reference to Verdugo's presence within the United States, and the difficulty of applying a test that measures an individual's connections to the United States all weigh in favor of characterizing *Verdugo* as a case about the Fourth Amendment's extraterritorial application rather than about immigrants' Fourth Amendment rights.

First, it is easy to dismiss *Verdugo*'s "substantial connections" test based on its failure to garner the support of a majority of the Justices. Only four of nine Justices appear to have agreed with Justice Rehnquist's "substantial connections" language.[76] Justice Kennedy, who concurred in the judgment, rejected Justice Rehnquist's attempt to limit application of the Fourth Amendment based on the Amendment's use of the term "the people." Justice Kennedy opined that if the search at issue in *Verdugo* had occurred in the United States, it would have been covered under the Fourth Amendment.[77] Justice Kennedy's concurrence is therefore difficult to reconcile with the Court's suggestion that only aliens with "substantial connections" to the United States can be classified as one of "the people" of the United States.[78]

Characterizing the "substantial connections" language as the dicta of a minority of Justices, some courts and commentators have refused to apply that test to limit the rights of aliens in the United States[79] or instead find that language to be persuasive, rather than controlling.[80] Others have refused to decide whether *Verdugo*'s "substantial connections" test governs, choosing to deny motions for exclusion of evidence on other

76. *See supra* note 8.

77. *Verdugo-Urquidez*, 494 U.S. at 278 (Kennedy, J., concurring).

78. *Id.* at 273.

79. *See, e.g.*, United States v. Guitterez, 983 F. Supp. 905, 915 (N.D. Cal. 1998) ("It is also noteworthy that a majority of the justices did *not* subscribe to Chief Justice Rehnquist's opinion, particularly with respect to his discussion and analysis regarding the scope of the Fourth Amendment as it applies to illegal aliens."), *rev'd on other grounds*, 203 F.3d 833 (9th Cir. 1999) (unpublished opinion).

80. *See, e.g.*, Martinez-Aguero v. Gonzalez, No. EP-03-CA-411(KC), 2005 U.S. Dist. LEXIS 2412, at *16 (W.D. Tex. Feb. 2, 2005), *aff'd*, 459 F.3d 618 (5th Cir. 2006).

grounds or finding that the claimant would have satisfied the substantial connections test if it were indeed controlling.[81] In a *Bivens* claim under the Fourth Amendment, the Fifth Circuit declined to decide whether the "substantial connections" language is valid precedent, finding that even if the *Verdugo* test were controlling, the claimant had sufficient connections to meet that test.[82] Similarly, the Ninth Circuit avoided the question of *Verdugo*'s precedential value by holding that the search at issue in *Barona* could not be considered violative of the Fourth Amendment even if the claimant could have shown substantial connections to the United States.[83]

Second, the judgment in *Verdugo* arguably rested (or at least could have rested) exclusively on the location of Verdugo's residences outside U.S. territory. According to this argument, *Verdugo* is a case about the extraterritorial application of the Constitution rather than the rights of aliens within U.S. territory.[84] This certainly seems plausible in light of Justice Rehnquist's insistence that a Fourth Amendment violation is complete upon conclusion of the allegedly unreasonable search: "For purposes of this case, therefore, if there were a constitutional violation, it occurred solely in Mexico."[85] Verdugo's right to exclude evidence gained from the allegedly illegal search during his U.S. trial within U.S. territory was merely a remedy for a possible Fourth Amendment violation, rather than a constitutional question in itself; thus, only the search's location (not Verdugo's location)[86] was relevant.[87] In that sense, the only question at

81. *See id*. *See also* Martinez-Aguero v. Gonzalez, 459 F.3d 618, 624–25 (5th Cir. 2006); United States v. Barona, 56 F.3d 1087, 1094 (9th Cir. 1995).

82. *Martinez-Aguero*, 459 F.3d at 625 ("We need not decide whether *Verdugo-Urquidez* is controlling, because even under the more demanding test, Martinez-Aguero has 'developed substantial connections with the country' and earned the protection of the Fourth Amendment."). There, the claimant had entered the United States on an invalid border-crossing pass on the erroneous advice of an immigration officer. *Id.* at 620. The claimant had entered the United States several times before on a valid visa to accompany her aunt to the nearest U.S. Social Security office. *Id.* These contacts, the Fifth Circuit explained, would have been sufficient to meet the "substantial connections" test. *Id.* at 625. Interestingly, the court in various places in the opinion framed the issue as one of standing. *See, e.g.*, *id.* at 624 ("We turn now to whether she has standing under the Fourth Amendment."). For a discussion tracking courts' adoption of the "substantial connections" test as requirement of standing, see Jeffrey Kahn, *Zoya's Standing Problem, or, When Should the Constitution Follow the Flag?*, 108 MICH. L. REV. 673 (2010).

83. *See Barona*, 56 F.3d at 1094 ("We could hold, therefore, that [the claimants] have failed to demonstrate that, at the time of the extraterritorial search, they were 'People of the United States' entitled to receive [Constitutional protection] . . . . We choose, however, not to reach the question because even if they were entitled to invoke the Fourth Amendment, their effort would be unsuccessful.").

84. *See* Connell & Valladares, *supra* note 12, at 1295 (characterizing the "substantial connections" language, at least as it applied to aliens in the United States, as dicta).

85. United States v. Verdugo-Urquidez, 494 U.S. 259, 264 (1990).

86. Although the Fourth Amendment protects people, not places, location is still an important

issue in *Verdugo* was whether property outside of the United States and belonging to an alien is protected under the Fourth Amendment, not whether aliens (documented or not) enjoy the Amendment's protections. In fact, that is precisely how the plurality characterized the issue at one point in the decision.[88]

Using this second argument, courts have dismissed *Verdugo* as irrelevant to an undocumented immigrant's motion to exclude evidence allegedly derived from an illegal search.[89] A district court in Colorado refused to analyze whether undocumented immigrant defendants bore "substantial connection" to the United States, arguing that "The broad language of the Chief Justice was not required for the holding and was not joined by the majority of the justices."[90] The question before it, the court contended, bore no relation to *Verdugo*'s actual holding: "This is not an extraterritorial application of the Fourth Amendment."[91] A district court in Texas echoed this reasoning: "[the present decision] does not involve the Fourth Amendment rights of those aliens physically located either legally or illegally within sovereign United States territory. As such, the facts of the decision alone may limit the potential relevancy of *Verdugo-Urquidez*."[92]

factor to consider in Fourth Amendment analysis. *See* Connell & Valladares, *supra* note 12, at 1311 ("The location-specific nature of the Fourth Amendment violations is based on the language of the amendment, which prohibits 'unreasonable searches and [seizures]' *per se*, rather than the use of tainted evidence at trial.").

87. *Verdugo-Urquidez*, 494 U.S. at 264 (citing United States v. Calandra, 414 U.S. 338, 354 (1974)) ("Whether evidence obtained from respondent's Mexican residences should be excluded at trial in the United States is a remedial question separate from the existence *vel non* of the constitutional violation."). *See also* Calandra, 514 U.S. at 354 ("The wrong condemned is the unjustified governmental invasion of these areas of an individual's life. That wrong, committed in this case, is fully accomplished by the original search without probable cause . . . . Questions based on illegally obtained evidence . . . . work no new Fourth Amendment wrong.").

88. *Verdugo-Urquidez*, 494 U.S. at 261 (framing the issue as "whether the Fourth Amendment applies to the search and seizure by United States agents of property that is owned by a nonresident alien and located in a foreign country").

89. *See, e.g.*, United States v. Iribe, 806 F. Supp. 917, 919 (D. Colo. 1992), *rev'd in part on other grounds*, *aff'd in part*, 11 F.3d 1553 (10th Cir. 1993).

90. *Iribe*, 806 F. Supp at 919. *See also* United States v. Medina-Ortega, No. CRIM.A. 20094-KHV, 2000 WL 1469314, at *2 (D. Kan. Sept. 25, 2000) (characterizing *Verdugo* as holding that "non-resident illegal aliens in foreign countries do not have constitutional rights" and assuming "without deciding that defendant [an undocumented immigrant] has standing to challenge the search under the Fourth Amendment").

91. *Iribe*, 806 F. Supp. at 919.

92. Martinez-Aguero v. Gonzalez, No. EP-03-CA-411(KC), 2005 U.S. Dist. LEXIS 2412, at *12–13 (W.D. Tex. Feb. 2, 2005), *aff'd*, 459 F.3d 618 (5th Cir. 2006). Ultimately, the appellate court in *Martinez-Aguero* proceeded to apply the "substantial connections" test to the undocumented immigrant at issue, finding that her prior legal crossings into the United States, as well as her good faith (although misguided) efforts to comply with U.S. in obtaining what she believed were subsequent legal entries,

Third, the plurality's vague language arguably gives courts insufficient direction in determining exactly who belongs to the class of persons identified in the Fourth Amendment's mention of "the people." Courts have, on this basis, declined to apply the "substantial connections" test to limit the rights of aliens that have experienced alleged Fourth Amendment violations within the United States.[93] Proceeding without further guidance, one court has argued, would be tantamount to "divin[ing] a rule."[94] Indeed, commentators have criticized the *Verdugo* plurality opinion for its broad and impractical language.[95]

The potential difficulty of applying *Verdugo*'s vague "substantial connections" test, combined with the divided opinions and complicated reasoning of the court, renders *Verdugo* an easily dismissible opinion.

2. *Verdugo* as Requiring Individual Analysis of Aliens' Fourth Amendment Rights

Despite the difficulty of applying *Verdugo*'s substantial connections test and the division among the Justices, some courts have declined to second-guess the opinion of the Court, taking at "face value the fact that Justice Kennedy joined the opinion of the Court."[96] These courts interpret the *Verdugo* plurality opinion's discussion of Verdugo's presence within the United States as imposing a new requirement, beyond mere territorial presence, for aliens claiming Fourth Amendment rights. The contours of this new requirement, though, are largely undefined, and courts have

were sufficient. Martinez-Aguero v. Gonzalez, 459 F.3d 618, 625 (5th Cir. 2006). *See also* United States v. Davis, 905 F.2d 245, 251 (9th Cir. 1990) (characterizing *Verdugo* as a case about extraterritorial application of the Fourth Amendment: "[*Verdugo*] only held that the fourth amendment does not apply to searches and seizures of nonresident aliens in foreign countries").

93. *See, e.g.*, United States v. Guitterez, 983 F. Supp. 905, 916 (N.D. Cal. 1998) ("Given the lack of any clear appellate guidance which alters the applicable standard or otherwise sets forth a definitive analysis in making these vital determinations, the Court is disinclined to impose a greater burden on this category of criminal defendants as a prerequisite to seeking the shelter of the Fourth Amendment."), *rev'd on other grounds*, 203 F.3d 833 (9th Cir. 1999) (unpublished opinion).

94. *Id*. at 915.

95. *See, e.g.*, Randall K. Miller, *The Limits of U.S. International Law Enforcement After* Verdugo-Urquidez*: Resurrecting* Rochin, 58 U. PITT. L. REV. 867, 887 (1997) ("Rehnquist's dictum invites the lower federal courts to jump into the quagmire of weighing the relative value of 'societal obligations' in determining the applicability of the Fourth Amendment to illegal aliens within the United States.") (emphasis omitted).

96. *Martinez-Aguero*, 459 F.3d at 624 (ultimately declining to decide if *Verdugo-Urquidez* is controlling because the claimant at issue would have satisfied the "substantial connections" test). *See also* United States v. Tehrani, 826 F. Supp. 789, 793 n.1 (D. Vt. 1993) (characterizing the Rehnquist opinion in *Verdugo-Urquidez* as demonstrating that "the Supreme Court firmly rejected the argument that all aliens enjoy certain constitutional rights.")

struggled to find a consistent method for analyzing a claimant's connections to the United States.

The Supreme Court of Florida, for example, characterized *Verdugo* as holding "that the fourth amendment does not apply to the search and seizure by the United States agents of property owned by a nonresident alien and located in a foreign country when that nonresident alien has no voluntary attachment to the United States."[97] Based on that understanding of *Verdugo*, the court proceeded to determine whether the claimant, a foreign national living in the United States who challenged the admissibility of evidence seized in Germany, had sufficient connections for Fourth Amendment rights to attach.[98] With little explanation, the court found that the claimant satisfied the test.[99] The court seemed to opine that voluntary legal residence in the United States was patently sufficient.[100]

The court in *United States v. Tehrani* reached a similar conclusion.[101] There, the claimants had fraudulently obtained tourist visas and entered the United States voluntarily.[102] This connection was sufficient: "[their] presence in the United States was voluntary, and they had gained admission, albeit surreptitiously, for a temporary visit as tourists."[103] These connections, the court held, differed significantly from the lawful, but involuntary, connection at issue in *Verdugo*.[104]

Several courts have been more careful to catalog claimants' individual interactions with the United States.[105] In *Martinez-Aguero v. Gonzales*, for

97. Riechmann v. State, 581 So.2d 133, 138 (Fla. 1991). In *Riechmann*, a German national living in Florida was accused of murdering his long-time friend and "life companion[]" Kersten Kischnick. *Id.* at 135. The state sought to prove that "Kischnick was a prostitute [and] Riechmann was her pimp supported by her income, and when she decided to quit prostitution, he killed her to recover insurance proceeds." *Id*.

98. *Id.* at 138. Riechmann sought to exclude insurance policies seized in Germany showing that Riechmann would have received close to one million dollars in the event of Kischnick's accidental death. *Id.* at 136.

99. *Id.* at 138 ("Riechmann did have a voluntary attachment to the United States and thus had greater entitlement to fourth amendment protection, having assumed the benefits and burdens of American law when he chose to come to this country.").

100. *Id*.

101. *Tehrani*, 826 F. Supp. at 793 n.1 (addressing the issue of whether aliens on a tourist visa were covered by the Fourth Amendment such that they could invoke the exclusionary rule, even though none of the parties had raised that issue).

102. *Id* at 796–97.

103. *Id.* at 793 n.1.

104. *Id*.

105. *See, e.g.*, Martinez-Aguero v. Gonzales, No. EP-03-CA-411(KC), 2005 U.S. Dist. LEXIS 2412, at *15–16 (W.D. Tex Feb. 2, 2005) (finding that the *Verdugo* "substantial connections" language was merely persuasive authority, but independently determining that the test should be applied in the case at bar), *aff'd*, 459 F.3d 618, 624–25 (5th Cir. 2006); United States v. Atienzo, No. 2:04-CR-

example, the claimant had made numerous visits to the United States with a valid border crossing pass to accompany her aunt to the nearest Social Security office.[106] When her border-crossing pass expired, she re-entered the United States illegally, though with a good-faith belief that her entry was authorized.[107] According to the Texas district court, the claimant's past visits to the United States, combined with her good-faith attempt to abide by U.S. immigration laws constituted sufficient connections for her to make a Fourth Amendment claim.[108] On appeal to the Fifth Circuit, which declined to decide whether *Verdugo* indeed required the application of the "substantial connections" test but found that the claimant would have nonetheless satisfied the test, the Fifth Circuit added that "aliens with substantial connections are those who are in this country voluntarily and presumably [have] accepted some societal obligations."[109] The Fifth Circuit agreed with the claimant's contention that her regular lawful entry and her voluntary submission to the U.S. immigration system were sufficient.[110]

Similarly, a district court in Utah held that an undocumented immigrant's nine-year presence within the United States, employment within the country, filing of U.S. tax returns, and relationship to immediate family members in the U.S. fulfilled *Verdugo*'s test.[111]

While prior entrances to the United States held a great deal of weight for the court in *Martinez-Aguero*, other courts have found them insufficient. In *American Immigration Lawyers Association v. Reno*, for example, a district court opined that an alien's repeated trips to the United States to visit an ill daughter and grandchild would have been insufficient

005534, 2005 U.S. Dist. LEXIS 31652, at *2 (D. Utah Dec. 6, 2005).

106. *See Martinez-Aguero*, 2005 U.S. Dist. LEXIS 2412, at *61.

107. *Id.* at *64–65.

108. *Id*.

109. *Martinez-Aguero*, 459 F.3d at 625 (quotation marks and citation omitted).

110. *Id*.

111. *Atienzo*, 2005 U.S. Dist. LEXIS 31652, at *16–18. Because the government had argued that the claimant in *Atienzo* was categorically excluded from the protections of the Fourth Amendment by virtue of his undocumented status, the government failed to submit evidence refuting the claimant's alleged connections. The court called attention to and relied on this aspect of the case in its finding of "substantial connections." *Id.* at *18. ("Having rejected the categorical position that all illegal aliens as a class lack sufficient connection to this country to assert Fourth Amendment rights, the court has no legal arguments before it disputing Atienzo's specific position that *he* has sufficient connections. In light of [this], the simplest course is for the court to then accept the uncontested . . . claim [to] Fourth Amendment protection."). Interestingly, the same court that decided *Atienzo* had, just two years earlier, held that previously deported undocumented immigrant felons were categorically outside the protection of the Fourth Amendment. *See* United States v. Esparza-Mendoza, 265 F. Supp. 2d 1254, 1267 (D. Utah 2003), *aff'd on other grounds*, 386 F.3d 953 (10th Cir. 2004). I discuss *Esparza-Mendoza* and other similar cases in subsection B.3 of this Part.

to satisfy *Verdugo*'s substantial connections test.[112] Though the opinions in which courts attempt to apply *Verdugo*'s substantial connections test differ in their evaluation of the contacts at issue, they share an important commonality: they evaluate individuals' substantial connections on a case by case basis.

3. *Verdugo* as a Categorical Bar on the Fourth Amendment Rights of Undocumented Immigrants

A third interpretation of *Verdugo* rejects a case by case evaluation of individuals' connections to the United States in favor of a categorical exclusion of certain classes of undocumented immigrants from Fourth Amendment protection. This third approach developed only recently, and though few courts espouse such an approach, public concerns about immigration may propel courts to increasingly adopt it in the future.[113] Because few courts have thus far taken such an approach, there is no consensus on which classes of undocumented immigrants are outside the Fourth Amendment's ambit.

Two courts have held that previously deported undocumented immigrant felons cannot claim the protection of the Fourth Amendment—as to those individuals, the government may properly conduct searches without Fourth Amendment limitations. The District of Utah's opinion in *United States v. Esparza-Mendoza*[114] gives a lengthy defense of just such a rule. There, a criminal defendant sought to exclude an identification card

112. Am. Immigration Lawyers Ass'n v. Reno, 18 F. Supp. 2d 38, 59–60 & n.17 (D.D.C. 1998). Notably, the plaintiff in the case claimed a violation of due process rather than a Fourth Amendment violation, and the district court interpreted *Verdugo* to apply to all constitutional protections. However, the district court ultimately determined that the "substantial connections" test was inapplicable to the claimant; the claimant was excluded from due process protections because she was merely a prospective entrant to the United States, rather than someone who was within the United States. The court's conclusion parallels substantial precedent holding that visitors arriving in the United States are not on U.S. soil for purposes of the law. Rather, they are treated as being outside of the United States until formally admitted such that due process rights do not apply to proceedings held to determine admissibility. *Id.* at 60 (noting that "overwhelming case law, including that of this circuit, hold[s] that initial entrants have no due process rights with respect to their admission"). *See also* Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 213 (1953); United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 544 (1950).

113. Though denial of Fourth Amendment rights to undocumented immigrants in *criminal proceedings* is relatively new, it has established corollaries in *immigration proceedings*. For a discussion of aliens' diminished Fourth and Fifth Amendment rights in immigration court, see Jennifer M. Chacón, *A Diversion of Attention? Immigration Courts and the Adjudication of Fourth and Fifth Amendment Rights*, 59 DUKE L.J. 1563 (2010). Chacón notes that the denial of Fourth Amendment rights in criminal court evidences "that the slippage in procedural protections threatens to spread from immigration court to the criminal court." *Id.* at 1620.

114. *Esparza-Mendoza*, 265 F. Supp. 2d at 1269–71.

that was the result of an allegedly illegal search and that ultimately allowed a police officer to identify the defendant as the subject of a previously issued fugitive warrant.[115] Esparza had first entered the United States in 1997 when he crossed the border from Mexico without authorization.[116] After two years, a Utah state court convicted him of a felony, and the Immigration and Naturalization Service ("INS") subsequently deported him to Mexico.[117] However, by the time of the allegedly illegal search, which took place in 2002, Esparza was back in the United States, once again without authorization.[118] The government argued that the Fourth Amendment did not apply to Esparza.[119]

To determine whether Esparza had "substantial connections" to the United States, the court embarked on a discussion of, "first, the historical background regarding the attachment of alien felons to the political community, and, second, the specific facts surrounding [Esparza]."[120] With respect to the history of alien felons, the court noted that the Framers "would have had grave concerns about *criminal* aliens in particular," and highlighted Britain's practice of sending convicted felons to its colonies as indentured servants.[121] Even after Britain could no longer send convicts to the U.S., the court noted, many of the states passed legislation prohibiting the transportation of convicts across their state borders.[122] The historical exclusion of alien criminals, in combination with the exclusion of aliens from voting, weighed against a finding that an alien criminal could be "part of or connected to the nation's political community. To the contrary, the historical materials suggest that the Framers were doing everything possible to exclude such persons from the national community."[123]

115. *Id.* at 1256.
116. *Id.* at 1255.
117. *Id.*
118. *Id.* at 1256.
119. *Id.* at 1258.
120. *Id.* at 1267. Before determining whether Esparza satisfied *Verdugo*'s "substantial connections" test, the court addressed Esparza's argument that *Verdugo* did not control his claim. *Id.* at 1260. The court disagreed. *Id.* at 1260–61. Because a majority of the Justices joined Justice Rehnquist's opinion in *Verdugo*, the opinion could not be called a plurality opinion: "This court is not at liberty to second-guess Justice Kennedy's direct statement that he was joining the Court's opinion. Therefore, . . . its 'sufficient connection' language must be followed here." *Id.* at 1261. Moreover, explained the *Esparza* court, the "substantial connections" test was sound law in light of the history and text of the Fourth Amendment: "Even if the court is mistaken about the controlling effect of *Verdugo-Urquidez*, the court independently reaches the same conclusion that the Fourth Amendment extends only to those persons who have sufficient connection with this country." *Id.* at 1261.
121. *Id.* at 1268.
122. *Id.* at 1268–69.
123. *Id.*

Although the court next purported to analyze Esparza's connections to the United States, the court merely restated Esparza's prior encounters with the INS. When Esparza failed to introduce any evidence of his connections with the United States, the court explained that U.S. law would prevent an undocumented immigrant from establishing such connections: an undocumented alien "cannot be lawfully employed," is not "entitled to federal or state public benefits," "can be restricted from voting or running for office," and "may not lawfully possess firearms."[124] The court looked not to Esparza's actual connections, but to what undocumented immigrants, as a class, may or may not lawfully do within the country. Despite having initially characterized its analysis as an inquiry into Esparza's individual connections to the United States, the court ultimately acknowledged its categorical approach in the holding:

> [P]reviously deported alien felons, such as Esparza-Mendoza, are not covered by the Fourth Amendment. In reaching this conclusion, the court has made a categorical determination about previously deported aliens. In other words, an individual previously deported alien felon is not free to argue that, in his particular case, he possesses a sufficient connection to this country to receive Fourth Amendment coverage (unless, of course, he could prove he was in this country lawfully).[125]

The Tenth Circuit later avoided the "substantial connections" issue entirely by affirming *Esparza-Mendoza* on other grounds.[126]

Nonetheless, the Utah district court's reasoning has found favor elsewhere. A district court in Kansas agreed with *Esparza-Mendoza*'s conclusion.[127] In *United States v. Gutierrez-Casada*, the court held that previously deported alien felons present in the United States without authorization are outside the scope of the Fourth Amendment.[128] In addition to echoing *Esparza-Mendoza*'s reasoning, the court commented on modern justifications for excluding undocumented immigrants from Fourth Amendment protections:

> [I]llegal aliens are among persons "typically considered dangerous or irresponsible" because: they have "already violated a law of this country" and are "likely to maintain no permanent address in this

124. *Id.* at 1270.

125. *Id.* at 1271. Interestingly, Judge Paul Cassell, who decided this case, would later find that *Esparza-Mendoza* was irrelevant to the Fourth Amendment rights of an undocumented immigrant who had *not* previously been deported as an alien felon. United States v. Atienzo, No. 2:04-CR-005534 PGC, 2005 U.S. Dist. LEXIS 31652, (D. Utah Dec. 6, 2005), discussed in Part II.B.2, *supra*.

126. United States v. Esparza-Mendoza, 386 F.3d 953, 960 (10th Cir. 2004).

127. United States v. Gutierrez-Casada, 553 F. Supp. 2d 1259 (D. Kansas 2008).

128. *Id.* at 1272.

> country, elude detection through an assumed identity, and—already living outside the law—resort to illegal activities to maintain a livelihood."[129]

The court further argued that a previously deported alien felon stands in virtually the same shoes as a prison escapee,[130] a parolee,[131] and a trespasser,[132] all of whom have little, if any, expectations of privacy under the Fourth Amendment.

One court has gone further than the courts in *Esparza-Mendoza* and *Gutierrez-Casada* to hold that aliens, as a rule, cannot establish substantial connections with the United States until they have entered legally.[133] In *United State v. Ullah*, the alien defendant's connections to friends and family members within the United States were irrelevant because the defendant had not gained lawful admission to the U.S.[134]

In some courts, unauthorized presence in the United States has played a factor, if not determined, the question of whether an individual has "substantial connections" to the United States.[135] A Texas state court, for example, held that the Fourth Amendment and its state equivalent did not apply to the claimant.[136] In evaluating the claimant's connections to the United States, the court emphasized the fact that his tourist visa had expired, although his lack of employment seemed to also play a role in the decision.[137] Cases in which courts have held or suggested that individuals lawfully present in the country are automatically entitled to the protections of the Fourth Amendment without regard to actual connections to the country also provide some evidence that a categorical approach, in which legal status determines the applicability of the Fourth Amendment, may be growing.[138]

129. *Id.* at 1267 (quoting United States v. Juan Ochoa-Cochado, 521 F.3d 1292, 1297 (10th Cir. 2008)).

130. *Id.* at 1267 ("Defendant's presence anywhere in the United States is wrongful, just as an escaped felon's presence anywhere outside his prison is wrongful. The court views defendant's Fourth Amendment position at the time of the search as akin to that of a constructive escapee.").

131. *Id.* at 1266–67.

132. *Id.* at 1269 ("Defendant's Fourth Amendment position at the time of the search is also comparable to that of a trespasser who has entered on another's land without the landowner's consent.").

133. United State v. Ullah, No. 04-CR-30A(F), 2005 U.S. Dist. LEXIS 12419, at *99 (W.D.N.Y. Mar. 17, 2005).

134. *Id.*

135. *See, e.g.*, Torres v. State, 818 S.W.2d 141, 143 & n.1 (Tex. Ct. App. 1991), *vacated*, 825 S.W.2d 124 (Tex. Crim. App. 1992).

136. *Id.*

137. *Id.*

138. United States v. Barona, 56 F.3d 1087, 1094 (9th Cir. 1995) (citing United States v.

A categorical approach based on status is an untenable reading of *Verdugo*'s text, because the facts in *Verdugo* foreclose such an interpretation. Verdugo himself was an authorized alien in the United States. He was present by virtue of the U.S. government's forced transportation across U.S. borders; the government explicitly allowed him—or required him—to be present within the United States. Nonetheless, he had insufficient connections to the United States. Clearly, Verdugo's lack of sufficient connections cannot be attributable to unauthorized status. Rather, the Court specifically noted that Verdugo's presence in the United States was involuntary; Verdugo did not manifest any willing submission to U.S. law. Although the inconsistency of this third approach to *Verdugo* with the actual text of the opinion significantly undermines cases like *Esparza-Mendoza*, as I argue below, it is the incongruency of those cases with the trajectory of membership theory in United States law that most persuasively calls for reexamination of this categorical approach.

III. SUBSTANTIAL CONNECTIONS: TOWARD A POST-TERRITORIAL APPROACH TO MEMBERSHIP

In its simplest form, membership is about belonging and inclusion. This concept plays a central role in our human understanding of the world; we order our interactions with each other and our surroundings by ascertaining who and what belongs where. From an early age, we learn to sort shapes, identify the object that does not belong, and pick out the color or texture that is different. As a society, we translate these skills into our cultural and legal structure: we sort members from nonmembers in order to assign privileges and responsibilities. From fitness clubs and video rental clubs to sororities and labor unions, the concept of membership serves as a gatekeeper to benefits and privileges. Legal rights are no exception—they are the privileges of membership in a more abstract "club."

The voting franchise, for example, is generally open only to U.S. citizens over the age of majority. Voting is the privilege of membership in the U.S. political community. While this is a broadly inclusive club, it excludes a number of individuals. Exclusion, it turns out, is an unavoidable byproduct of inclusion. As a result, membership rules—the mechanisms by

Verdugo-Urquidez, 856 F.2d 1214, 1234 (9th Cir. 1988) (Wallace, J., dissenting)) (stating that the Fourth Amendment protects "lawful resident aliens within the borders of the United States 'who are victims of actions taken *in the United States* by American officials,'" but declining to decide whether the Fourth Amendment protects lawful resident aliens from unlawful searches that take place outside the U.S.) (emphasis added).

which we sort members from nonmembers—are a volatile subject in the legal arena as legislators and courts struggle with the meaning of belonging and accordingly expand and contract the reach of government-secured rights.[139]

Fourth Amendment rights are no exception; they are privileges of membership that correspond to inclusion in a club, and courts wrestle with the contours of its membership.[140] In that sense, *Verdugo* is peculiarly about membership—it is about formulating a rule for determining who gets Fourth Amendment privileges. In fact, *Verdugo*'s progeny serves as a singularly useful study in the role of membership theory in U.S. law. The three general approaches that courts have taken in applying *Verdugo* parallel the competing approaches to membership currently identifiable in U.S. law: a strictly territorial model, a post-territorial approach, and a status-based model.[141] In this part, I describe these three membership models, giving examples of their application in U.S. law. I then compare the three interpretations of *Verdugo*'s effect on the Fourth Amendment rights of aliens in the United States, arguing that each *Verdugo* interpretation is a manifestation of a membership model. Finally, I re-examine *Verdugo* through a membership theory lens and place it in the broader trajectory of membership theory in U.S. law, which I argue is moving toward post-territoriality. In that context, I conclude, not only does *Verdugo* emerge as a quintessential post-territorial case, but it also becomes a pivotal case moving U.S. alienage law toward such an approach.

139. The voting franchise has been shaped by just such a dynamic. Contrary to popular perceptions of the right to vote as one that has gradually and consistently become more inclusionary, the "history of the right to vote in America is one of expansion and contraction, of punctuated equilibria, rather than gradual evolution." Pamela S. Karlan, *Ballots and Bullets: The Exceptional History of the Right to Vote*, 71 U. CIN. L. REV. 1345, 1345 (2003).

140. Membership is meaningless without reference to a particular sphere of membership. Just as the Rotary Club has different membership criteria than does the local fitness club, membership for purposes of Fourth Amendment protection may have different requirements than membership for purposes of other legal benefits. Interestingly, scholarly literature on membership does not clearly make this distinction, which contributes to a lack of clarity in the discussion of membership. Sometimes, membership refers to a general political membership, sometimes it refers to membership for purposes of Constitutional rights, and sometimes it refers to membership for purposes of basic human rights. Throughout this Article, membership denotes the broad concept of belonging, as applied in the sphere of the Fourth Amendment.

141. It is worth noting that a fourth membership model, the human rights model, sometimes appears in alienage law literature. Under this model, certain rights attach to individuals simply by virtue of personhood, irrespective of status or location. Because this approach has had little clout in U.S. alienage law decisions, I do not discuss it here. For articles advocating a human rights approach, see Linda Bosniak, *Persons and Citizens in Constitutional Thought*, 8 INT'L J. CONST. L. 9 (2010) and M. Isabel Medina, *Exploring the Use of the Word "Citizen" in Writings on the Fourth Amendment*, 83 IND. L.J. 1557 (2008).

A. THREE *VERDUGO*S, THREE MEMBERSHIP MODELS

The near-perfect alignment of the three interpretations of *Verdugo* with the three membership models identifiable in U.S. law evidence the important, though subtle, role that membership theory plays in alienage law. *Verdugo*'s progeny have taken advantage of *Verdugo*'s seemingly contradictory language to shape *Verdugo* to fit a membership model—a set of rules for sorting members from nonmembers—that seems appropriate to the deciding court. *Verdugo,* then, has three membership faces: a territorial face, a post-territorial face, and a status-based face.

1. The Territorial Model: Using Geography as a Proxy

a. Territoriality, Generally

Territoriality distributes membership rights and benefits according to geographic boundaries, without reference to heritage, community ties, legal status, or any other criterion.[142] Under a strict territorial approach, individuals within a state's territory are members entitled to all rights offered by the state, while individuals outside the state territory have no guaranteed rights.[143] Thus, in its simplest form, territoriality's dividing line is the nation-state's border.[144]

Territoriality has played a significant role in U.S. law, and many of our legal constructs derive their structure from this approach. Under the U.S. concept of *jus soli*, or birthright citizenship, individuals born on U.S. soil automatically gain U.S. citizenship without regard to the child's status or parentage.[145] Similarly, presence within the United States guarantees an undocumented immigrant child a right to the same free public education

142. NEUMAN, *supra* note 21, at 6–8 (dividing approaches to the distribution of constitutional rights into membership approaches, mutuality approaches, universality, and global due process); Bosniak, *supra* note 21, at 391. *See also* Linda S. Bosniak, *Exclusion and Membership: The Dual Identity of the Undocumented Worker Under United States Law*, 1988 WIS. L. REV. 955, 1031 (1988).

143. *See* Bosniak, *supra* note 21, at 394.

144. MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY 42–44 (1983).

145. U.S. CONST. amend. XIV, § 1 ("All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States . . . ."). Of course, *jus soli* has received renewed criticism in recent years. *See, e.g.*, Peter H. Schuck, *Birthright of a Nation*, N.Y. TIMES, Aug. 13, 2010, at A19 (arguing that the Fourteenth Amendment does not require automatic bestowal of citizenship on the children of undocumented immigrants born in the United States). *But see* Garrett Epps, *The Citizenship Clause: A Legislative History*, 60 AM. U. L. REV. 331, 343 (2010) (disagreeing with Schuck and arguing that the historical context of the Fourteenth Amendment's passage supports birthright citizenship for all individuals born in the United States.).

enjoyed by U.S. citizens and authorized residents.[146] Indeed, all individuals present within the United States are entitled to equal protection under the law and due process by exclusive virtue of their presence here.[147]

b. *Verdugo* as a Territorial Case

Courts that have dismissed *Verdugo*'s "substantial connections" language as irrelevant to the rights of aliens in the United States[148] have essentially adopted a territorial approach to membership. *Verdugo*, under this view, is a case about *exclusion* based on extra-territoriality. These courts have found the "substantial connections" language to be mere dicta from a divided Supreme Court.[149] The crux of the issue in *Verdugo*, for these courts, was the location of the searched property.[150] After all, Justice Rehnquist had been careful to note that because the searched property was outside U.S. borders, and because a violation of the Fourth Amendment is complete upon the conclusion of an illegal search or seizure, any Fourth Amendment violation occurred in Mexico.[151] Moreover, the plurality opinion further emphasized U.S. Supreme Court precedent that had declined to extend constitutional rights to aliens abroad.[152] If it was only the location of the property outside the United States that foreclosed the application of the Fourth Amendment, it is not a large leap in logic to assume that location *within* the United States would require the opposite result.

Presumably, for the courts that interpret *Verdugo* this way, the U.S.

146. Plyler v. Doe, 457 U.S. 202, 230 (1982). *See also* David Cole, *Enemy Aliens*, 54 STAN. L. REV. 953, 978 (2002) ("[R]elatively little turns on citizenship status. The right to vote and the right to run for federal elective office are restricted to citizens, but all of the other rights are written without such limitation.").

147. Of course, whether someone is present in the United States can be ambiguous. First, knowing whether someone is within U.S. territory presupposes an understanding of what, exactly, constitutes U.S. territory. This has not always been an easy inquiry. *See, e.g.*, Boumediene v. Bush, 553 U.S. 723, 771 (2008) (discussing whether Guantanamo Bay is under U.S. sovereignty such that enemy combatants held there may assert habeas rights). Second, even someone factually on U.S. soil may be legally absent from the U.S. *See, e.g.*, Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 213 (1953) (holding that denying the petitioner's admission to the United States on national security grounds, and subsequently detaining him for twenty-one months without a determination of his danger to the public's safety was not a violation of due process: "In sum, harborage at Ellis Island is not an entry into the United States.").

148. *See supra* Part II.B.1, where I catalogue the reasons courts have chosen to interpret *Verdugo* as a case about the extraterritorial application of the Fourth Amendment rather than an alienage law case.

149. See *supra* Part II.B.1.

150. *See* United States v. Verdugo-Urquidez, 494 U.S. 259, 264 (1990).

151. *Id.* at 262.

152. *Id.* at 267–68.

border marks the line between inclusion in and exclusion from Fourth Amendment protection, and these courts would be likely to apply the Fourth Amendment's protections to all individuals within U.S. territory. Of course, this raises an important question: What is so important about territory that these courts are willing to base the distribution of fundamental constitutional rights on location?

c. Territoriality's Rationales

While territoriality is easy to apply, predictable,[153] and inclusive, the rationales for a purely territorial approach to legal rights escape precise identification.[154] What is it about being within the United States that renders an individual deserving of membership? How does crossing a border make an individual any more a "member" of the United States (or of any other "club" for that matter)? Clearly, territory, as an abstract concept, means nothing. An individual's physical location changes nothing about her characteristics or traits that might be relevant to determining whether she is a member or should be a member of any particular club.

Rather, territorial presence must be a proxy for other indicators of membership. Territorial presence must stand for a larger concept, one that more intuitively raises a presumption of membership and belonging. Commentators have offered three types of rationales for a territorial approach to membership by identifying more fundamental indicators of membership for which territorial presence serves as proxy. However, none of the proffered rationales adequately justifies a strictly territorial approach to membership.

i. Mutuality of Obligation

Territoriality is likely based, in part, on the notion that the state must afford protections to those within its territory because those are the individuals upon whom it may impose obligations. Thus, because presence within the United States subjects an individual to the obligations of U.S. law, it also guarantees protections.[155] The individual, in effect, has accepted the state's jurisdiction over her simply by being here.[156] Voluntary presence within the United States reflects (and serves as a proxy for) a willing submission to U.S. law, which requires reciprocal corresponding

153. *See infra* Part IV.B.

154. For a more detailed discussion of territoriality's rationales, see Núñez, *supra* note 25.

155. *See* NEUMAN, *supra* note 21, at 107–08 (describing territoriality as based on mutuality of obligation); Bosniak, *supra* note 21, at 408.

156. *See* NEUMAN, *supra* note 21, at 107–08.

rights from the state.[157]

Mutuality of obligation as a rationale for territoriality makes a lot of sense in a purely Westphalian world, where states only impose obligations on individuals within their territory, and individuals within a territory are exclusively subject to the obligations imposed by the sovereign charged with that territory.[158] *Where*, rather than *who*, the individual is, determines what rules apply.[159]

The reality, however, is that states often do impose obligations upon individuals outside of their borders and sometimes exempt individuals within their borders from certain obligations.[160] As a result, a membership model based solely on mutuality of membership would not be a purely territorial model. Rather, under a mutuality-of-obligation-based model, all those subjecting themselves to the laws of the nation-state, whether inside or outside the border, would be members entitled to corresponding membership benefits.[161]

157. This is related to, though not entirely based on, the notion that a government, as an artificial entity, may only act according to the powers delegated to it in its founding document. This "structural" or "delegation" approach assumes that the founding document's objective is to constrain the power of government rather than to affirmatively protect individual rights. Thus, wherever the government acts, it must act under the constraints of its founding document. In the context of the Constitution, this translates into the notion that whenever a government acts upon someone, it is constrained by the Constitution. Where the Constitution affords "protections" it essentially limits the government from imposing naked obligations on its subjects without enforcing corresponding rights. *See* Edward A. Fallone, *Charters, Compacts, and Tea Parties: The Decline and Resurrection of a Delegation View of the Constitution*, 45 WAKE FOREST L. REV. 1067, 1073 (2010) ("Under this view of the nature of federal power, the government's ability to perform an act does not depend on the identity of the individual who is the subject of government action."); Robert Knowles & Marc D. Falkoff, *Toward a Limited-Government Theory of Extraterritorial Detention*, 62 N.Y.U. ANN. SURV. AM. L. 637, 641 (2007); J. Harvie Wilkinson III, *Our Structural Constitution*, 104 COLUM. L. REV. 1687, 1688 (2004).

158. In a Westphalian conception of sovereignty, the nation-state is a unitary, self-contained actor with complete and exclusive jurisdiction over the people within its territory. This approach to sovereignty rejects feudal notions of sovereignty that predated the Peace of Wesphalia, in which an individual owed overlapping allegiance to multiple vassals. *See* DANIEL PHILPOTT, REVOLUTIONS IN SOVEREIGNTY: HOW IDEAS SHAPED MODERN INTERNATIONAL RELATIONS 79 (2001) (describing feudal allegiance as a "system of arteries in a body, not a pyramid with an apex"). *See also* Stèphane Beaulac, *The Westphalian Model in Defining International Law: Challenging the Myth*, 8 AUSTL. J. LEGAL HIST. 181, 182 (2004), *available at* http://www.austlii.edu.au/au/journals/AJLH/2004/9.html; Leo Gross, *The Peace of Westphalia*, 42 AM. J. INT'L L. 20, 34 (1948).

159. *See* Kal Raustiala, *The Geography of Justice*, 73 FORDHAM L. REV. 2501, 2514 (2005).

160. The Foreign Corrupt Practices Act, for example, applies to companies operating outside of the United States. *See* 15 U.S.C. § 78dd-1 (2006). Foreign diplomats to the U.S. enjoy certain immunities from U.S. law despite their presence on U.S. soil. *See* Vienna Convention on Diplomatic Relations art. 27, Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95.

161. Territoriality's inability to coincide with mutuality of obligation has resulted in some calling for the adoption of a model that directly evaluates an individual's and state's reciprocal obligations to each other. *See* Raustiala, *supra* note 159, at 2504 (advocating the adoption of a "rebuttable

ii. Community Preservation

The preservation of an egalitarian system of ordering might also justify territoriality. Under this "community preservation" rationale,[162] the distribution of membership rights to all individuals within a territory is desirable because it avoids the creation of an unpalatable social and legal hierarchy.[163] However, this rationale is not one of benevolence. An egalitarian society is worth preserving not because it is generous to strangers but because those who were already here desire to live in an egalitarian community without the risk of becoming part of a future subclass of residents.[164]

iii. Community Ties

The natural formation of relationships among individuals living within the same geographic region also might explain territoriality as a membership model. Under this rationale, territorial presence within a state serves as a proxy for an individual's community ties. As an individual lives in close proximity to others, the argument goes, she forms business, social, familial, and other relationships within the surrounding community. This resulting loyalty, in turn, is worth preserving and therefore should be rewarded with membership benefits. Also, as newcomers develop ties to the surrounding community, already established members of the community begin to depend on those newcomers. Thus, not only does territoriality reward a newcomer's loyalty and contribution to the

presumption that when legal power is brought to bear, so too are legal protections").

162. Though others have labeled this notion of community preservation the "anti-caste" or "anti-subjugation" principle, see, e.g., Bosniak, *supra* note 21, at 392–95, I use the "community preservation" label to emphasize this rationale's focus on a social system, rather than the well-being of "the other."

163. *See* Bosniak, *supra* note 21, at 392–95.

164. Owen Fiss argues that this notion of community preservation is implicit in the Fourteenth Amendment as "a statement about how a society wishes to organize itself, and prohibits subjugation, even voluntary subjugation, because such a practice would disfigure society." That is, "[w]e ought not to subjugate immigrants, not because we owe them anything, but to preserve our society as a community of equals." Owen Fiss, *The Immigrant as Pariah*, BOSTON REV., Oct.–Nov. 1998, 4, 6. S*ee also* Thomas Jefferson, *Drafts of the Kentucky Resolutions of 1798*, *in* 7 THE WRITINGS OF THOMAS JEFFERSON, 1795–1801 303 (Paul Leicester Ford, ed. 1896) ("[T]he friendless alien has indeed been selected as the safest subject of a first experiment; but the citizen will soon follow . . . ."); WALZER, *supra* note 144, at 63. This phenomenon is easily identifiable in labor and employment law, where the inability of one class of persons to assert claims against their employer for violations of employment laws allows the employer to coerce all employees into silence. In effect, the employer may selectively replace complaining employees with members of the rightless underclass, thus encouraging all of the employees to refrain from asserting rights. *See* Núñez, *supra* note 25, at 864–68; Hiroshi Motomura, *The Rights of Others: Legal Claims and Immigration Outside the Law*, 59 DUKE L.J. 1723, 1753–54 (2010) (discussing "the practical ties between unauthorized migrants and other persons whose welfare depends on how the law treats the unauthorized" and suggesting that this empowers undocumented immigrants through "citizen proxies").

surrounding community, but it protects the surrounding community's ties and relationships to—and resulting dependence on—the newcomer. Under the community ties rationale, then, territoriality keeps communities intact.[165]

The inclusive nature of the community ties rationale and its intuitive logic makes it a favorite among commentators. However, territorial presence within a community is an increasingly inappropriate proxy for community ties because physical proximity does not dictate affiliations the way it may have in the past.[166] The world is a smaller place today than it was two hundred—even fifty—years ago. Individuals in the United States can easily maintain business, social, and family relationships that span political borders. Cousins on opposite sides of the globe are an inexpensive Internet call away from each other; business colleagues can traverse seven time zones in a matter of hours to attend in-person meetings; friends everywhere share photos and videos on social networking Internet sites accessed from mobile devices. Not only is it possible to maintain relationships across borders, it is also possible for an individual to have very little affiliation with those inside the country in which she resides. Even where an individual does have ties to others within the nation-state's borders, these ties may be attributable to something other than physical proximity. For example, Texans and New Yorkers live within U.S. borders, but the relationships that Texans maintain with New Yorkers is unlikely a result of their shared location within U.S. borders—in this case, the nation-state's borders do not ensure proximity.

2. The Post-Territorial Model: A Rejection of Inadequate Proxies

a. Post-Territoriality, Defined

Courts are increasingly taking note of territoriality's failure to always produce results consistent with its underlying rationales. Territorial presence, it seems, is a disappointing proxy for the more fundamental indicators of membership inherent in territoriality's underlying rationales.[167] As a result, U.S. courts and commentators have begun to abandon the proxy of territorial presence in favor of a more substantive analysis of an individual's community ties and obligations to the United

165. *See supra* Part III.A.1.c.ii.

166. For a discussion of "place" and its overstated relationship with identity and responsibility, see Doreen Massey, *Geographies of Responsibility*, 86 GEOGRAFISKA ANNALER, Series B, Human Geography, 5–18 (2004), *available at* http://oro.open.ac.uk/7224/1/Geographies_of_responsibility_Sept 03.pdf.

167. *See* Núñez, *supra* note 25, at 842.

States—along with the corresponding government obligation to the individual—as well as the risk of detrimentally altering the character of the U.S. community.[168]

This approach, which I have called the post-territorial approach because of its rejection of geography and adherence to the underlying rationales of territoriality,[169] is underdeveloped and lacks a cohesive framework. The post-territorial model is in early stages of development as courts, likely without any intention of creating a new membership paradigm, elevate one or all of the underlying rationales of territoriality to the forefront of analysis. As a whole, Supreme Court precedent in the area of alienage law and extraterritorial law suggests that much of U.S. law that was once governed by territoriality is moving toward a distribution of rights based on a balancing of the three rationales underlying territoriality.[170] Thus, where territorial presence was once the focus of analysis, mutuality of obligation, community ties, and community preservation have taken its place.[171]

Clearly, post-territoriality forsakes predictability and clarity in favor of fairness and more desirable results.[172] Ascertaining whether an individual is standing on the U.S. or the Canadian side of the border is much easier than determining whether the individual has community ties or voluntarily assumes the obligations of U.S. law. Likewise, evaluating whether an individual is a citizen, a legal permanent resident, or an undocumented immigrant (as required for the status-based approach discussed below) poses fewer challenges than determining the quality and number of an individual's ties to the United States or the nature of her obligation to the United States.

Nonetheless, courts and legislators are slowly contributing to the development of this emerging post-territorial approach. The Supreme

168. *See id*.

169. *Id*. at 847.

170. *Id*. *See also infra* Part III.B.1 (summarizing the gradual transformation of the territorial model to produce a post-territorial model).

171. These, of course, are also difficult to measure and are thus inevitably measured with reference to other, hopefully more accurate, proxies, as discussed later in this Article.

172. Of course, with the loss of predictability, comes a potential increase in discretion, which allows courts to inject majoritarian values and social norms into the analysis. Thus, a more nuanced post-territorial approach to membership is susceptible to critique by critical race theorists who argue that discretion subjects ethnic minorities to unfair application of the law. *See* George A. Martínez, *Legal Indeterminacy, Judicial Discretion and the Mexican-American Litigation Experience: 1930–1980*, 27 U.C. DAVIS L. REV. 555 (1994). As I explain below, however, a more nuanced and substantive approach to membership may be achieved without resorting to an amorphous balancing test by referencing more effective proxies. *See infra* Part IV.

Court's opinion in *Boumediene v. Bush*,[173] for example, explicitly rejected the contention that Guantanamo Bay detainees were categorically outside the ambit of the right to the writ of habeas on account of their absence from U.S. territory.[174] Instead, the Court adopted a more functional approach that examined the actual, de facto power that the United States exerts over the detainees. The detainees, the Court explained, answered exclusively to U.S. law rather than Cuban law despite their technical presence on Cuban soil.[175] In essence, the Court examined the question of mutuality of obligation without reference to territorial presence as a proxy.[176] Cancellation of removal,[177] under which undocumented immigrants may avoid deportation, provides another salient example of an area governed by a post-territorial model. This example is an especially important one because immigration law has often been governed by a status-based approach, discussed below, that awards rights based on legal status. However, under cancellation rules, an alien, though present within the United States without authorization and found deportable, may be given the status of a permanent legal resident. The alien must, among other things, show that she has been present in the United States for ten years, has been of good moral character, and deportation will result in exceptional and extremely unusual hardship to a relative in the United States.[178] These criteria conform with the three factors balanced in the post-territorial approach: length of presence in the United States corresponds to community ties, extreme and unusual hardship to a U.S. relative corresponds to community ties and community preservation, and good moral character arguably corresponds to community ties and willingness to take on societal and legal obligations.[179]

173. Boumediene v. Bush, 553 U.S. 723, 771 (2008).

174. *See id* at 770–71.

175. *See id.* at 751 (explaining that "no law other than the laws of the United States applies at the naval station" even though Cuba retains technical sovereignty over Guantanamo.). For an analysis of *Boumediene*'s functional approach to the extraterritorial application of the Constitution, see Gerald L. Neuman, *The Extraterritorial Constitution After* Boumediene v. Bush, 82 S. CAL. L. REV. 259, 261 (2009).

176. For a more detailed analysis of *Boumediene*, see *infra* Part III.B.2.b.

177. Under section 240A of the Immigration and Nationality Act ("INA"), both legal permanent residents who are found deportable and unauthorized aliens may apply for "cancellation" of their removal order, which, in the case of a legal permanent resident results in a restoration of that status. An undocumented immigrant whose deportation is canceled receives legal permanent residence. Cancellation requires both eligibility, which is defined by the statute, and a favorable exercise of discretion by the immigration judge. Immigration and Nationality Act § 240A, 8 U.S.C. § 1229b (2006).

178. *See id.* § 1229b(b)(1).

179. Admittedly, the cancellation statute's rules use proxies—length of stay in U.S. and hardship to U.S. relatives, for example—to measure membership. Although post-territoriality is an attempt to

b. *Verdugo* as a Post-Territorial Case

Characterizing *Verdugo* as a post-territorial case poses few challenges. The plurality opinion implicitly rejected the notion that territory serves as an adequate indicator of membership and instead required something more—"substantial connections." This language brings to mind the community ties rationale of territoriality, suggesting that what *Verdugo* ultimately attempts is to strip territoriality of its preoccupation with geography and turn directly to the rationales underlying territoriality. This is precisely what post-territoriality does.[180] In Part III.B below, I develop the post-territorial theme in *Verdugo* in great detail.

3. The Status-Based Model: Using Status as a Proxy

a. The Status-Based Model, Defined

A status-based approach to membership sorts members from nonmembers based on status.[181] This approach values the state's consent above all else. In such a system, an undocumented immigrant, whose entrance the state has not consented to, enjoys the fewest number of membership rights despite territorial presence, community ties, or any other factors. A citizen, on the other hand, has access to the full suite of membership rights available. Given the variety of legal statuses available in the United States, this model translates into a multi-tiered system in which individuals gain increasingly inclusive packages of rights as they ascend the hierarchy of status.[182]

Although much of U.S. law has been dominated by the territorial

shed proxies in favor of more accurate indicators of membership, a system that replaces existing proxies with more accurate ones, as INA § 240A(b) does, approaches a post-territorial approach. I do not argue that the use of any proxy is impermissible, but merely that post-territoriality is a rejection of proxies that are no longer useful.

180. In a recent article, Jeffrey Kahn criticizes *Verdugo*'s "substantial connections" test, especially as courts have treated it as a requirement of standing, on the basis that it is inconsistent with any coherent constitutional membership theory. Jeffrey Kahn, *Zoya's Standing Problem, or, When Should the Constitution Follow the Flag?*, 108 MICH. L. REV. 673, 676 (2010). For example, he argues, the test is inimical to a territorial view of the constitution, which would ask only whether an individual is on the inside or the outside of a border. Likewise, according to Kahn, it bears no relationship to a social compact approach (similar to what I have called a status-based approach) to the Constitution. *Id.* at 676–77. However, Kahn does not take into account the rationales of these approaches to determine whether the substantial connections test best fits. Dissecting territoriality reveals territoriality's metamorphosis toward post-territoriality and the substantial connections test's relationship to this new approach to membership.

181. Bosniak, *supra* note 21, at 390.

182. *Cf.* THOMAS ALEXANDER ALEINIKOFF ET AL., IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 2 (6th ed. 2008).

approach[183] and now moves toward post-territoriality, several areas of law follow a status-based approach. Voting is perhaps the most identifiable example: only citizens are members of the voting franchise.[184] A status-based approach also informs the United States' complex system of social and welfare benefits, in which legal permanent residents receive more benefits than do tourists, and citizens enjoy eligibility for more benefits than do legal residents.[185] In most states, the right to obtain a driver's license depends on the applicant's legal status, with undocumented immigrants ineligible to apply.[186]

b. *Verdugo* as a Status-Based Case

The courts that have used *Verdugo*'s "substantial connections" test to categorically deny certain classes of undocumented immigrants Fourth Amendment protection[187] subscribe to a status-based membership model.[188] By denying rights based on immigration status, the courts have reverted to a system of proxies for determining whether an individual is a member for purposes of the Fourth Amendment. These courts would likely argue that an undocumented immigrant or a previously deported alien felon is unlikely to have the community ties or sense of obligation to the United States that a legal immigrant does. In many cases, that assumption may be true, but regardless of these courts' reference to "substantial connections,"

183. *See supra* Part III.A.1.a.

184. Of course, this has not always been true. In the nineteenth century, a territorial conception of membership governed alien suffrage, with at least twenty-two states and territories allowing for noncitizen voting. Virginia Harper-Ho, *Noncitizen Voting Rights: The History, the Law and Current Prospects for Change*, 21 IMMIGR. & NAT'LITY L. REV. 477, 479 (2000).

185. ALEINIKOFF ET AL., *supra* note 182, at 528–31.

186. State laws regarding eligibility for driver's licenses have increasingly followed a status-based conception of membership. In 2005, approximately half of all states required that driver's license applicants be lawfully present in the United States. ALISON M. SMITH, CONG. RESEARCH SERV., RL32127, SUMMARY OF STATE LAWS ON THE ISSUANCE OF DRIVER'S LICENSES TO UNDOCUMENTED ALIENS, 2, 5–6, 13 (2005). In response to the REAL ID Act of 2005, which provides minimum standards for states' issuance of drivers licenses in order for those licenses to be recognized as valid identification in certain settings, most states have enacted legislation precluding undocumented immigrants from obtaining driver's licenses. *See* REAL ID Act of 2005, Pub. L. 109-13, 119 Stat. 231. As of late 2011, only New Mexico and Washington allow undocumented immigrants to apply for driver's licenses, and Utah allows undocumented immigrants to apply for a "Driving Privilege Card." *See* Marc Lacey, *License Access in New Mexico Is Heated Issue*, N.Y. TIMES, Aug. 23, 2011, at A1; Nkoyo Iyamba, *REAL ID Act Making It Hard for Legal Immigrants to Renew Drives Licenses*, KSL.COM (Sept. 30, 2011, 7:44 PM), http://www.ksl.com/?nid=148&sid=17472630.

187. *See supra* Part II.B.3 for a description of these cases.

188. Isabel Medina correlates this with the increasing use of the word "citizen" in Fourth Amendment discussions and argues that using status-based labels is inappropriate in the Fourth Amendment context. M. Isabel Medina, *Exploring the Use of the Word "Citizen" in Writings on the Fourth Amendment*, 83 IND. L.J. 1557 (2008).

they are not measuring membership through connections to the United States, but rather through legal status.

B. FINDING *VERDUGO*'S TRUE CHARACTER

Although courts have unwittingly fashioned *Verdugo*'s holding into a pliable conception of the Fourth Amendment that embraces multiple membership models, an analysis of the trajectory of membership theory in U.S. law, in combination with the reasoning employed by the Justices in *Verdugo*, reveals that *Verdugo* is an archetypal post-territorial case. In fact, *Verdugo* marks the turning point in U.S. alienage law when territoriality began transforming into post-territoriality.

In the years leading up to *Verdugo*, Supreme Court case law demonstrated a more detailed attention to the importance of geography in distributing membership rights. Rather than dogmatically applying a territorial model, the Supreme Court carefully examined the rationales underlying territoriality. By the time *Verdugo*'s case appeared before the Supreme Court, a rejection of strict territoriality was brewing, and *Verdugo* posed a perfect opportunity to finally reject the exclusive use of territory as a proxy for other indicators of membership in U.S. alienage law. Now, two decades after *Verdugo*, the movement is gaining momentum, especially with respect to the extension of rights to individuals outside U.S. borders (which would have been impossible under a strictly territorial approach).

1. Early Adherence to Territoriality[189]

Prior to *Verdugo*, the U.S. border marked a sharp dividing line between those that belonged and those that did not. A century ago, this notion was such an integral part of U.S. law that it rarely warranted explanation. In *Yick Wo v. Hopkins*, a seminal alienage law case, the Supreme Court based its extension of the Fourteenth Amendment guarantee of equal protection to Chinese immigrants based exclusively on the alien's presence within the United States.[190] Although the Court was explicit in its espousal of a territorial model of membership, it gave no explanation for its decision: "These provisions [of the Fourteenth Amendment] are universal in their application, to all persons within the territorial jurisdiction, without

189. For a more detailed analysis of the historical development of the territorial approach to membership, see Núñez, *supra* note 25 (identifying the emergence of the post-territorial approach and applying it to criticize cases in which undocumented workers, despite federal legislation that specifically covers them, have categorically been denied remedies for workplace law violations on account of their status).

190. Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886).

regard to any differences of race, of color, or of nationality."[191] Immigration and citizenship status, it seems, had very little importance. Under the draconian Chinese Exclusion Act that prohibited Chinese immigration,[192] the petitioners would never be able to naturalize under then-applicable U.S. law.[193]

Less than a decade later, in *Wong Wing v. United States*, the Court underscored the irrelevance of immigration status when it held that the alien petitioners had a right to Fifth and Sixth Amendment protections despite allegedly being in the United States in violation of the Chinese Exclusion Act.[194] The Court explained that the territorial reasoning of *Yick Wo* applied to the Fifth and Sixth Amendments: "[I]t must be concluded that all persons within the territory of the United States are entitled to the protection guaranteed by those amendments, and that even aliens shall not be . . . deprived of life, liberty, or property without due process of law."[195]

Notably, the Court explained that Congress's plenary power over immigration, by which it may summarily exclude or remove aliens from the country, does not limit aliens' Fifth and Sixth Amendment protections while within the country.[196] However, the Court failed to explain why

191. *Id.*

192. Chinese Exclusion Act, ch. 126, 22 Stat. 58 (1882), *repealed by* Magnuson Act, ch. 344, 57 Stat. 600 (1943).

193. The prohibition on Chinese naturalization was paradoxical in light of the birthright citizenship rule of the Fourteenth Amendment, which applied to secure U.S. citizenship for second generation Chinese Americans. United States v. Wong Kim Ark, 169 U.S. 649, 705 (1898); Kevin R. Johnson, *Race, The Immigration Laws, and Domestic Race Relations: A "Magic Mirror" into the Heart of Darkness*, 73 IND. L.J. 1111, 1121–22 (1998) (discussing further immigration legislation by which the United States excluded Asian non-white immigrants who were "ineligible to citizenship."). For an account of the influence of race citizenship law, see IAN F. HANEY LÓPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE 39–42 (1996).

194. Wong Wing v. United States, 163 U.S. 228 (1896). The claimants had been summarily found guilty and sentenced under a provision stating that any "person of Chinese descent, convicted and adjudged to be not lawfully entitled to be or remain in the United States, shall be imprisoned at hard labor for a period not exceeding one year, and thereafter removed from the United States." *Id.* at 233–34. The government contended that the Constitution did not apply to an offense of being and remaining unlawfully within the United States because it was "a political offense, and is not within the common-law cases triable only by a jury." *Id.* at 234.

195. *Id.* at 238.

196. *Id.* at 237 ("No limits can be put by the courts upon the power of congress to protect, by summary methods, the country from the advent of aliens whose race or habits render them undesirable as citizens, or to expel such if they have already found their way into our land, and unlawfully remain therein. But to declare unlawful residence within the country to be an infamous crime, punishable by deprivation of liberty and property, would be to pass out of the sphere of constitutional legislation, unless provision were made that the fact of guilt should first be established by a judicial trial."). For an analysis of Congress's plenary power over jurisdiction in the context of its constitutionally limited power over non-immigration-related treatment of aliens in the United States, see Bosniak, *supra* note

territorial presence secured these rights in the first place.

In the years leading up to *Verdugo*, Supreme Court opinions demonstrated a more detailed attention to the importance of geography in distributing membership rights. Rather than dogmatically applying a territorial model, the Supreme Court carefully examined the rationales underlying territoriality. In its 1982 opinion in *Plyler v. Doe*, the Court addressed the rationales underlying a territorial model of membership when it invalidated a Texas statute allowing local schools to deny enrollment to undocumented children.[197] The State, the Court held, must afford undocumented children the same public education offered to their documented counterparts to comply with the Fourteenth Amendment's Equal Protection clause.[198] Being on the inside of the U.S. border—even though they lacked authorization to be there—guaranteed the children this protection: "That a person's initial entry into a State, or into the United States, was unlawful, and that he may for that reason be expelled, cannot negate the simple fact of his presence within the State's territorial perimeter."[199]

Two rationales for this "territorial theme"[200] emerge, though not explicitly, from the Court's reasoning, and both of these rationales correspond to the rationales discussed earlier in this Article.[201] First, mutuality of obligation supported the application of a territorial model of membership. The Court began with the proposition that the Fourteenth Amendment protects all individuals on whom the State may impose its laws.[202] It followed, then, that because Texas could impose legal obligations on anyone within its territory—including undocumented immigrants—Texas, in turn, must afford equal protection of its laws to anyone within the state—including undocumented immigrants.[203]

24.

197. Plyler v. Doe, 457 U.S. 202, 205 & 230 (1982). The Texas law withheld state funds for the education of children not "legally admitted" into the U.S. and allowed local school districts to exclude those children from public school.

198. *Id.* at 215 (holding that the Equal Protection clause of the Fourteenth Amendment applies to the claimant children); *Id.* at 230 (holding that the Texas statute violated the Fourteenth Amendment under intermediate scrutiny because it does not further a substantial state interest).

199. *Id.* at 215.

200. *Id.* at 212.

201. *See supra* Part III.A.1.

202. *Plyler*, 457 U.S. at 212–13.

203. *Id.* at 214. Though the Court spoke in broad terms about the claimants being within the territory and therefore entitled to the same public education that their authorized counterparts received, it is worth noting that its strong territorial reasoning has not since resurfaced to overturn any other state statutes denying other types of rights to undocumented immigrants. Commentators attribute the Court's strong language and use of intermediate scrutiny to the involvement of minors who were involuntary

Second, the need to preserve the character of the community weighed in favor of affording membership benefits (here, the protections of the Fourteenth Amendment) to the claimants.[204] Providing undocumented children a public education is necessary to preserve "a democratic system of government"[205] and "sustain[] our political and cultural heritage."[206] Notably, the Court did not emphasize fairness to the individual claimants. The Court focused on preservation of an egalitarian system that "prides itself on adherence to principles of equality under the law."[207]

This "territorial theme," which governed "as dogma for most of American constitutional history"[208] has been equally strong in the Supreme Court's analysis of the membership rights of those *outside* the United States.[209] In *In re Ross*, a quintessentially territorial case, the Court held that a sailor on a U.S. merchant ship being tried by a U.S. consular court in Japan had no Sixth Amendment right to a jury trial.[210] The *Ross* Court emphatically

within the United States on account of adults' decisions to cross the border without authorization. *See* Motomura, *supra* note 164, 1731–32. This is especially interesting in light of *Verdugo*, which suggests that voluntary presence is one of the touchstones of "substantial connections" that would allow an individual to claim protection under the Fourth Amendment. United States v. Verdugo-Urquidez, 494 U.S. 259, 271 (1990). *See also* Connell & Valladares, *supra* note 12 (interpreting *Verdugo*'s holding to require a substantial connection, sufficed by voluntary presence in the United States, when a search of an undocumented alien occurs outside the United States).

204. *Plyler*, 457 U.S. at 221.

205. *Id.* (quoting Abington School District v. Schempp, 374 U.S. 203, 230 (1963) (Brennan, J., concurring).

206. *Id*.

207. *Id.* at 219. Though not necessarily a rationale for the *Plyler* Court's application of a territorial approach, the claimants' involuntary arrival (as their parents charges) in the United States weighed *in favor* of extending rights. That is, though the claimants had never willingly crossed the United States border, their presence within United States territory was sufficient to protect them. This is in stark contrast to the plurality opinion in *Verdugo*, where the Court found the claimant's *involuntary* presence in the United States weighed *against* extending rights. Without voluntarily crossing the U.S. border, the claimant could not have possibly developed any ties to the United States. Although this might merely be explained by the *Plyler* claimants' status as children who were innocent of their parents' initial unauthorized entry in the territory, it may also illustrate the evolving nature of the post-territorial approach. While territorial presence alone once controlled the extension of rights in *Plyler*, it bore importance in *Verdugo* only as an opportunity for an individual to develop the required "substantial connections."

208. NEUMAN, *supra* note 21, at 7.

209. *See, e.g.*, Dorr v. United States, 195 U.S. 138 (1904); Hawaii v. Mankichi, 190 U.S. 197 (1903); Armstrong v. United States, 182 U.S. 243 (1901); De Lima v. Bidwell, 182 U.S. 1 (1901); Dooley v. United States, 182 U.S. 222 (1901); Downes v. Bidwell, 182 U.S. 244 (1901); *In re* Ross, 140 U.S. 453 (1891). *But see, e.g.*, Reid v. Covert, 354 U.S. 1, 14 (1957) ("The 'Insular Cases' can be distinguished from the present cases in that they involved the power of Congress to provide rules and regulations to govern temporarily territories with wholly dissimilar traditions and institutions whereas here the basis for governmental power is American citizenship."), *limited by* United States v. Verdugo-Urquidez, 494 U.S. 259 (1990).

210. *Ross*, 140 U.S. at 464–65.

stated, "The Constitution can have no operation in another country."[211] Notably, the Court viewed the application of strict territoriality in *Ross* as perfectly consistent with territoriality's underlying rationales. The Court explained that its strictly territorial approach resulted from a lack of mutuality of obligation between the claimant and the United States. The claimant had undertaken no obligation to the United States that required reciprocity on the U.S. government's part; the operation of the U.S. consular court did not impose obligations upon the claimant that might require the extension of corresponding protections, but rather as a gratuitous mitigation of more burdensome obligations that might be imposed by the host nation.[212] It was by mere diplomatic courtesy—an agreement between Japan and the U.S.—that the claimant enjoyed the privilege of being tried by a consular court, rather than a Japanese court. Thus,

> While, therefore, in one aspect the American accused of crime committed [abroad] is deprived of the guaranties of the constitution against unjust accusation and a partial trial, yet in another aspect he is the gainer, in being withdrawn from the procedure of their tribunals, often arbitrary and oppressive, and sometimes accompanied with extreme cruelty and torture.[213]

Territoriality, for the *Ross* Court, adequately preserved the notion of mutuality of obligation.

2. *Verdugo*'s Role in Introducing Post-Territoriality to U.S. Law

In the decades leading up to *Verdugo*, the Supreme Court had managed to explain why territory accurately measured membership.[214] But what if a case arose in which territory alone proved an insufficient substitute for the concept of membership? *Verdugo* provided just such a test case, and, understandably, the Supreme Court struggled to answer the question. Ultimately, the *Verdugo* plurality seized the opportunity to adopt a post-territorial approach to the law governing aliens *within* the United States but left the corresponding adoption of a post-territorial approach to the law governing individuals *outside* U.S. borders to a subsequent case, *Boumediene v. Bush*.[215] Together, these cases form the framework of an emerging post-territorial approach to membership that applies on both sides

211. *Id.* at 464.
212. *Id.* at 465.
213. *Id.*
214. *Id.* at 464; Plyler v. Doe, 457 U.S. 202, 215 (1982).
215. Boumediene v. Bush, 553 U.S. 723, 755 (2008).

of the border.

a. *Verdugo* as the Usher of Post-Territoriality Within the United States

The defendant in *Verdugo* posed an unusual combination of characteristics—one that had never appeared in prior cases. Verdugo was a foreign national with illegal operations in Mexico who neither lived in the United States nor claimed to have any connections to the United States.[216] Moreover, Verdugo had no wish to enter the United States and evaded U.S. investigators in Mexico. Investigators secured custody of Verdugo only after Mexican officials abducted him and delivered him to U.S. officials at the U.S. border, rendering Verdugo's presence in the United States a mere accident of being transported against his will.[217] Verdugo could just as easily have ended up Canada or Honduras—his location was completely involuntary. He clearly had no ties—nor wanted any—to the United States and had no sense of obligation to U.S. law. This aspect of the case rendered the territorial approach to membership inadequate.

If territorial presence is meaningful because of its concurrence with community ties and obligation to the United States, then territory was meaningless in *Verdugo*. Applying a territorial model in Verdugo would have defied one of the defining characteristics of territoriality: that it awards membership based on choices made by the individual rather than the government's unilateral decision of which status to grant the individual. Moreover, denying rights to Verdugo posed little risk of altering the character of the community, mostly because Verdugo did not claim to be (and simply could not be) a member of the community. Rather, Verdugo's detention kept him isolated from the community, and it seemed inconceivable that a denial of Fourth Amendment rights could alter anyone else's rights.

With the territorial model inadequately accounting for the unique facts of the case, the Court could have resorted to a status-based approach. However, a status-based approach would lead to a bizarre result. Verdugo was technically authorized to be in the United States in that it was the U.S. government that physically placed him within U.S. boundaries. Moreover, applying a status-based approach would have been even less faithful to the rules and considerations the Court had articulated in *Yick Wo*,[218] *Wong*

216. United States v. Verdugo-Urquidez, 494 U.S. 259, 271 (1990).
217. *Verdugo-Urquidez*, 494 U.S. at 262.
218. Yick-Wo v. Hopkins, 118 U.S. 356 (1886).

Wing,[219] and *Plyler*,[220] where the Court had specifically adhered to a territorial conception of membership in awarding constitutional rights to immigrants in the United States.

Given the inadequacy of a status-based and territorial approaches to the question of Fourth Amendment rights for aliens within the United States, the *Verdugo* Court could either reject the notion of proxies altogether and recharacterize prior case law as ultimately requiring something more significant (in this case, "substantial connections"), or it could focus on the location of the searched property outside the United States. The Court understandably did both.

i. Rejecting Strict Territoriality by Recharacterizing *Yick Wo*

The plurality cast a new light on previous alienage law cases that distributed rights to foreign nationals in the United States. It claimed that the *Yick Wo* line of cases, which had afforded constitutional rights to aliens in the United States, required something more than territorial presence.[221] According to the *Verdugo* plurality, those cases had required "substantial connections" with the United States.[222] However, even a cursory reading of *Yick Wo* and its progeny reveal that the Court had expressly relied on territory in affording the claimants in each case constitutional rights. In *Yick Wo*, the Court had specifically stated: "The fourteenth amendment to the constitution is not confined to the protection of citizens . . . . [The provisions of the Fourteenth Amendment] are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality."[223]

Arguably, though, *Yick Wo* and its progeny allocated constitutional rights based on territorial presence precisely because territorial presence reflected, among other things, substantial connections with the United States. As discussed above, an individual's location has historically corresponded to increased affiliations and ties with individuals and institutions within the same territory.[224] This relationship between location and connections may have been what the *Verdugo* plurality was highlighting when it rejected the notion that territorial presence, in the absence of "substantial connections," conferred membership rights on an individual. The *Verdugo* plurality's statement, then, can be read as a

219. Wong Wing v. United States, 163 U.S. 228 (1896).
220. Plyler v. Doe, 457 U.S. 202 (1982).
221. *See Verdugo-Urquidez*, 494 U.S. at 271.
222. *Id*.
223. *Yick Wo*, 118 U.S. at 369.
224. *See supra* Part III.A.1.c.

recognition that territorial presence is valuable only as an indicator of something more fundamental—an individual's connections to the United States. In Verdugo's case, where he had absolutely no connections to the United States despite being present within its borders, territorial presence served as an inadequate measure of membership. Thus, the Court had to look directly to Verdugo's affiliations.

ii. Adhering to Strict Territoriality by Focusing on the Location of the Search

While the plurality rejected location as an adequate measure of membership when it came to Verdugo's presence within the United States, it relied on location when it held that the Fourth Amendment did not extend to protect against searches of aliens conducted outside the United States.[225] In a sense, the plurality adhered to a territorial approach only insofar as it denied Verdugo a Fourth Amendment right. Location could exclude Verdugo from Fourth Amendment protection, but location would not suffice to include him. In its simultaneous rejection and adherence to territoriality, it seemed that the plurality was having its cake and eating it, too.

However, the plurality's inconsistent approach can be explained with reference to prior case law. The stage had already been set for the application of a post-territorial approach in the realm of alienage law. As detailed above, the Court had explained in *Plyler* and other cases that territory mattered not for its own sake, but as a proxy for other, more important measures of membership such as community ties and mutuality of obligation. In rejecting strict territoriality as far as it guarantees rights to individuals within the United States, the plurality merely took the next step. It eliminated territory as a proxy and addressed "substantial connections" directly. When it came to evaluating the significance of Verdugo's property being outside the United States, the plurality could not as easily dismiss strict territoriality.

First, there was simply no need to. The extraterritorial location of Verdugo's property coincided perfectly with the Court's conclusion that Verdugo bore no "substantial connections" to the United States and therefore did not enjoy membership for purposes of the Fourth Amendment. Besides, since the Court had historically treated rules about the extraterritorial application of U.S. law separate from rules about the application of U.S. law to aliens within the United States, it would not have

225. *Verdugo-Urquidez*, 494 U.S. at 266–67.

seemed odd to treat the two separately in *Verdugo*. Indeed, it is only in hindsight and through the lens of membership theory, which treats exclusion and inclusion as necessary corollaries, that the relationship between these two areas of law becomes clear.

Second, even if the Court had wanted to introduce a post-territorial approach to the application of Fourth Amendment rights to individuals outside the United States, it would have had to recharacterize prior precedent suggesting that a status-based approach was emerging in that realm. Indeed, when the Supreme Court had finally overturned *Ross*'s strict territoriality in *Reid v. Covert*, it suggested that the claimant's status might be the determinative factor.[226] In *Reid*, the Court held that two U.S. citizens living abroad enjoyed the protection of the Constitution and that their murder conviction by a U.S. military court was invalid without a trial by jury and indictment by a grand jury.[227] The Court focused on the claimant's U.S. citizenship: "[W]e reject the idea that when the United States acts against citizens abroad it can do so free of the Bill of Rights."[228]

Because Verdugo was not a U.S. citizen and because the search took place outside of U.S. territory, existing precedent treating the extraterritorial application of the U.S. Constitution seemed to foreclose the possibility of applying the Fourth Amendment to the search at issue.

b. *Boumediene* as the Usher of Post-Territoriality *Outside* the United States

The opportunity to fully address the membership model as applied to individuals outside of the United States and to bring that area of law into

226. Reid v. Covert, 354 U.S. 1 (1957).

227. *Id*. at 18–19.

228. *Id.* at 5. Elsewhere, I have argued that *Reid* can be characterized as moving toward a post-territorial approach rather than exclusively toward a status-based approach. *See* Núñez, *supra* note 25, at 845. While the *Reid* Court emphasized the claimants' citizenship, it did so on the basis of mutuality of obligation—an underlying rationale of territoriality. The Court explained that the U.S. Constitution must be applied as both shield and sword, by imposing obligations and affording reciprocal protections: "When the Government reaches out to punish a citizen who is abroad, the shield which the Bill of Rights and other parts of the Constitution provide to protect his life and liberty should not be stripped away just because he happens to be in another land." *Reid*, 354 U.S. at 6. By invoking their U.S. citizenship, the claimants had subjected themselves to U.S. jurisdiction and U.S.-imposed obligations (as arranged by treaty with Japan) and could therefore claim constitutional protections. *Id.* at 6. To sum up the principle of mutuality of obligation, the Court aptly quoted an English historian: "In a Settled Colony the inhabitants have all the rights of Englishmen. They take with them, in the first place, that which no Englishman can by expatriation put off, namely, allegiance to the Crown, the duty of obedience to the lawful commands of the Sovereign, and obedience to the Laws which Parliament may think proper to make with reference to such a Colony. But, on the other hand, they take with them all the rights and liberties of British Subjects; all the rights and liberties as against the Prerogative of the Crown, which they would enjoy in this country." *Id.*

conformity with the rejection of territoriality as it applied to aliens within the United States arose in 2008 when the Supreme Court decided *Boumediene v. Bush*.[229] There, Guantanamo Bay detainees claimed the protection of the Suspension Clause and the right to petition in habeas.[230] The Court quite explicitly acknowledged that prior precedent suggested that the status-based and territorial approaches to membership governed the realm of extraterritorial constitutional law: "In deciding the constitutional questions now presented we must determine whether petitioners are barred from seeking the writ or invoking the protections of the Suspension Clause *either* because of their *status*, *i.e.*, petitioners' designation by the Executive Branch as enemy combatants, or their *physical location*, *i.e.*, their presence at Guantanamo Bay."[231]

However, the Court rejected both territory and status as accurate indicators of membership, opting for a more functional approach that values the underlying rationales of territoriality. Congress, the Court held, was bound by the Suspension Clause in its provision of a right to habeas for the detainees despite the detainees' lack of status or presence in the United States.[232] The Court's rejection of strict territoriality rested, in part, on its failure to preserve the notion of mutual obligations. Guantanamo Bay, the Court noted, may not be U.S. territory, but it certainly is under U.S. control: "no law other than the laws of the United States applies at the naval station."[233] Moreover, the effective application of U.S. law at Guantanamo was neither difficult nor impractical—the United States was in a position to effectively enforce its law there.[234] This contrasted sharply with the cases in which the Supreme Court and British courts had historically declined to offer constitutional and other protections outside state borders. In effect, Westphalian notions of sovereignty did not accurately describe Guantanamo and therefore did not warrant the application of strict territoriality.

Boumediene, a case about the right of habeas as it applies to enemy combatant detainees abroad, obviously does not control the law regarding the Fourth Amendment rights of aliens inside the United States. However, the Court's reasoning and ultimate holding do provide significant insight into the Court's waning adherence to territoriality as a membership model.

229. Boumedine v. Bush, 553 U.S. 723 (2008).
230. *Id.* at 739.
231. *Id.* (emphasis added).
232. *Id.* at 771.
233. *Id*.
234. *Id*. at 770.

Boumediene has particular relevance as a lens through which to analyze *Verdugo* because it delves into the themes of territory and status on which *Verdugo* turns. Notably, Justice Kennedy, who had joined Justice Rehnquist's opinion in *Verdugo* but had written separately to offer a different line of reasoning for the decision, wrote for the Court in *Boumediene*. Thus, *Boumediene* ameliorates the seeming division in the *Verdugo* opinions and suggests that a more functional post-territorial approach is indeed taking an increasingly important role in U.S. law—both inside and outside the border. *Boumediene* and *Verdugo*, in this respect, are opposite sides of the same post-territorial coin.

IV. RESTORING POST-TERRITORIALITY TO THE FOURTH AMENDMENT

Together, *Verdugo* and *Boumediene* suggest that strict territoriality no longer exclusively describes the Supreme Court's distribution of important constitutional rights. After *Boumediene*, *Verdugo* must be interpreted to adopt a post-territorial approach to the Fourth Amendment, one that rejects presence within the United States as sufficient for the attachment of rights. *Verdugo* and *Boumediene*,[235] read together, indicate that physical borders neither guarantee nor exclude individuals from constitutional rights. Put simply, whether an individual is on the north or south side of an imaginary line turns out to be an inaccurate measure of "membership" for purposes of the Fourth Amendment. In that sense, *Verdugo* rejects territorial presence within the United States as a proxy for a more substantive criterion:

235. Gerald Neuman has argued that *Boumediene* repudiates *Verdugo*'s "substantial connections" test. Neuman, *supra* note 175, at 272 ("*Boumediene* provides a long overdue repudiation of Rehnquist's opinion in *Verdugo-Urquidez*, which Kennedy had nominally joined, while sharply limiting it in his concurrence."). It is true that, in one sense, a comparison of the holdings would suggest precisely that. One could argue that the *Boumediene* Court's willingness to extend constitutional rights to enemy combatants abroad seriously undermines *Verdugo*'s denial of constitutional rights to an individual legally present (Verdugo was, after all, brought to the United States by federal authorities) inside the United States. This makes sense if we assume that status and territory must control the allocation of constitutional rights. If that is the case, then certainly an authorized person inside U.S. territory deserves more than does an enemy combatant outside U.S. territory. However, I propose that *Boumediene* and *Verdugo* are reconcilable in that they both reject status and territory as viable exclusive determinants of membership. Instead, they adopt a more functional approach—a post-territorial approach that does not merely look to status or territory. While Justice Kennedy's concurrence in *Verdugo* does suggest that Justice Kennedy would have opined differently if the search had been in the United States, I do not read this as a rejection of the substantial connections test, especially when Justice Kennedy did join in the majority opinion that used the "substantial connections" language. Rather, Kennedy's language in his concurrence might suggest his opinion that an individual who has property within the United States is more likely to have the required connections to the United States. In any event, the noteworthy parallel between *Verdugo* and *Boumediene* remains the same: the use of a more functional approach that looks to something other than rigid proxies for membership in favor of a multi-factored inquiry.

"substantial connections."

A. STATUS, REJECTED

By looking to the claimant's status, the courts in *Esparza-Mendoza* and *Gutierrez-Casada* implicitly replaced territorial presence with status as an indicator of—a proxy for—an individual's connections to the United States. But is status a better proxy for membership than territorial presence? Can status serve as an indicator of the "substantial connections" required by *Verdugo*?

The answer is no. *Verdugo* and *Boumediene* foreclose the use of status as a proxy for membership or "substantial connections." In *Verdugo*, the claimant was authorized to be in the United States. In fact, he was brought to the United States by federal authorities. However, Verdugo's legal status did not guarantee him Fourth Amendment rights. *Verdugo* therefore suggests that even *authorized* status does not necessarily accurately reflect "substantial connections" to the United States.

Boumediene similarly rejects status as an accurate proxy for membership. In *Boumediene*, an alien whose status was that of an enemy combatant, a status that is possibly the lowest in the hierarchy of U.S. statuses,[236] was not categorically barred from habeas rights. Thus, the courts that have interpreted *Verdugo* as a license to categorically bar certain classes of undocumented immigrants from Fourth Amendment rights must re-evaluate *Verdugo* in light of the larger post-territorial trend evidenced in U.S. law. The denial of Fourth Amendment rights based exclusively on status seems incompatible with the reasoning and results in *Verdugo* and *Boumediene*, which denied and allocated rights despite status.

236. In a status-based conception of membership, one might think of citizenship as the highest level of membership because it secures the full suite of status-based rights available. A variety of other statuses secure differing rights. A legal permanent resident, for example, does not have the voting privileges a citizen has. A legal permanent resident, however, has the right to work in the United States, which an individual present within the United States on a tourist visa does not. In that sense, citizenship sits at the top of a hierarchy of statuses. *See* ALEINIKOFF ET AL., *supra* note 182, at 2 (describing two visual representations of membership based on status: one in which citizenship occupies the center-most of several concentric circles representing lesser statuses and one in which citizenship is at the end of a horizontal line of statuses); LINDA BOSNIAK, THE CITIZEN AND THE ALIEN: DILEMMAS OF CONTEMPORARY MEMBERSHIP 122 (2006) (describing citizenship as "the ultimate prize at the core" of concentric circles representing the steps—or statuses—that precede bestowal of citizenship and its accompanying rights and privileges).

B. APPLYING THE SUBSTANTIAL CONNECTIONS TEST THROUGH ALTERNATIVE PROXIES

The rejection of status as a proxy for evaluating "substantial connections" does not necessarily mean that all proxies are inaccurate. Courts could certainly develop the contours of a post-territorial approach to Fourth Amendment rights by identifying categories of connections that satisfy the "substantial connections" test and track the very essence of what membership means. Such rules would likely be more nuanced than a purely territorial or status-based rule, but they would advance post-territoriality and avoid the encroachment of a status-based model into the vacuum created by the slow abandonment of strict territoriality.

Cancellation of removal, which I have discussed above, provides a good example of this process of identifying more accurate proxies. Of course, the factors that might be relevant in a cancellation of removal case, which awards permanent legal status, are not necessarily the same factors that might play into a determination of whether the Fourth Amendment applies to an individual. The types of connections that will satisfy a right to Fourth Amendment protections would likely be fewer, and less significant than the types of connections that allow a court to give an undocumented immigrant permission to stay indefinitely in the United States despite having been in removal proceedings.

In fact, using the three factors that I have argued apply to a post-territorial approach—community preservation, community ties, and mutuality of obligation—I believe very few cases would call for the denial of Fourth Amendment rights to an individual voluntarily living within the United States. Such a denial would pose a serious risk of detrimentally affecting the Fourth Amendment rights of other individuals such that the community preservation rationale would weigh heavily against a denial of rights. Moreover, an individual who voluntarily resides in the United States likely, although not necessarily, has ties to the surrounding community. An individual voluntarily within the United States willingly submits herself to U.S. law because U.S. law is the only law that applies. Thus, mutuality of obligation weighs in favor of granting such an individual Fourth Amendment rights. Cases in which these factors do not weigh in favor of granting Fourth Amendment rights might be quite rare and limited to scenarios like that of *Verdugo* or to individuals who cross borders merely to engage in discreet illegal transactions.

C. RETHINKING THE CATEGORICAL APPROACH OF *ESPARZA-MENDOZA* AND *GUTIERREZ-CASADA*

The purpose of this paper is not to establish a series of rules that courts should use to evaluate a Fourth Amendment claimant's connections to the United States. Rather, my purpose is to challenge the recent trend of using status as a measurement of membership for purposes of the Fourth Amendment. The courts in *Esparza-Mendoza* and *Gutierrez-Casada* did just that. At their core, these cases dismissed the respective claimants' individual substantive connections to the United States and looked directly to status.[237] In fact, the court in *Esparza-Mendoza* limited its discussion of the claimant's "substantial connections" to a history of the claimant's interactions with law enforcement and immigration authorities.[238] Ultimately, the courts in these cases failed to examine *Verdugo* in the context of the broader trajectory of membership theory in U.S. case law. *Verdugo* and *Boumediene* call for a reevaluation of the meaning of membership that cuts through antiquated shortcuts and proxies to arrive at more accurate measures of belonging. While *Boumediene* analyzed membership in the domain of habeas relief, *Verdugo* stripped geography from the meaning of membership for purposes of the Fourth Amendment. Federal trial courts are now left to fill the created by *Verdugo*, and they will hopefully be guided by a close examination of *Verdugo* in its proper post-territorial context.

Though few cases have gone as far as the *Esparza-Mendoza* holding, it is nonetheless important to highlight their incongruence with emerging membership theory. First, because criminal law is increasingly the stage for immigration enforcement, it is likely that more and more cases involving the Fourth Amendment rights of undocumented immigrants will arise in the future. This is especially true in light of states' enactment of immigration-targeted laws requiring law enforcement officers to stop and detain suspected undocumented immigrants. Second, the tendency to use status as a proxy for more substantive indicators of membership is gaining ground

237. *See* United States v. Gutierrez-Casada, 553 F. Supp. 2d 1259, 1266, 1272 (2008) (analyzing the effect of claimant's prior deportation order and concluding that "[a] deportation order effects a significant change in one's legal status," ultimately rendering him "not entitled to the same Fourth Amendment protections as are ordinary citizens"); United States v. Esparza-Mendoza, 265 F. Supp. 2d 1254, 1271 (2003) ("In reaching this conclusion, the court has made a categorical determination . . . . [A]n individual previously deported alien felon is not free to argue that, in his particular case, he possesses a sufficient connection to this country to receive Fourth Amendment coverage . . . .").

238. *See Esparza-Mendoza*, 265 F. Supp. 2d at 1269–70 (limiting the analysis of the claimant's "substantial connections" to a discussion of the claimant's history with the INS).

and may bleed into other areas of alienage law. As a result, the need to properly contextualize *Verdugo* is urgent.

V. CONCLUSION

Verdugo has been an unpopular case among commentators because it threatens to undermine the Fourth Amendment rights of undocumented immigrants in the United States. These concerns have materialized in cases like *Esparza-Mendoza*, in which a district court held that previously deported alien felons are categorically excluded from the Fourth Amendment. Though an isolated analysis of *Verdugo* might suggest that the Supreme Court broke entirely with an inclusive, territorially based conception of the Fourth Amendment in favor of a status-based approach, a broader analysis of the Supreme Court's evolving approach to membership provides a different interpretation of *Verdugo*. Read in context, *Verdugo* is one piece of a larger trend in which the Supreme Court is slowly removing one layer of the membership analysis in order to better analyze the deeper, more substantive, layers, including an individual's ties to the surrounding community and obligation to the polity.

The Court has not wholly abandoned territoriality. Rather, the Court has moved beyond territoriality—to a post-territorial approach—by emphasizing the substantive indicators of membership for which territorial presence once stood as an effective proxy. Because an individual's presence within the United States no longer guarantees that the individual will have community ties or be a part of a mutually reciprocal relationship with the United States, the Court has begun looking directly to those substantive factors. Placing *Verdugo* on a trajectory of the Supreme Court's approach to membership rescues *Verdugo*'s holding from the clutches of a status-based approach to membership. Read in the context of this post-territorial trajectory, *Verdugo* represents a pivotal moment in the development of membership theory in U.S. law rather than an arbitrary aberration. *Verdugo* signals the development of a model that recognizes the insufficiency of a single determinant of membership and instead advocates a multi-faceted approach to membership that evaluates community ties, mutuality of obligation, and community preservation.

Since *Verdugo* is just one step in this development, it understandably leaves the multi-faceted post-territorial approach unclear. Consequently, courts have injected a status-based approach into the analysis and even categorically denied certain classes of undocumented immigrants Fourth Amendment rights. Not only do these courts revert to an oversimplified

proxy-based system that *Verdugo* and other U.S. law is slowly rejecting, but they undermine—even eliminate—fundamental constitutional and other rights for individuals based on a single determinant.

In redeeming *Verdugo*'s holding rather than repudiating it, this Article delegitimizes the use of *Verdugo* to categorically deny undocumented immigrants Fourth Amendment rights. It also identifies the need for courts, legislators, and commentators to recognize the trend toward a post-territorial conception of membership and to avoid adopting inaccurate proxies as substitutes for a more principled analysis of an individual's membership in the United States.