2010

Citizenship Perception Strain in Cases of Crime and War: On Law and Intuition

Mary De Ming Fan
University of Washington School of Law

CITIZENSHIP PERCEPTION STRAIN IN CASES OF CRIME AND WAR: ON LAW AND INTUITION

Mary De Ming Fan[*]

2010 MICH. ST. L. REV. 1

TABLE OF CONTENTS

ABSTRACT

The jurisprudence on crime and war has repeatedly indicated that citizenship matters in determining the scope and applicability of constitutional

---

* Assistant Professor of Law, University of Washington School of Law. E-mail: marydfan@uw.edu. Phone: (206) 685-4971. Many thanks to Linda Bosniak, Janie Chuang, Amanda Frost, Daniel Kanstroom, Michelle McKinley, Ezra Rosser, Juliette Stumpf, Dan Tichenor, Robert Tsai, and Steve Vladeck for very helpful comments and discussions. I am also grateful to Peggy R. Jarrett, Cheryl R. Nyberg, Adeen Poster and Reba C. Turnquist for always-excellent librarian support and George Howell, Elisa Lintemuth, and Salina Maxwell for their editing and care.

protections. Just how citizenship matters and what vision of the citizen controls have been murky, however. A rich literature has developed deploring how the nation and the jurisprudence have appeared to slip beneath the baseline of protections when faced with formal citizens who challenge our popular notions about what citizens look like, feel like, and do. What warrants further examination is why this may be so. Understanding the processes that may blur the doctrine and lead to slippage in citizenship perception and protection is a step towards fashioning a standard that provides for greater doctrinal clarity and stability. This is the aim of this Article.

The Article argues that jurisprudential blurriness about the relevance of citizenship for the scope of legal protections stems in part from the confounding of our intuitions and categorical perception by the in-between categories of the citizen-like alien, alienated citizen, and citizen perceived as alien. Debates and doctrine slip between formal positive definitions of citizenship and our intuitions about the functional indicia of belonging. The Article argues for redressing the resulting blurriness and instability by regularizing our intuitions into a transparent rule to regulate which conception of citizenship should be deployed in defining the quantum of rights and protections due. Intuitions about citizenship's substance cannot be a basis for derogation from the minimum floor of rights and protections that would otherwise apply based on formal citizenship status. Functional ideas about citizenship despite formal status may, however, be a basis to accord protections above the minimum that would otherwise be dictated because of formal legal status.

INTRODUCTION

Cases on crime and war indicate that citizenship matters for the applicability of key constitutional guarantees—but just how citizenship matters and what vision of the citizen controls remain blurry.[1] Infamously, our jurisprudence has struggled between conceiving of citizenship as the mast that

1. *See, e.g.*, Munaf v. Geren, 128 S. Ct. 2207. 2218 (2008) (explaining that "habeas jurisdiction can depend on citizenship"); Hamdi v. Rumsfeld, 542 U.S. 507, 532-33 (2004); (O'Connor, J., plurality opinion) (analyzing what due process requires "when a United States citizen is detained in the United States as an enemy combatant" and prescribing protections for a "citizen-detainee"); *id.* at 554, 574-75 & n.5, 577 (Scalia, J., dissenting) (reasoning that citizens and non-citizens are not equally situated for purposes of procedural protections and citizens are entitled to regular criminal process absent suspension of the writ of habeas corpus); United States v. Verdugo-Urquidez, 494 U.S. 259, 265 (1990) (plurality opinion) (ruling that "'the people' protected by the Fourth Amendment . . . refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community"); Johnson v. Eisentrager, 339 U.S. 763, 769 (1950) (explaining the longstanding distinction between citizens and aliens and citizenship as a ground of protection).

moors us to our constitutional commitments in times of turmoil, and slipping below the baseline of protections when faced with formal citizens who confound our intuitions and ideals about what citizens should do, look like, and feel.[2] Famously controversial cases like *Ex parte Quirin*,[3] *Korematsu v. United States*[4] and contemporary adjudication of terrorism cases and popular backlash against raced citizens have sparked a rich critical literature deploring slippage below our constitutional commitments for the citizen who looks uncitizenly.[5] In the political arena, moreover, the strain of repeatedly confronting cases of American citizens engaged in acts of alleged terrorism, such as Faisal Shahzad, the alleged Times Square car bomber this summer, continues to heat legislative debate, even prompting a proposal that American citizens "be deprived automatically of their citizenship and therefore be deprived of rights that come with that citizenship when they are apprehended and charged with a terrorist act."[6]

While there is a rich corpus of scholarship centered on the interpretive and normative conflict over whether citizenship *should* matter in determining the scope of constitutional protections,[7] this Article starts from the reality, demonstrated by recent cases,[8] that conceptions of citizenship *do* matter

---

2. *See infra* Part II.

3. 317 U.S. 1 (1942).

4. 323 U.S. 214 (1944).

5. *E.g.*, NATSU TAYLOR SAITO, FROM CHINESE EXCLUSION TO GUANTANAMO BAY: PLENARY POWER AND THE PREROGATIVE STATE (2007); Juliet Stumpf, *Citizens of an Enemy Land: Enemy Combatants, Aliens, and the Constitutional Rights of the Pseudo-Citizen*, 38 U.C. DAVIS L. REV. 79 (2004); Leti Volpp, *The Citizen and the Terrorist*, 49 UCLA L. REV. 1575 (2002).

6. Peter Baker, *A Renewed Debate Over Suspect Rights*, N.Y. TIMES, May 5, 2010, at A28.

7. *E.g.*, Stephen I. Vladeck, *Deconstructing* Hirota*: Habeas Corpus, Citizenship, and Article III*, 95 GEO. L.J. 1497, 1503, 1533-44 (2007); David Cole, *Enemy Aliens*, 54 STAN. L. REV. 953, 957-58, 978-1003 (2002); Victor C. Romero, *The Domestic Fourth Amendment Rights of Undocumented Immigrants: On* Guitterrez *and the Tort Law/Immigration Law Parallel*, 35 HARV. C.R.-C.L. L. REV. 57, 83-90 (2000); ALEXANDER M. BICKEL, THE MORALITY OF CONSENT 53 (1975).

8. Munaf v. Geren, 128 S. Ct. 2207, 2218 (2008) (recognizing right of American citizen held overseas by U.S. forces to petition for habeas relief and declining to extend the foreclosure of jurisdiction in *Hirota v. MacArthur*, 338 U.S. 197 (1948), to American citizens); Al-Marri v. Wright, 487 F.3d 160, 171 (4th Cir. 2007) (reasoning that "[i]n enacting the [Military Commissions Act], Congress distinguished between those . . . it believed [it] ha[d] a constitutional right to habeas corpus" and those who only had a right by statute, tracking distinctions made by the Supreme Court in *Johnson v. Eisentrager*, 339 U.S. 763, 777-78 (1950), and *United States v. Verdugo-Urquidez*, 494 U.S. 259, 271 (1990), "between aliens within the United States who become 'invested with the rights guaranteed by the Constitution to all people within our borders,'" and "aliens who have no lawful contacts with this country and are captured and held outside its sovereign territory"), *vacated by en banc court sub nom.* Al-Marri v. Pucciarelli, 534 F.3d 213 (4th Cir. 2008) (per curiam), *vacating as*

in determining the quantum of protections and rights due—at least sometimes. My interest is in how slippage between citizenship positivism—the formal designation of law—and intuitive notions of citizenship's functional attributes generates murkiness and unpredictability regarding the relevance of citizenship for the scope of legal protections in the affectively charged contexts of crime and war. This Article's aim is twofold: (1) to offer an account of how conceptual slippage because of intuitions about citizenship and confounded categorical cognition contribute to the jurisprudential murkiness and instability about the relevance of citizenship for the scope of protections, and (2) to propose the regularization of conflicting intuitions into a standard to regulate which conception of citizenship should be deployed in defining the quantum of rights and protections due.

In theorizing the impact of citizenship intuition and cognition, this Article draws on two strands of research and theory in cognitive and social psychology on: (1) categorical cognition—how we sort things into categories based on similarities to prototypes—and (2) intuition and the impact of affect—the positive or negative charge mentally associated with a stimulus. Problems of categorical cognition arise when category members are not similar enough to the prototype or exemplar or when nonmembers are similar to the prototype or exemplar.[9] Difficulty in categorical cognition is compounded by the impact of affect. The "affective revolution" in psychological research over the last two decades has explored how affective states powerfully influence perception and judgment.[10] Researchers have yet to agree on a precise definition of the term affect,[11] which has been deployed generically to signify a range of experiential states with the defining feature being positive and negative valence.[12] I adopt the working definition of "affect heuristic" scholars, including Paul Slovic and colleagues, who explain that affect signifies the feeling—whether conscious or unconscious—of "'goodness' or 'badness,'" or positivity or negativity, elicited by a stimu-

---

moot because petitioner released from military custody sub nom. Al-Marri v. Spagone, 129 S. Ct. 1545 (2009) (mem.).

9. Douglas L. Medin & Lawrence W. Barsalou, *Categorization Processes and Categorical Perception*, *in* CATEGORICAL PERCEPTION: THE GROUNDWORK OF COGNITION 455, 463 (Stevan Harnad, ed., 1987).

10. Joseph P. Forgas, *Affective Influences on Attitudes and Judgments*, *in* HANDBOOK OF AFFECTIVE SCIENCES 596, 596 (Richard J. Davidson et al. eds., 2003).

11. Melissa L. Finucane, Ellen Peters & Paul Slovic, *Judgment and Decision Making: The Dance of Affect and Reason*, *in* EMERGING PERSPECTIVES ON JUDGMENT AND DECISION RESEARCH 327, 328 (Sandra L. Schneider & James Shanteau eds., 2003).

12. *See* Marcel Zeelenberg et al., *Emotion, Motivation, and Decision Making: A Feeling Is for Doing Approach*, *in* INTUITION IN JUDGMENT AND DECISION MAKING 173, 174 (Henning Plessner et al. eds., 2008) ("*Affect* is a generic term that refers to many experiential concepts including moods, emotions, attitudes, evaluations, and preferences. The defining feature is the valence dimension. *Valence* is a term borrowed from physics and chemistry and it refers to the positivity or negativity of an experience.") (internal citations omitted).

lus.[13] Concepts and images, like the notions of the citizen, criminal, alien, and the figures of the alienated citizen or citizen-like alien, are saturated with affect. Affect can mediate perception, judgment, and decisionmaking, interfacing with, and impacting, cognition.[14]

In terms of stance, this piece is broadly influenced by Dan Simon's "third view" of legal decisionmaking that straddles the conflict between the Rationalist and Critical conceptions of decisionmaking.[15] Rationalist schools of thought posit that legal decisionmaking is the product of dispassionate rational forms of logical inferences and application of rules that are the foundation of legitimate and evenhanded application of the law.[16] Critical schools, such as the legal realists or critical theorists, contend that hidden biases, preferences, and policy interests are the levers for decisionmaking beneath the cloak of formal axioms manipulated towards an end.[17] The third view posits that deviations from Rationalist ideals can arise not from cynical, strategic manipulation, but rather from cognitive processes surrounding decisionmaking in honest good faith.[18]

Bringing to light the impact of the cognition, intuition, and affect of citizenship as subtle sources of slippage and instability provides a foundation for formulating principles to facilitate greater stability. Switching between conceptions of citizenship should be a disciplined, conscious, and rule-bound process that systematizes our deepest-held intuitions, rather than a wavering byproduct of strain in categorical cognition and affect-laden intuition.

This Article derives from the jurisprudence on citizenship and the scope of rights a two-part protective principle to regulate which conception of citizenship should be deployed in defining the quantum of rights and protections due. First, parsing of indicia of functional belonging cannot be a basis for derogation from the minimum floor of rights and protections otherwise applicable to someone with formal citizenship status. A broader functional conception of citizenship may be deployed, however, to accord protections above the minimum that would otherwise be dictated because of formal legal status.

Part I of the Article introduces three background concepts to frame the analysis. First, the multivalent and multiple meanings of citizenship are introduced. Second, the Article presents research regarding categorical

13. Paul Slovic et al., *The Affect Heuristic*, *in* HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT 397 (Thomas Gilovich, Dale Griffin & Daniel Kahneman, eds., 2008).

14. Forgas, *supra* note 10, at 596.

15. Dan Simon, *A Third View of the Black Box: Cognitive Coherence in Legal Decision Making*, 71 U. CHI. L. REV. 511, 512-13 (2004).

16. *Id.*

17. *Id.* at 512-14.

18. *Id.* at 513-14.

cognition predicated on prototypes. Third, the Article introduces the idea of the affect heuristic and the interplay of intuition and affect with cognition on decisionmaking and judgment.

Part II presents an account of how the cognition and intuition of citizenship account for the slippage in the jurisprudence on the relevance of citizenship for the quantum of rights in the affectively charged contexts of crime and war. This Part examines the journey of jurisprudence through tumultuous times since the landmark ruling in *Ex parte Milligan*[19] conceiving of citizenship as the mast that moors us to our constitutional commitments. This Part focuses on two-way slippage past the formal shell of citizenship in (1) dipping below the baseline for formal citizens who are suspected of being functionally non-citizens; and (2) extending protections beyond formal citizens to those possessing sufficient attributes associated with citizenship, though formally designated aliens.

Part III proposes a protective principle to regulate shifts between formal and functional conceptions of citizenship in determining the scope of rights. While functional conceptions of citizenship unmoored from formal status can be a basis for according a more robust complement of rights, they cannot be the basis for going below the baseline of protections for formal citizens. The protective principle elucidated systematizes our intuitions into a regularized rule that can help guide judicial interpretation, legislative crafting, and executive and military decisions.

I. THE PERCEPTION OF CITIZENSHIP

We begin by framing three background concepts: the many meanings of citizenship and how processes of categorical cognition, intuition and affect may influence the perception of citizenship. James Madison wrote that "no language is so copious as to supply words or phrases for every complex idea, or so correct as not to include many equivocally denoting different ideas."[20] This insight resonates when it comes to unraveling the concept of the "citizen," a category saturated with affective valence. This Part begins by introducing the multiple meanings of citizenship and abstracting them into two main clusters for purposes of analysis—formal citizenship defined by positive law and functional citizenship, suffused with psychological and sociological ideas of the substance of citizenship. This Part then introduces psychological theory and research about our processes of categorical cognition and the impact of affect in judgment. The introduction to these three key concepts—citizenship, categorical cognition, and affect—lays the groundwork for the analysis in Part II about how the cognition of citizen-

19. 71 U.S. (4 Wall.) 2, 119-21 (1866).

20. THE FEDERALIST NO. 37, at 197 (James Madison) (Clinton Rossiter ed., 1961).

ship accounts for jurisprudential slippage in conceptualizing the relevance of citizenship for rights in cases of crime and times of war.

A. Citizenship's Multitude of Meanings

Across time and civilizations, citizenship is a multivalent and evocative signifier of legal status, social identity, ideals, and ideas—yet there is no agreed-on definition of citizenship.[21] Peter Schuck proposed four axes to pin down citizenship's normative and positive dimensions: (1) political, (2) legal, (3) psychological, and (4) sociological.[22] As will be discussed, these axes—particularly the legal dimension—are not neat and discrete and may generate conflicting cognitions and intuitions.

The political dimension of citizenship in democratic states centers on participation in self-government and a boundary of inclusion of full members demarcated by the exclusion of others from the full panoply of political activities, most saliently, voting.[23] The psychological dimension centers on which political community affiliation is salient to the self and to others in perceiving the individual and conceptions of affective affiliation.[24] The sociological dimension focuses on integration and status in civil society.[25]

The legal dimension of citizenship in Schuck's conceptualization is predicated on positive law that *both* confers the status of citizen *and* "that prescribes the specific rights and obligations attaching to citizens but not to others on the state's territory—much less to humankind generally."[26] Schuck's conceptualization of the legal dimension captures how we tend to assume that rights follow the formal legal definition of citizenship.

Schuck writes that the legal dimension of citizenship is "the most easily defined and measured."[27] Yet analyzed through the prism of the allocation of rights in the affectively charged contexts of crime and war, the legal dimension is surprisingly blurry and slippery. Its boundaries are sometimes overrun by our intuitions and cognition of citizenship that reflect psychological or sociological understandings.

Why look at citizenship through the prism of rights? In the Western tradition, with roots in Roman legal conceptions, we have a "widely shared

---

21. *See* Peter H. Schuck, *Citizenship in Federal Systems*, 48 AM J. COMP. L. 195, 207 (2000) ("Citizenship—as social fact, as legal status, as idea, and as ideal—is an ancient phenomenon with no agreed-upon definition, either then or now."); *cf.* JUDITH N. SHKLAR, AMERICAN CITIZENSHIP: THE QUEST FOR INCLUSION 1 (1991) ("There is no notion more central in politics than citizenship, and none more variable in history, or contested in theory.").

22. Schuck, *supra* note 21, at 207.

23. *See id.*

24. *Id.*

25. *Id.* at 208.

26. *Id.* at 207.

27. *Id.*

understanding of citizenship as entitlement to, and enjoyment of, rights."[28] This conception views the defining feature of membership as enjoyment of rights under law, and "those who possess the rights are usually presumed thereby to enjoy citizenship."[29]

Most countries reserve the full complement of rights and benefits to citizens and as a corollary, do not grant those lacking citizenship status—designated "aliens"—the full range of social, political, and civil rights.[30] In the United States, however, formal noncitizens enjoy many of citizenship's core attributes based on their personhood and territorial presence, suggesting, as Linda Bosniak has influentially illuminated, that seeing citizenship through the prism of rights opens up our idea of citizenship past the formal legal definition.[31] Citizenship's broadened scope beyond the demarcation of positivism has teeth because it carries with it a broader scope of rights.

For purposes of analysis, I want to distinguish between citizenship formalism and notions of citizenship's essence or functional attributes, between our technical legal definitions of who bears the label of citizen and our cognition and intuition of citizenship. Fundamentally, the multivalent, affectively charged concept of citizenship is about belonging in a thin and thick sense: (1) formal belonging, as a "filing system" to allocate people among states and (2) subjective-affective belonging, in terms of a sentiment and perception of identification.[32] The slippage I wish to trace extends beyond formal legal definitions of citizenship to definitions that can at once be potentially broader and potentially narrower based on our conceptions of what citizenship means functionally.

Citizenship formalism is defined by positive law. The traditional approaches to formal legal status used blood and soil as proxies for the manifold senses of citizenship. The stronger sense among nations is that the substance of citizenship flows through the blood and that soil is a more dubious substrate. While almost all states deem children born of the state's nationals to be citizens under the principle of *jus sanguinis*, only some—albeit an increasing number—deem children born within the state's territory

28. LINDA BOSNIAK, THE CITIZEN AND THE ALIEN: DILEMMAS OF CONTEMPORARY MEMBERSHIP 18-19 (2006) ("[C]itizenship is a concept flexible enough to take on new meanings . . . [y]et it is unlikely that the idea of citizenship will ever become fully severed from its association with community belonging.").

29. *Id.* at 19.

30. *Id.* at 37.

31. *Id.* at 19.

32. *See* T. ALEXANDER ALEINIKOFF, SEMBLANCES OF SOVEREIGNTY: THE CONSTITUTION, THE STATE, AND AMERICAN CITIZENSHIP 177-78 (2002) (quoting ROGERS BRUBAKER, CITIZENSHIP AND NATIONHOOD IN FRANCE AND GERMANY 31 (1992)); BOSNIAK, *supra* note 28, at 2 ("In normative terms, boundary-focused citizenship is understood to denote not only community belonging but also community exclusivity and closure. The status of citizenship in any given state is rationed, and the limitations on its availability mark the limitations on belonging.").

citizens under the principle of *jus soli*.[33] The indicia of citizenship can also be acquired and assimilated, through a process of conscious and methodical *naturalization*, and most states have rules for naturalization that predicates formal belonging on proofs of citizenly substance.[34]

What I call functional citizenship, to contrast it with citizenship formalism, slips past the technical labels of law and captures our psychological and sociological ideas about citizenship. We "see" citizenship past formal labels based on ideas about the stuff of citizenship, such as affective affiliation, solidarity, loyalty and civic republicanism—vibrant engagement in the life of the political community past the narrow horizon of the formal ballot box.[35] Loyalty is a particularly prominent factor when we think about the stuff or substance of citizenship.

History also shows the salience of race in assessing the supposed substance of citizenship and how intuitions about race may conflict with the formal status of citizens.[36] We have persistently used citizenship and race-based conceptions of belonging as proxies for the vital essence of loyalty.[37]

Thus, our understandings and perceptions of citizenship's functional attributes may be both broader and narrower than a citizen's formal status. Through a civic republicanism lens, the class of citizens participating in the life of the nation may well be broader than the group of formal rights-bearing citizens.[38] The group of formal rights-bearers may also be broader than the class of citizens who formally hold citizenship. Through the lens of affective affiliation—psychological ties—the group of citizens may be at once broader and narrower than formal citizens because some formal citizens may be affectively alienated from their nation of citizenship, while some non-citizens may have tight ties of affection and longing.

These cross-cutting cognitions and intuitions have led to an oscillation between citizenship formalism and functionalism to which even the expert eyes of the academy are not immune[39] and which, as will be theorized in the

---

33. BOSNIAK, *supra* note 28, at 31-32.

34. *Id.* at 32.

35. *Id.* at 19-20.

36. Victor C. Romero, *Proxies for Loyalty in Constitutional Immigration Law: Citizenship and Race After September 11*, 52 DEPAUL L. REV. 871, 872, 877-89 (2003); Leti Volpp, *The Citizen and the Terrorist*, 49 UCLA L. REV. 1575, 1592, 1594 (2002).

37. Romero, *supra* note 36, at 872, 877-89.

38. *See* BOSNIAK, *supra* note 28, at 29 (noting that "[t]he class of republican participatory citizens . . . will not necessarily correspond—and has not always corresponded—with the class of rights-bearing citizens more generally, nor with the class of legal status citizens, nor with the class of psychological citizens.").

39. Schuck, *supra* note 21, at 195-96 ("An odd and somewhat disquieting feature of citizenship talk in the academy is its oscillation between two discursive poles, one formalistic and the other substantive. . . . This tension between formal and substantive conceptions of citizenship reflects, among other things, the stark differences among legal rules, political realities, and civic aspirations.") (footnote omitted).

next sections, can be explained in part because of our processes of categorical cognition and the impact of affect.

B. What Citizenship Looks Like: Categorical Cognition

Research on categorical perception can inform our understanding of how our perceptions of citizenship may be confounded by deviation from notions of how a citizen should look. This section frames background on insights from studies of categorical perception. How diverse items, from a concrete thing to complex abstract ideas, are sorted into categories is one of the most basic questions of cognitive science.[40] Because sorting permits differentiated responses to stimuli, categorization plays a crucial rule in mediating thinking and perception.[41]

The classical view of categories was that they had all-or-nothing boundaries with lines corresponding to defining features that made category members clearly separate from members of other categories.[42] This view has eroded. As Wittgenstein pointed out, even a simple category like "game" lacks a clear all-or-nothing defining feature shared by all members and not shared by those outside the category.[43] This acknowledgment of the blurriness of boundaries has led to revised understandings built on the empirical reality that often a member of a category is not simply in or out—rather, the task of categorization is to ascertain how "in" something is.[44]

More recent work centers on "fuzzy categories" where it is not possible to specify a rule identifying all category members and only members of the category.[45] In fuzzy categories, there may instead be a "family-resemblance structure" wherein each category member has a strong similarity to a number of others in the category and not much similarity to those outside the category.[46] Most general knowledge categories—which include complex concepts that are the staple of legal analysis—are fuzzy.[47]

Classification within general knowledge categories can proceed by formal rules, by exemplars, or by prototypes.[48] Categorization by rule is analogous to assigning items to a grouping that meets the formal criteria of

---

40. Stevan Harnad, *Introduction* to CATEGORICAL PERCEPTION: THE GROUNDWORK OF COGNITION 1 (Stevan Harnad ed., 1987).

41. *See id.*

42. *See* CRAIG MCGARTY, CATEGORIZATION IN SOCIAL PSYCHOLOGY 31 (1999); EDWARD E. SMITH & DOUGLAS L. MEDIN, CATEGORIES AND CONCEPTS 1 (1981).

43. LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS §§ 66-69 (1953).

44. MCGARTY, *supra* note 42, at 31.

45. Medin & Barsalou, *supra* note 9, at 461.

46. *Id.*

47. *Id.* at 462.

48. *Id.* at 463-64.

law.[49] For example, a rules-based approach to classification would go about assessing if someone is a bachelor by seeing if the formal criteria of being a male, unmarried, and adult are met.[50] Research indicates, however, that cognitively, people do not mechanically perceive and process categories by mechanically consulting a checklist of rules; rather, cognitively, we tend to categorize by assessing similarity to a prototype rather than on meeting formal criteria.[51]

Precisely what constitutes a prototype is still open to definitional debate, but a working definition is a model with "features of either a typical or an 'ideal' category member."[52] These features are not necessarily possessed by every category member.[53] Typicality is an important feature of both the exemplar view of classification, which posits that an item to be categorized is classified based on similarity to previously experienced exemplars of the category,[54] and the classification-by-prototype view, also known as the probabilistic view.[55] The central tenet of the classification-by-prototype view is that people determine whether something belongs to a category based on how similar it is to the category's prototype.[56] While we tend to use the exemplar approach of categorization when differentiating between individual instances, we focus on prototypicality when differentiating between categories.[57] Classification is predicated on an abstract summary often patterned on the best example of the category.[58] The abstract summary may describe an ideal that does not actually exist.[59] The attributes of the prototype representing the category or concept must be salient features—prominent either conceptually or perceptually or both.[60] An item that has "a critical number of features" in the abstract summary will be assigned to that category.[61]

---

49. *See id.* at 463 (explaining "this form of classification simply requires that each exemplar meet the defining criteria" of the category).

50. *Id.*

51. Eleanor Rosch, *Principles of Categorization*, *in* FOUNDATIONS OF COGNITIVE PSYCHOLOGY: CORE READINGS 251, 254 (Daniel J. Levitin ed., 2002).

52. Harnad, *supra* note 40, at 19.

53. *Id.*

54. The exemplar view posits that exemplars are automatically retrieved in making social judgments based on the stimuli that they resemble. Typicality of items to be categorized is important in this process because the more typical something is, the more likely it will resemble exemplars stored in memory and trigger similar categorization. MCGARTY, *supra* note 42, at 87.

55. *Id.*

56. Medin & Barsalou, *supra* note 9, at 463.

57. *Id.* at 41.

58. MCGARTY, *supra* note 42, at 32.

59. *Id.* at 33.

60. *Id.*

61. *Id.*

Where categories are fuzzy, things that are sufficiently similar to the prototypes are perceived and processed as category members whereas insufficiently similar things are deemed nonmembers of the category.[62] Within members and potential members of the category, some will share more of the critical prototypical attributes than others. Those with more of the critical properties will seem more representative of the concept.[63] In this approach to perceiving and processing categories, errors may arise for the more puzzling cases where a category member lacks similarity to the prototype or when non-category members look similar to the prototype.[64]

Flexibility is one of the most striking features of general knowledge categories.[65] For example, an entity can be readily cross-classified into a range of categories.[66] Moreover, what is perceived of as typical for a category and prototypes for a category can shift with context and when points of view of different cultures and subcultures are considered.[67] The typicality of an entity is important to the ease of classification within a category.[68]

Research and theory in categorical cognition indicates that processes of categorical perception of objects apply to perceiving people.[69] Craig McGarty argues that categorization in this context is socially mediated by norms that are not only prescriptive, but also explanatory, adding meaning to phenomena.[70] While there is not yet a definitive scientific theory of what social norms are, in social psychology, norms "involve prescriptive rules or social values" and "suggest similarities within groups and differences between groups" that are more than accidental regularities because they help social groups function and achieve consensus.[71] Social norms of behavior—such as the idea that citizens should be loyal—thus mediate perception of belonging and non-belonging within categories. When norms are transgressed, category membership becomes unstable. Certain particularly salient attributes, such as race, may also powerfully influence the assignment of people into categories or complicate categorical perception where someone is of a race different from the prototype.[72]

---

62. Medin & Barsalou, *supra* note 9, at 463.
63. SMITH & MEDIN, *supra* note 42, at 3.
64. Medin & Barsalou, *supra* note 9, at 463.
65. *Id.* at 468.
66. *Id.*
67. *Id.*
68. *Id.* at 471.
69. Craig McGarty & Diana M. Grace, *The Constraints of the Social Context in Categorization*, *in* MCGARTY, *supra* note 42, at 190, 196.
70. *Id.* at 197-98.
71. *Id.* at 198.
72. *See id.*; *cf.* Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1499-1500, 1527 (2005) (analyzing impact of implicit bias on perception). For further analysis in the context of the salience of race in cases of crime and war, see *infra* Part II.B.2.

C. What Citizenship Feels Like: The Impact of Affect

To understand citizenship perception, it is also important to understand the impact of affect and intuition. Typically, all items within a category are saturated "with the same ideational and emotional flavour" that mediates our perceptions.[73] Stated alternatively, generally, all items in a category carry a similar affective charge—the same conscious or unconscious feeling of goodness or badness that demarcates the positive or negative quality of a stimulus.[74] What happens when an item formally within a category under a rules-based approach to classification carries the opposite affective valence than is generally common to the category? This is the conundrum posed by constructs such as the alienated citizen, citizen perceived as alien, and citizen-like alien that we will soon encounter in the key cases on the relevance of citizenship for rights in cases of crime and times of war.

Citizenship is an affectively charged concept. As Linda Bosniak explains, "[c]itizenship is a word of the greatest approbation."[75] To cloak people, experiences, practices, and institutions in the "language of citizenship is not merely to describe them, but also to accord them a kind of honor and political recognition."[76] Indeed, the sharp conflict over the proper application of the label of citizen is "precisely because of the concept's immense emotional resonance and perceived value."[77]

Since the "affective revolution" in social psychology research, a new wave of work has focused on how intuition and affect subtly steer our perception, judgment, and decisionmaking.[78] The Nobel Prize-winning work of Daniel Kahneman and Amos Tversky was guided by the twin ideas that "(i) most judgments and most choices are made intuitively;" and "(ii) that the rules that govern intuition are generally similar to the rules of perception."[79] The label of intuition is used for judgments generated by the automatic and often affectively charged processes of what has been dubbed System 1 cog-

---

73. MCGARTY, *supra* note 42, at 25.

74. Finucane, Peters & Slovic, *supra* note 11, at 328.

75. BOSNIAK, *supra* note 28, at 17; *see also* Linda Bosniak, *Constitutional Citizenship through the Prism of Alienage*, 63 OHIO ST. L.J. 1285, 1286, 1288 (2002) (explaining that citizenship is a positively and normatively charged concept, often portrayed as aspirational ideal and embodiment of "the highest political values: democracy, egalitarianism, pluralism, civic virtue, community—and sometimes, all of these at once"); M. Isabel Medina, *Exploring the Use of the Word "Citizen" in Writings on the Fourth Amendment*, 83 IND. L.J. 1557, 1585 (2008).

76. BOSNIAK, *supra* note 28, at 17.

77. *Id.*

78. *See, e.g.*, Finucane, Peters & Slovic, *supra* note 11, at 330; Forgas, *supra* note 10, at 596.

79. Daniel Kahneman, *Maps of Bounded Rationality: Psychology for Behavioral Economics*, 93 AM. ECON. REV. 1449, 1449-50 (2003).

nitive processes.[80] The label "System 1" derives from the influential dual-process model of mental processing. System 1 involves "ancient, rapid, automatic, intuitive processes" and highly contextualized information processing to reach its conclusions; whereas System 2 "decontextualize[s] and depersonalize[s] problems" and deploys "more evolutionarily recent, controlled, slow, conscious reasoning processes to reach its conclusions."[81]

A wave of new research views intuition as central to a richer understanding of cognitive processes.[82] Intuition can be a powerful and accurate guide, particularly when honed by experts such as skilled nurses, sensitive to impending heart failure, or chess masters, but it can also lead us astray.[83]

Our intuitions are closely related to affect.[84] The role of affect in influencing decisions is increasingly rising to the foreground as decision research shifts from a past focus on rationality and cognition.[85] I draw on the vein of research in affect and decisionmaking that focuses on how the objects of judgment or choice can carry positive or negative affective valences and trigger subtle feelings influencing decisionmaking.[86]

Theories of the impact of affect on behavior often revolve on the concept of imagery, such as visual impressions, ideas, and words, which are positively and negatively charged through learning and conditioning.[87] Paul Slovic and colleagues theorize that affect impacts judgment and decisionmaking because images tagged with positive and negative affective feelings guide perception, decisionmaking, and judgment.[88] Their research indicates that people consult a pool of images tagged with affect in making judgments, particularly when confronted with complex decisions.[89] For example, a survey of expert members of the British Toxicological Society found

---

80. *Id.* at 1452.

81. Jonathan Haidt & Selin Kesebir, *In the Forest of Value: Why Moral Intuitions Are Different from Other Kinds*, *in* INTUITION IN JUDGMENT AND DECISION MAKING 224 (Henning Plessner et al. eds., 2008); Keith E. Stanovic & Richard F. West, *Individual Differences in Reasoning: Implications for the Rationality Debate?*, *in* HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT 421, 436 (Thomas Gilovich et al., eds., 2002). *See also* Steve Catty & Jamin Halberstadt, *The Use and Disruption of Familiarity in Intuitive Judgments*, *in* INTUITION IN JUDGMENT AND DECISION MAKING 298 (Henning Plessner et al. eds., 2008) ("System 1 processes represent those that are not deliberative but rather based on quicker, more reflexive processes less available to consciousness" while "System 2 processes reflect the antithesis of System 1 processes and involve slow, rule-based information processing that requires high cognitive effort and systematic reasoning.").

82. Catty & Halberstadt, *supra* note 81, at 295.

83. *See* Kahneman, *supra* note 79, at 1451.

84. Henning Plessner, Cornelia Betsch & Tilmann Betsch, *Preface to* INTUITION IN JUDGMENT AND DECISION MAKING *ix* (Henning Plessner et al. eds., 2008).

85. Slovic et al., supra note 13, at 397-98.

86. Finucane, Peters & Slovic, *supra* note 11, at 328-29.

87. *Id.* at 333.

88. *Id.* at 340-41.

89. *Id.* at 342-43.

that the experts' affective reactions toward hazardous items influenced their judgments about the risks and benefits of the hazards.[90]

The shorthand coined by Slovic and colleagues for this process of affect-guided decisionmaking is "the affect heuristic."[91] The affect heuristic steers the integration of information in judgments and decisions and guides reason.[92] The postulate of the affect heuristic school is that "mental representations of the decision stimuli evoke on-line affective *experiences* that influence people's perceptions and consequently their judgments and decisions."[93] Image-based feelings mediate responses to phenomena like managing risk or decisionmaking.[94]

The affect heuristic school of research shares an intellectual heritage with dual processes theories that posit that people process reality with two interactive parallel processing systems that have been dubbed System 1 and System 2,[95] or the experiential system and the rational system.[96] "The *rational* system is a deliberative analytical system that functions by way of established rules of logic and evidence," while the "*experiential* system encodes reality in images, metaphors, and narratives imbued with affective feelings."[97]

Evidence is also mounting that affect shapes our implicit cognitive representations.[98] A leading theory about how affect shapes judgment posits that positively and negatively valenced concepts prime the retrieval of associated thoughts and representations that are then more likely to be deployed in cognitive tasks.[99] Affect therefore impacts information retrieval and processing—what people think and how people think.[100]

Even when people try very hard to make important decisions in a rational, reasoned manner, affect, which may be automatic and unconscious or consciously experienced, may tilt preferences toward a particular direction.[101] Decisions are often mediated by affect even when we convince ourselves that we have proceeded in a rational manner.[102] Studies suggest that

---

90. *Id.* at 345.
91. *Id.* at 340-41.
92. *Id.* at 341.
93. *Id.*
94. *Id.*
95. Kahneman, *supra* note 79, at 1451.
96. Finucane, Peters & Slovic, *supra* note 11, at 346.
97. *Id.*
98. Forgas, *supra* note 10, at 598.
99. *Id.* at 599.
100. *Id.* at 601.
101. Marcel Zeelenberg et al., *Emotion, Motivation, and Decision Making: A Feeling Is for Doing Approach*, *in* INTUITION IN JUDGMENT AND DECISION MAKING 173, 173-75 (Henning Plessner et al. eds., 2008).
102. Robert B. Zajonc, *Feeling and Thinking: Preferences Need No Inferences*, 35 AM. PSYCHOLOGIST 151, 154-55 (1980).

atypical stimuli—such as atypical people—calling for more complex processing and harder thinking, actually lead to a more pronounced reliance on affectively primed thoughts and associations.[103] Rapid automatic affective reactions can also stem from violations of the shared norms on which social organization depends.[104]

II. CITIZENSHIP PERCEPTION STRAIN IN CRIME AND WAR

As insights about prototype-based categorical cognition and affect-laden perception would predict, citizenship becomes at once more salient and more slippery when it comes to interpreting the scope of rights of dissonant figures that confound our prototypes of citizen and noncitizen. The citizen enemy combatant is the central image of our times that encapsulates the dissonance between our formal categories and our intuitions about citizenship's substance—including its essential elixir of loyalty. I wish to pair the enigma of the alienated citizen with another enigmatic figure, that of the citizen-like alien, who Congress and the Supreme Court have suggested is entitled to the fuller package of rights that citizens possess.

Before we proceed, however, I would be remiss if I did not foreground that the idea of tying citizenship to rights is a hotly contested matter. This Section begins with an introduction to the contested idea of a rights-citizenship linkage and then turns from the long debate over what *ought to be* to what currently *is* in cases of crime and times of war and analyzes how slippage in the cognition and intuition of citizenship has made for an unstable jurisprudence about the rights-citizenship linkage.

A. The Contested Rights-Citizenship Linkage

Alexander Bickel famously contended that "the original Constitution presented the edifying picture of a government that bestowed rights on people and persons, and held itself out as bound by certain standards of conduct in its relations with people and persons, not with some legal construct called citizen."[105] What Bickel termed the original "idyllic state of affairs" was disrupted by the infamous decision in *Dred Scott v. Sandford*.[106] The jurisprudence on the relevance of citizenship in determining the quantum of rights thus has ignoble roots.

In the pre-Civil War era, Dred Scott was suing in federal court for his freedom from slavery and had to establish diversity of citizenship jurisdic-

---

103. Forgas, *supra* note 10, at 605.

104. Phoebe C. Ellsworth & Klaus R. Scherer, *Appraisal Processes in Emotion*, *in* HANDBOOK OF AFFECTIVE SCIENCES 581 (Richard J. Davidson et al. ed., 2003).

105. ALEXANDER M. BICKEL, THE MORALITY OF CONSENT 36 (1975).

106. 60 U.S. (19 How.) 393 (1857).

tion.[107] He argued that because he was a citizen of Missouri and slave owner John Sandford was a citizen of New York, the federal court had jurisdiction.[108] In framing the question presented, the Supreme Court described the Constitution as a document detailing the rights of the citizen.[109] The Court took as a given that membership in the political community is a prerequisite to enjoyment of rights.[110]

The Court wrote that "[t]he words 'people of the United States' and 'citizens' are synonymous terms," and "both describe the political body who, according to our republican institutions, form the sovereignty, and who hold the power and conduct the Government through their representatives."[111] In a passage that has been a stain on American legal history and jurisprudence, the Court ruled that "a negro, whose ancestors were imported" into the United States were deemed an "inferior class of beings . . . subjugated by the dominant race" and therefore "were not intended to be included, under the word 'citizens' in the Constitution, and can therefore claim none of the rights and privileges which that instrument provides for and secures to citizens of the United States."[112]

Alexander Bickel termed the decision a "rape" that violated the "Constitution's innocence of the concept of citizenship."[113] The reversal of *Dred Scott* by the 1866 Civil Rights Act, and then the Fourteenth Amendment prohibition against abridging the privileges or immunities of U.S. citizens, had the side effect of entrenching the association of citizenship with rights.[114] Bickel contended that the *Slaughter-house Cases*—which famously cabined the privileges and immunities clause of the Fourteenth Amendment to a narrow set of rights associated with national citizenship such as the right to use navigable U.S. waters or to petition for habeas corpus—returned the constitutional balance to the original state in which little turns on citizenship.[115] As will be discussed in Parts II.B and III, the constitutional right to petition for habeas corpus has not been so minor of a right in the context of crime and war—nor has it always been read to be limited to formal citizens.

---

107. *Id.* at 400.
108. *Id.*
109. *Id.* at 403.
110. *Id.* ("The question is simply this: Can a negro, whose ancestors were imported into this country, and sold as slaves, become a member of the political community formed and brought into existence by the Constitution of the United States, and as such become entitled to all the rights, and privileges, and immunities, guarantied by that instrument to the citizen?").
111. *Id.* at 404.
112. *Id.* at 403-05.
113. BICKEL, *supra* note 105, at 40.
114. *Id.* at 40-42.
115. *Id.* at 45.

The general conception that rights are attached to citizenship has not been extinguished. Rather, as T. Alexander Aleinikoff illuminates, the idea that citizens are full members of the national community and non-citizens are less-than-full members or non-members of the community shapes the Court's constitutional rules and its background assumptions.[116]

In a dissent in *Perez v. Brownell* that would later win a majority and lead to invalidation of laws on involuntary citizenship-stripping, Chief Justice Earl Warren wrote: "Citizenship *is* man's basic right for it is nothing less than the right to have rights."[117] The person stripped of citizenship would, in the United States, "presumably enjoy, at most, only the limited rights and privileges of aliens" because citizenship "alone, assures him the full enjoyment of the precious rights conferred by our Constitution."[118] Chief Justice William Rehnquist also read the Constitution to "recognize[] a basic difference between citizens and aliens" made "constitutionally important in no less than 11 instances in a political document noted for its brevity."[119]

The distinction between the alien and the citizen is particularly robust in the context of rights touching on participation in the political life of the nation. The Supreme Court permits the exclusion of aliens from certain rights, such as political participation or holding public office.[120] The "'power to exclude aliens from participation in . . . democratic . . . institutions' [i]s part of the sovereign's obligation 'to preserve the basic concept[] of . . . political community,'" the Court reasoned.[121] The linking of rights to citizenship is, of course, not American exceptionalism—most countries reserve the full complement of rights and benefits to citizens.[122]

A conundrum lies within American constitutional law: the membership theory in current circulation adopts the default rule that the Constitution is about citizens, and aliens are therefore outsiders to the Constitution

---

116. ALEINIKOFF, *supra* note 32, at 167-68.

117. Perez v. Brownell, 356 U.S. 44, 64 (1958) (Warren, C.J., dissenting).

118. *Id.* at 64, 78.

119. Sugarman v. Dougall, 413 U.S. 634, 651 (1973) (Rehnquist, J., dissenting). *But see* ALEINIKOFF, *supra* note 32, at 171 ("Either the framers thought that their Constitution was really about citizens, and therefore regularly reminded us of that, or they thought that their document was primarily about persons, and therefore mentioned citizens in particular situations as a special case.").

120. *See* Cabell v. Chavez-Salido, 454 U.S. 432, 439 (1982) (holding that the exclusion of aliens from carrying out state functions "bound up with the operation of the State as a governmental entity . . . need not clear the high hurdle of strict scrutiny, because that would obliterate all the distinctions between citizens and aliens, and thus depreciate the historic value of citizenship") (internal citations, quotation marks, and brackets omitted).

121. Foley v. Connelie, 435 U.S. 291, 295-96 (1978) (quoting Sugarman v. Dougall, 413 U.S. 634, 647-48 (1973)).

122. BOSNIAK, *supra* note 28, at 37.

entitled to a lesser quantum of protections.[123] This does not mean that protection is extinguished; rather the scope of protections is at times depicted as a sliding scale.[124] Yet, at least inside the United States, aliens are accorded most of the constitutional rights afforded citizens.[125] Indeed, the Supreme Court has interpreted the Equal Protection Clause of the Fourteenth Amendment to mean that state legislative classifications burdening economic and social rights based on alienage and nationality, are, like classifications predicated on race, "inherently suspect and subject to close judicial scrutiny."[126] On this standard, the Court invalidated welfare benefits laws disfavoring non-citizens;[127] land conveyance laws discriminating against U.S. citizens born of Japanese fathers;[128] and laws denying fishing licenses to lawfully present aliens ineligible for citizenship.[129]

The Supreme Court, Justice Brennan writing, went so far as to hold that while undocumented aliens are not a "suspect class" under the Equal Protection Clause, laws excluding undocumented children from public schools are invalid for failure to serve a "substantial goal of the State."[130] The Equal Protection Clause, of course, protects "any person," and the Court has long held that "the term 'person' in this context encompasses lawfully admitted resident aliens as well as citizens of the United States and entitles both citizens and aliens to the equal protection of the laws of the State in which they reside."[131] Supreme Court jurisprudence also suggests that the First Amendment's protections of speech and assembly apply to aliens and citizens alike[132]—at least outside the special gray zone of deporta-

---

123. ALEINIKOFF, *supra* note 32, at 171. *See also* Cabell v. Chavez-Salido, 454 U.S. 432, 439-40 (1982) (explaining that "[s]elf-government . . . begins by defining the scope of the community of the governed and thus of the governors as well: Aliens are by definition those outside of this community.").

124. *See, e.g.*, Johnson v. Eisentrager, 339 U.S. 763, 770 (1950) ("The alien, to whom the United States has traditionally been hospitable, has been accorded a generous and ascending scale of rights as he increases his identity with our society.").

125. *See* BOSNIAK, *supra* note 28, at 170.

126. Graham v. Richardson, 403 U.S. 365, 372, 376 (1971).

127. *Id.* at 376.

128. Oyama v. California, 332 U.S. 633, 644-46 (1948).

129. Takahashi v. Fish & Game Comm'n, 334 U.S. 410, 413-14,420-22 (1948).

130. Plyler v. Doe, 457 U.S. 202, 223-30 (1982).

131. *Graham*, 403 U.S. at 371.

132. *See* Bridges v. Wixon, 326 U.S. 135, 161-62 (1945) (Murphy, J., concurring):

> [O]nce an alien lawfully enters and resides in this country he becomes invested with the rights guaranteed by the Constitution to all people within our borders. Such rights include those protected by the First and the Fifth Amendments and by the due process clause of the Fourteenth Amendment. None of these provisions acknowledges any distinction between citizens and resident aliens. They extend their inalienable privileges to all "persons" and guard against any encroachment on those rights by federal or state authority.

Id. at 161.

tion, where the Supreme Court held that unlawfully present aliens alleging selective prosecution have no constitutional rights to assert.[133]

While the Supreme Court has robustly recognized and policed the social and economic rights of settled immigrants against state incursion, the Court has generally declined to interfere with federal laws distinguishing citizen and non-citizen because of the doctrine of noninterference with the executive's power to control the borders and regulate immigration.[134] The berth the Court has given the federal political branches in the name of sovereign power to regulate immigration has been so wide that federal Medicaid laws requiring permanent residence status in the United States for five years were upheld[135] though a state welfare benefits law distinguishing between citizen and non-citizen was subjected to strict scrutiny and invalidated[136]—though the Court has noted in the Equal Protection context that "it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government."[137]

When it comes to social and economic rights, we face a tension regarding how we balance competing normative interests of egalitarianism and membership protection. The questions of citizenship and social and economic rights are particularly shaped by the intuitive sense, captured by scholars like Daniel J. Tichenor and Joseph Carens, that an influx of people without boundaries on belonging and social and economic entitlement would overwhelm the ability to provide welfare to mitigate disparities among people born into belonging in our communities—that is, to protect our own.[138] This sense of group loyalty is a commonly held moral intuition.[139] Even as loyalty toward racial or religious groups has been supplanted by universalism and egalitarianism, the intuition of group loyalty still manifests—perhaps all the more strongly—in the sense of stronger obligations to those in one's national group.[140] Sociobiologists and others have

---

133. Reno v. Am.-Arab Anti-Discrimination Comm., 525 U.S. 471, 488 & n.10 (1999).

134. *See, e.g.*, Fiallo v. Bell, 430 U.S. 787, 792 (1977) ("Our cases 'have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control.'") (quoting Shaughnessy v. Mezei, 345 U.S. 206, 210 (1953) (collecting cases reiterating the proposition)).

135. Matthews v. Diaz, 426 U.S. 67 (1976).

136. *Graham*, 403 U.S. at 372, 376.

137. *See, e.g.*, Bolling v. Sharpe, 347 U.S. 497, 499-500 (1954).

138. Daniel J. Tichenor, *Membership and American Social Contracts: A Response to Hiroshi Motomura*, *in* IMMIGRATION AND CITIZENSHIP IN THE TWENTY-FIRST CENTURY 223, 226 & n.8 (Noah M. J. Pickus, ed., 1998) (citing Joseph Carens, *Immigration and the Welfare State*, *in* DEMOCRACY AND THE WELFARE STATE 211 (Amy Gutmann ed., 1988)).

139. JONATHAN BARON, JUDGMENT MISGUIDED: INTUITION AND ERROR IN PUBLIC DECISION MAKING 9 (1998).

140. *Id.* at 9, 69, 71.

theorized that group loyalty is embedded in human nature, as an outgrowth of tribal loyalty, related to the fact that humans evolved in tribes.[141] As Tichenor writes, "the entanglement of immigration and citizenship rights may pose disquieting tradeoffs for those of us who both welcome immigration and yearn to redress oppressive poverty in American society" rendering equality between citizen and noncitizen far more contentious than we may be willing to acknowledge.[142]

My aim is to turn our gaze from the context of social and economic rights to the sphere of rights and protections in cases of crime and times of war. The stakes and logic of differential treatment are qualitatively different here. The oft-recapitulated refrain that we cannot be a haven of welfare, social benefits, and wellbeing for the world is inapplicable. There is not the sense of competition for scarce social welfare resources that has at times driven a wedge between the poor on the inside and outside of citizenship,[143] nor is there the issue of executive power to regulate immigration over borders that is present in the deportation context. Instead, at stake is the package of protections and rights for people in the grips of state power who may be equally dangerous regardless of citizenship status—or equally innocent. Citizenship should matter less—yet, as we see below, in these affectively charged spheres, citizenship perceived in slippery ways, sometimes subtle and sometimes express, seems to matter more.

B. Rights-Citizenship in Times of War

As Jerome Barron writes, the enemy combatant cases make clear that citizenship matters.[144] More provocatively, Barron suggests that citizenship *should* matter to preserve the conception of citizenship as suffused with rights and to protect the citizen from subjection to the summary procedures we tend, in turmoil, to subject the outsider.[145] This idea echoes in different epochs in the jurisprudence. But what conception of citizenship matters? From the Civil War era to the World War II era to the present, the Supreme Court's jurisprudence on the relevance of citizenship for rights has battled with how to deal with the temptation to see functional citizenship past the formal shell of citizenship.

---

141. *Id.* at 9, 70.

142. Tichenor, *supra* note 138, at 227.

143. For an excellent study that helps illuminate the dynamics behind this phenomenon, see MICHÈLE LAMONT, THE DIGNITY OF WORKING MEN: MORALITY AND THE BOUNDARIES OF RACE, CLASS, AND IMMIGRATION 88-93 (2000).

144. Jerome A. Barron, *Citizenship Matters: The Enemy Combatant Cases*, 19 NOTRE DAME J.L. ETHICS & PUB. POL'Y 33, 36 (2005).

145. *Id.* at 69.

1. *Citizenship as Masthead in Times of Turmoil*

From the perspective of social organization, anthropologists explain that a critical feature of constituting a community is boundary-drawing—delineating a membership that self-identifies and is identified by others as distinct because of demarcation from others.[146] This insight of the scholars of human organization resonates with the insights of scholars, such as Carl Schmitt, whose influence on political thought transcends his history.[147] Schmitt conceived of the political as founded on the categorical antithesis of friend and enemy.[148]

What happens when the enemy is alleged to be within, and the deeply rooted norm of group loyalty is transgressed? One of the early Civil War-era cases in which the Supreme Court confronted the question was *Ex parte Milligan*, involving a U.S. citizen, Lambdin P. Milligan, accused of conspiring against the U.S. government; "[a]ffording aid and comfort to rebels against the authority of the United States"; "[i]nciting insurrection"; "disloyal practices"; and "violation of the laws of war."[149] Milligan was tried by a military commission and sentenced to hang.[150]

After the military proceedings ended, the U.S. Circuit Court for Indiana empanelled a grand jury on January 2, 1865, to determine whether Milligan had violated any laws.[151] The grand jury declined to indict Milligan.[152] Shortly before the execution date scheduled by the military commission, Milligan petitioned for discharge from prison under an act of Congress that permitted habeas relief for "citizens of states in which the administration of the laws in the Federal tribunals was unimpaired" when an empanelled grand jury did not indict.[153]

The question the Supreme Court considered was whether the military commission had jurisdiction over Milligan, who was not a resident of a rebellious state or a prisoner of war, but an Indiana citizen for the past twenty years arrested while in his home and homeland.[154] Wrote the Court: "No graver question was ever considered by this court, nor one which more near-

146. For a classical explanation in the anthropological canon, see, for example, FREDERIK BARTH, *Introduction* to ETHNIC GROUPS AND BOUNDARIES: THE SOCIAL ORGANIZATION OF CULTURE DIFFERENCE 11-13 (Frederik Barth ed., 1969).

147. Schmitt has been dubbed "the Crown Jurist of the Third Reich" for his Nazi fervor. Charles E. Frye, *Carl Schmitt's Concept of the Political*, 28 J. POL. 818, 818-19 (1966).

148. CARL SCHMITT, THE CONCEPT OF THE POLITICAL 26 (George Schwab trans., 1996).

149. 71 U.S. (4 Wall.) 2, 6 (1866).

150. *Id.* at 107.

151. *Id.* at 108.

152. *Id.*

153. *Id.* at 107-08, 116.

154. *Id.* at 118.

ly concerns the rights of *the whole people; for it is the birthright of every American citizen when charged with crime, to be tried and punished according to law.*"[155] In the great and terrible revolution at the nation's founding, the Court wrote, the people had wrested a written Constitution that enshrined the Fourth, Fifth, and Sixth Amendment rights to a jury trial, protection against unreasonable search and seizure, grand jury presentment, due process, compulsory process, and counsel.[156] These constitutional commitments could not be evaded in "troublous times."[157]

The government argued that the military commission had jurisdiction over Milligan under the law and usages of war.[158] The Court's rejection of this contention reiterated that it would not countenance such treatment of the civilian citizen:

> It can serve no useful purpose to inquire what those laws and usages are, whence they originated, where found, and on whom they operate; they can never be applied to citizens in states which have upheld the authority of the government, and where the courts are open and their process unobstructed. . . . [N]o usage of war could sanction a military trial . . . for any offence whatever of a citizen in civil life, in nowise connected with the military service.[159]

Those who entered military service surrendered the right to be tried by civilian courts, but "*[a]ll other persons*, citizens of states where the courts are open, if charged with crime, are guaranteed the inestimable privilege of trial by jury," wrote the Court.[160]

In an emergency, the Court wrote, the Constitution envisioned suspension of the writ of habeas corpus so the government would not be required to produce persons arrested.[161] But "[t]he Constitution goes no further," the Court wrote. "It does not say after a writ of *habeas corpus* is denied a citizen, that he shall be tried otherwise than by the course of the common law."[162] The "lessons of history" had taught the Constitution's framers "that a trial by an established court, assisted by an impartial jury, was the only sure way of protecting the citizen against oppression and wrong."[163]

Milligan was thus a case about the importance of citizenship as a salient mast to which we bind ourselves, despite troubled times and alleged enemies in our midst. Juliet Stumpf intriguingly argues that *Milligan* "laid the groundwork for the evolution of a category of pseudo-citizens without full membership in the citizenry" because it is replete with references to

---

155. *Id.* at 118-19 (emphasis added).
156. *Id.* at 119-21.
157. *Id.* at 120.
158. *Id.* at 121.
159. *Id.* at 121-22.
160. *Id.* at 123.
161. *Id.* at 125-26.
162. *Id.* at 126.
163. *Id.*

citizenship in its description of rights.[164] On its terms, however, *Milligan* was about the commitments we keep in times of turmoil rather than exclusion. Indeed, three decades later, the Supreme Court held, based on the open-textured references of "person" and "accused" in the Fifth and Sixth Amendments, that the protections of the Fifth and Sixth Amendments extend to aliens unlawfully present on U.S. territory.[165]

The emblem and refrain of "citizen" in *Milligan* was used to hold the government fast to these constitutional commitments despite the passions and turmoil of the times and the temptation to purge the alleged enemy within. Besides repeating the refrain that Milligan was a citizen, the Court reiterated in various registers that when "the passions of men are aroused and the restraints of law weakened" the safeguard of rights and protections "need, and should receive, the watchful care of those intrusted with the guardianship of the Constitution and laws."[166] The *Milligan* Court was wise to the insight that we need principles to hold fast to when in the flush of affect-laden judgment. The emblem of a citizen suffused with rights was the masthead in a time of turmoil.

2. *Slippage Between Citizenship Formalism and Functionalism*

In terms of citizenship cognition, *Ex Parte Milligan* presented an easier case than the ones to come. Milligan looked citizenly. He was not only formally a U.S. citizen, he was a long-time resident of twenty years in the very citizenly state of Indiana, which was "eminently distinguished for patriotism," and stocked with people who were "upright, intelligent."[167] The only dissonant attribute was his alleged participation in trying to overthrow the government—which, granted, is pretty dissonant. But a properly constituted jury of the aforementioned upright, intelligent, and patriotic people had declined to indict, suggesting that the evidence was weak.

In the World War II era, and in our current historical moment, however, the Supreme Court and the nation have wrestled with harder cases of citizenship cognition. In the World War II era, the Supreme Court was confronted with the troubling figures of the convicted citizen enemy, Herbert Haupt, and the perceived citizen enemy, Fred Korematsu. In our current historical moment, we wrestle with the dissonant figures of citizen enemy combatants such as Yaser Esam Hamdi, Jose Padilla, Omar Abu Ali, Shawqi Ahmad Omar, and Mohammad Munaf. These figures proved a challenge

---

164. Juliet Stumpf, *Citizens of an Enemy Land: Enemy Combatants, Aliens, and the Constitutional Rights of the Pseudo-Citizen*, 38 U.C. DAVIS L. REV. 79, 89 (2004).

165. Wong Wing v. United States, 163 U.S. 228, 238 (1896).

166. *Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 124 (1866).

167. *Id.* at 107, 122.

to our cognition and intuition of citizenship, and there is a resulting struggle with slippage.

a. The World War II Era

In the stealth of night, Herbert Haupt and three other members of the German Marine Infantry slipped from a German submarine ashore to the United States, carrying "explosives, fuses, and incendiary and timing devices."[168] He shed his military uniform, buried it, and entered the United States in civilian clothing.[169] He and his companions, as well as another team of four German soldiers, were captured by FBI agents and tried by a military tribunal.[170] All eight captured enemy soldiers petitioned for a writ of habeas corpus, arguing that they were entitled to a trial with the normal safeguards guaranteed by the Fifth and Sixth Amendments.[171]

Haupt stands out in history from the other petitioners because unlike the others, who, as far as the Court was aware, were German nationals,[172] Haupt was a United States citizen.[173] Haupt contended that he moved with his parents to the United States when he was five years old and was a citizen through the naturalization of his parents.[174]

In a decision heavily criticized for the haste and pressure in which it was fomented,[175] the Supreme Court did not resolve the disputed question of Haupt's citizenship.[176] With a terseness and dearth of analysis that contrasts sharply with *Milligan*'s extensive cautions and care, the *Quirin* Court stated:

> Citizenship in the United States of an enemy belligerent does not relieve him from the consequences of a belligerency which is unlawful because in violation of the law of war. Citizens who associate themselves with the military arm of the enemy government, and with its aid, guidance and direction enter this country bent on hostile acts, are enemy belligerents within the meaning of the Hague Convention and the law of war.[177]

---

168. *Ex parte* Quirin, 317 U.S. 1, 21 (1942).

169. *Id.*

170. *Id.* at 21, 23.

171. *Id.* at 24.

172. According to Robert E. Cushman, another person among the eight soldiers, Earnest Peter Burger, was also a naturalized citizen. Robert E. Cushman, Ex parte Quirin et al.—*The Nazi Saboteur Case*, 28 CORNELL L.Q. 54, 54 (1942).

173. *Ex parte* Quirin, 317 U.S. at 20.

174. *Id.*

175. *See e.g.*, Neal K. Katyal & Laurence H. Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 YALE L.J. 1259, 1290-92 (2002); Carlton F.W. Larson, *The Forgotten Constitutional Law of Treason and the Enemy Combatant Problem*, 154 U. PA. L. REV. 863, 895-98 (2006). *See also* Hamdi v. Rumsfeld, 542 U.S. 507, 569 (2004) (Scalia, J., dissenting) (noting *Ex parte Quirin* was "not this Court's finest hour").

176. *Ex parte* Quirin, 317 U.S. at 20, 22.

177. *Id.* at 37-38.

Haupt was charged "as an enemy belligerent."[178] The Court therefore declined to look at citizenship because it was eclipsed by enemy belligerent status.

As for *Milligan*, the *Quirin* Court distinguished the case on the ground that Milligan was not a part of, nor associated with, an enemy armed force, and therefore was not subject to the law of war.[179] As Juliet Stumpf aptly argues, this was a flimsy ground of distinction because Milligan was, like Quirin, accused of aiding the enemy, among other charges.[180] Stumpf argues that the *Quirin* Court was influenced by the sense that Haupt was only an accidental citizen without sufficient connections to the United States, and, as a result, Haupt was relegated to the status "of an alien without constitutional protections."[181]

The outcome deviated from Rationalist ideals of rule-bound perception, but that does not necessarily mean it was a product of cynical eschewal of deliberation. The citizenship slippage could be the natural product of processes of categorical cognition during deliberation in an affectively charged context.

Categorical cognition was strained because Quirin lacked many of the most salient attributes of citizenship. He deviated to a substantial degree from the prototype of citizenship on many attributes: his place of birth; how he acquired citizenship incidentally through his parents' naturalization while he was still in the age of minority; and his choice to expatriate himself and to join an enemy army. His transgression of social norms that mediate category perception further destabilized the perception of his membership category,[182] permitting his formal citizenship to be eclipsed because his attributes were more similar to the outsider enemy.

The brief paragraph stepping over the citizenship question contrasts with the immediately preceding paragraph, which extensively detailed highly affectively loaded imagery of enemies slipping in by stealth, bent on destruction.[183] *Milligan*'s call to hold steadfast to rights in such an affectively charged context went unheeded in this harder case of categorical perception under strain.

Fred Korematsu's case haunts the jurisprudence of citizenship slippage even more than the case of Herbert Haupt, for a different reason. The reason, of course, is that he did not *do* anything, and there was no allegation that he did anything against the nation. He was just born of Japanese par-

178. *Id.* at 38.
179. *Id.* at 45.
180. Stumpf, *supra* note 164, at 111.
181. *Id.* at 112-13.
182. *See* MCGARTY, *supra* note 42, at 197-98 (explaining how social norms mediate perceptions of human categories).
183. *Ex parte* Quirin, 317 U.S. at 20-21.

ents. His citizenship was suspect because of his race—or, more precisely, his lineage, because he was born of Japanese parents.

Korematsu v. United States is one of the iconic cases in the jurisprudence of rights in crime and war.[184] It produced five separate expressions of views: the majority opinion by Justice Hugo Black; Justice Felix Frankfurter's concurrence; and separate dissents by Justices Owen Roberts, Frank Murphy, and, most famously, Justice Robert H. Jackson, who would later become the chief prosecutor of Nazi war criminals at the Nuremberg Tribunal.

The interchange between the justices about their diverging opinions suggests that a central factor in the Court's fracture was the perception of citizenship and its essence. The salience of citizenship in the case is evident in the various fractured opinions in the case. The two centerpiece writings in the case—the majority's opinion and Justice Jackson's famous dissent[185]—both open by describing Korematsu's citizenship as a formal and functional matter.[186] As a formal matter, "[t]he Constitution makes him a citizen of the United States by nativity and a citizen of California by residence."[187] This was a proposition settled in *United States v. Wong Kim*

---

184. 323 U.S. 214 (1944). Indeed, *Korematsu* has been a point of contention and analysis in key international jurisprudence on the quantum of protection in war. *See, e.g.*, Prosecutor v. Kordić & Čerkez, Case No. IT-95-14/2-T, Judgment, ¶¶ 278, 290-91 (Feb. 26, 2001) (analyzing defendant's claim regarding the legality of detention of civilians predicated on *Korematsu* and *Hirabayashi v. United States*, 320 U.S. 81 (1943)). Interestingly, while the Tribunal ultimately declined to deem the *Korematsu* and *Hirabayashi* decisions of precedential value in interpreting the scope of the power to detain under the Geneva Conventions because the decisions had roundly condemned inside the United States and deemed "overruled in the court of history," *id.* at ¶ 290, the Tribunal's interpretation of safeguards that must be afforded detained civilians paralleled a portion of Justice Murphy's *Korematsu* dissent. Justice Murphy deplored that the interned Japanese had not been treated "on an individual basis by holding investigations and hearings to separate the loyal from the disloyal, as was done in the case of persons of German and Italian ancestry." *Korematsu*, 323 U.S. at 241 (Murphy, J., dissenting). Agreeing with an earlier decision by a Trial Chamber of the Tribunal, the *Kordić & Čerkez* Trial Chamber held "internment and assigned residence are exceptional measures to be taken only after careful consideration of each individual case, and never on a collective basis." *Kordić*, Case No. IT-95-14/2-T, at ¶ 285.

185. Great dissenter Justice William J. Brennan, Jr. listed Justice Jackson's dissent in *Korematsu* as among "the most famous and powerful dissents of this century." William J. Brennan, Jr., *In Defense of Dissents*, 50 HASTINGS L.J. 671, 676 (1999). Justice Jackson's dissent has been much celebrated for its critique of the majority opinion—and much criticized for its proposed course of eschewal from *either* ratifying or interfering with extra-legal military action that violates the rights of citizens on racial grounds. Famously, Eugene Rostow termed the analysis "a fascinating and fantastic essay in nihilism." Eugene V. Rostow, *The Japanese American Cases—A Disaster*, 54 YALE L.J. 489, 510-11 (1945).

186. *Korematsu*, 323 U.S. at 215-16; *id.* at 242-43 (Jackson, J., dissenting).

187. *Id.* at 242-43. *See also* 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 . . . .").

Ark[188]—a case that also involved a fracture because of a perceived dissonance between formal definitions of citizenship and essential notions of fealty flowing through lineage, which coded for race, that affected perception of functional belonging.[189]

As a matter of his functional citizenship, however, Korematsu was of Japanese ancestry—albeit a person of Japanese ancestry born on U.S. soil and a lifelong resident of the United States. Korematsu was before the Court because of his criminal conviction for violating a military order excluding all people of Japanese ancestry from San Leandro, his home.[190] The military order rested on the judgment of military authorities that there were disloyal people among the Japanese population whose identity could not be ascertained readily and quickly enough, and their exclusion was necessary to prevent espionage and sabotage.[191] The government essentially acted upon a categorical presumption that Korematsu's functional citizenship was suspect because of his race.

The majority infamously permitted this assumption to stand despite Korematsu's formal citizenship status, thereby casting the imprimatur of law on race-based citizenship slippage—even while professing that racial antagonism can never justify restrictions curtailing the civil rights of a single racial group.[192] In his dissent, Justice Murphy called out the essence of the government's action as "fall[ing] into the ugly abyss of racism."[193] Essentially, the categorical perception of the government and the majority had been skewed sharply by the salient factor of race and the affective factors of the sense of emergency and covert enemies in the nation's midst.

In contrast, Justice Jackson's counterpoint to the majority's opinion emphasized the strong indicia of Korematsu's functional citizenship to combat the perceptual skew of racial salience. Jackson's dissent began: "Korematsu was born on our soil, of parents born in Japan. The Constitution makes him a citizen of the United States by nativity and a citizen of California by residence."[194] From this underscoring of formal citizenship, Justice Jackson segued immediately to portraying Korematsu's functional citizenship, to rebut the government's proposition that in substance, beyond formalism, Japanese-American citizens are not truly loyal citizens. He wrote that Korematsu was convicted of "merely of being present in the state

188. 169 U.S. 649 (1898).

189. *See id.* at 705, 708, 718, 720, 726 (Fuller, J., dissenting) (contending that despite their expatriation to the United States and domicile, the Chinese "seem in the United States to have remained pilgrims and sojourners as all their fathers were" and that the conception of citizenship should not embrace children born on United States of strangers passing through).

190. *Korematsu*, 323 U.S. at 215.

191. *Id.* at 218-19.

192. *Id.* at 216.

193. *Id.* at 233 (Murphy, J., dissenting).

194. *Id.* at 242-43 (Jackson, J., dissenting).

whereof he is a citizen, near the place where he was born, and where all his life he has lived."[195]

This was not the first time that the Court's categorical cognition of citizenship foundered on the salient factor of Asian race. Though nearly half a century separates *Wong Kim Ark* and *Korematsu*, there are powerful echoes in the tension between formal definitions and functional conceptions of citizenship predicated on notions of race as a proxy for affective affiliation and national belonging. In *Wong Kim Ark*, the government argued it had the ability to exclude Wong Kim Ark, who was born in the United States to parents of Chinese descent, from returning home to the United States after a temporary visit to China.[196] The question was whether Wong was a citizen because of his birth in the United States. If he was a citizen, then the government conceded that the Chinese Exclusion Act, the government's statutory basis for exclusion, could not apply to him.[197] The Fourteenth Amendment's definition stated pretty plainly that "[a]ll persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside."[198] The government tried to argue—unsuccessfully, as we know now—that in a society full of birthright citizens the natural allegiance of a person of Chinese descent was to China and the place of birth should not determine citizenship.[199]

The idea of allegiance as a measure of functional belonging has deep roots in common law.[200] Nationality in English common law was fundamentally bound with the notion of "birth within the allegiance, also called 'ligeality,' 'obedience,' 'faith,' or 'power,'of the King."[201] Those born into allegiance to the king were subject to the king's protection.[202] The touchstone was the sense of allegiance, not the bright-line of birth within the realm. Those born in the realm, but not into allegiance, for example, because they were born to enemies during hostile occupation of part of the king's dominions, were not "natural-born subjects" party to the reciprocity of protection and allegiance.[203]

---

195. *Id.* at 243.

196. United States v. Wong Kim Ark, 169 U.S. 649, 652-54 (1898).

197. *Id.* at 653.

198. U.S. CONST. amend XIV, § 1.

199. *Wong Kim Ark*, 169 U.S. at 656-57.

200. *Id.* at 655.

201. *Id.* As Chief Justice Fuller, joined by Justice Harlan explained in dissent, "[t]he rule was the outcome of the connection in feudalism between the individual and the soil on which he lived, and the allegiance due" liege men to liege lords. *Id.* at 707 (Fuller, C.J., dissenting).

202. *Id.* at 655 (majority opinion).

203. *Id.*

The Court has wrestled repeatedly with the sense that Asians lack this essential essence of citizenship. Infamously, in *Chae Chan Ping v. United States*, the Supreme Court characterized Chinese resident aliens in the United States as inassimilable and foreign, "strangers in the land, residing apart by themselves, and adhering to the customs and usages of their own country" making it "impossible for them to assimilate with our people or to make any change in their habits or modes of living."[204] This peacetime decision drew on a martial metaphor to justify sovereign power to repel "aggression and encroachment . . . whether from the foreign nation acting in its national character, or from vast hordes of its people crowding in upon us."[205]

The stumbling block of racial salience was further aggravated in Korematsu's case by the foreign nationality of his parents. The sense that a child born on U.S. soil to foreign nationals is foreign was vociferously voiced by Justice Fuller, joined by Justice Harlan, in *United States v. Wong Kim Ark* in his dissent from the majority's holding that the Fourteenth Amendment conferred birthright citizenship.[206] Justice Fuller quoted Justice Miller's *Lectures on Constitutional Law*:

> "If a stranger or traveler passing through, or temporarily residing in this country, who has not himself been naturalized, and who claims to owe no allegiance to our Government, has a child born here which goes out of the country with its father, such child is not a citizen of the United States, because it was not subject to its jurisdiction."[207]

Korematsu's reduction to the status of the alien is striking when read in light of *Johnson v. Eisentrager*,[208] penned by Justice Jackson six years later. In *Eisentrager*, Justice Jackson wrote, "[t]he alien, to whom the United States has been traditionally hospitable, has been accorded a generous and ascending scale of rights as he increases his identity with our society."[209] War, however, "exposes the relative vulnerability of the alien's status."[210] For the resident alien in war, "[t]he security and protection enjoyed while the nation of his allegiance remains in amity with the United States are greatly impaired when his nation takes up arms against us."[211] "The resident enemy alien is constitutionally subject to summary arrest, internment and deportation whenever a 'declared war' exists."[212] War exposed the vulnerability of Fred Korematsu's status. Though subjectively he may have identified with the society of his birth and lifelong residence, and formally he was a citizen,

204. 130 U.S. 581, 595 (1889).
205. *Id.* at 606.
206. *Id.* at 705, 718 (Fuller, C.J., dissenting).
207. *Id* at 718-19 (citation omitted).
208. 339 U.S. 763 (1950).
209. *Id.* at 770.
210. *Id.* at 771.
211. *Id.*
212. *Id.* at 775.

society certainly did not identify him as one in substance. As a result, he was subject to citizen slippage and internment—the treatment to which resident enemy aliens are subject.

b. The Terror War Era

Today we find ourselves wrestling with more frightening figures of the citizen enemy in the embers of another conflagration. These figures carry the fear factor of Herbert Haupt because several of them are alleged to have acted in violence against the nation. Courts have wrestled with how to proceed, and in the fractures we see how the courts have wrestled with the effects of conflict in citizenship cognition and affect-laden perception.

i. *Citizenship Cognition Strain*

Yaser Esam Hamdi and Jose Padilla were among the first figures of the citizen enemy in the War on Terror, together with American Taliban fighter, John Walker Lindh. Hamdi was captured on foreign soil, in combat with his country of citizenship, the United States.[213] Upon learning Hamdi was an American citizen, military authorities transferred him to a naval brig in Norfolk, Virginia and then to a brig in Charleston, South Carolina.[214] Padilla was apprehended at Chicago's O'Hare International Airport, where he was arrested on a material witness warrant related to a grand jury investigation of the September 11 terrorist attacks, and held in the Consolidated Naval Brig in Charleston, South Carolina.[215]

While the government opted to prosecute Lindh through regular criminal processes,[216] Hamdi and Padilla were subject to indefinite detention without trial—in Hamdi's case, on the strength of a mere declaration about the circumstances of his capture.[217] Prosecution decisions regarding the very citizenly looking Lindh—who was born in Washington, D.C., grew up in wealthy Marin County, California, and whose father worked at the U.S. Department of Justice and said his son was brainwashed while an impressible young man traveling abroad—raise interesting questions about categorical perception of citizen and terrorist and the exercise of prosecutorial discretion. Lindh did not resemble the prototypical and, as commentators like Leti Volpp and Victor C. Romero deplore—raced—terrorist in the national

213. Hamdi v. Rumsfeld, 542 U.S. 507, 510 (2004) (plurality opinion).

214. *Id.* at 510.

215. Rumsfeld v. Padilla, 542 U.S. 426, 430-32 (2004).

216. *See* United States v. Lindh, 212 F. Supp. 2d 541, 547 (E.D. Va. 2002) (detailing procedural history of case).

217. Hamdi v. Rumsfeld, 316 F.3d 450, 459 (4th Cir. 2003), *vacated*, 542 U.S. 507, 509 (2004); Padilla v. Rumsfeld, 352 F.3d 695, 698 (2d Cir. 2003) *rev'd*, 542 U.S. 426, 451 (2004).

imagination.[218] Both Hamdi and Padilla were formally U.S. citizens.[219] Their cases thus both presented the question of whether indefinite detention of U.S. citizens, rather than regular criminal processing, violated the Constitution.[220]

I focus on Hamdi's case because the decisions by the Fourth Circuit and Supreme Court in his case are fascinating examples of citizenship perception strain and because the Supreme Court's decision presents an important moment in the attempt to reconcile competing intuitions and understandings. Padilla's petition, in contrast, was dismissed by the Supreme Court because it was filed in the wrong district court.[221]

Taking up the question in Hamdi's case, the Fourth Circuit prefaced its analysis by underscoring that the Bill of Rights "applies to American citizens regardless of race, color, or creed," and "may become even more a lens through which we recognize ourselves" as the nation becomes more diverse.[222] Therefore: "To deprive any American citizen of its protections is not a step that any court would casually take."[223] The characterization of rights as a lens on which we increasingly must rely to see ourselves as the nation grows more diverse is a fascinating metaphor. It is a metaphor of vision—of perception. The idea of increasing reliance on the Bill of Rights to recognize ourselves indicates perception strain. In Hamdi's case, what was the source of this strain in perception? What made Hamdi look less citizenly?

A brief passage of the opinion captures the doubt in categorizing Hamdi as citizen and the obvious reason for it: "Yaser Esam Hamdi is apparently an American citizen. He was also captured by allied forces in Afghanistan, a zone of active military operations."[224] "This dual status—that of American citizen and that of alleged enemy combatant" confounds our categorical cognition.[225] The court's perception of Hamdi's citizenship is couched in terms of doubt—he "may not have renounced his American citizenship," wrote the court, and is "apparently an American citizen."[226]

The salient feature of enmity rather than amity was further compounded because Hamdi was lacking in the other prominent attributes of the

---

218. *See* Volpp, *supra* note 5, at 1592, 1594 (detailing racial imagery of terrorism); Romero, *supra* note 36, 872, 877-89.

219. *Hamdi*, 542 U.S. at 509; *Padilla*, 542 U.S. at 430.

220. Hamdi v. Rumsfeld, 316 F.3d 450, 459 (4th Cir. 2003), *vacated*, 542 U.S. 507, 509 (2004); Padilla v. Rumsfeld, 352 F.3d 695, 698 (2d Cir. 2003) *rev'd*, Rumsfeld v. Padilla, 542 U.S. 426, 451 (2004).

221. *Padilla*, 542 U.S. at 451.

222. *Hamdi*, 316 F.3d at 464.

223. *Id.*

224. *Id.* at 462.

225. *Id.*

226. *Id.* at 460, 462.

citizen prototype. He was nurtured not in the bosom of America, but rather left the United States when still a small child.[227] Though formally a category member, Hamdi lacked similarity to the prototypical citizen and shared very salient attributes with the prototypical enemy outsider—confounding the categories of citizen and non-citizen and the fundamental dichotomy between friend and enemy upon which political community is founded.[228]

The tension in perception spills into the text of the opinion. After detailing the disparity between Hamdi's formal citizenship and tenuous functional citizenship, the decision states, in terms at once frank and understated: "As the foregoing discussion reveals, the tensions within this case are significant."[229]

The slippage in categorical perception of Hamdi's citizenship is manifested through the court's interpretation of the applicability of the Bill of Rights—what it had earlier characterized as the "lens through which we recognize ourselves."[230] The court applied the *Quirin* doctrine, which, as discussed above, had effaced the issue of citizenship with the label of enemy belligerent.[231] "The safeguards that all Americans have come to expect in criminal prosecutions do not translate neatly to the arena of armed conflict," wrote the court.[232]

What about the right of an American citizen to contest the designation of enemy combatant that effaced his citizenship? The court had earlier ruled that the deference of courts to the political branches in issues of national security and foreign relations because of the executive's "delicate, plenary and exclusive power" over foreign affairs extended to military designations of individuals as enemy combatants in times of active war.[233] Juliet Stumpf highlights that this ruling marks the first time that a court explicitly applied the plenary power doctrine—rules for aliens—to U.S. citizens detained in the United States as alleged unlawful enemy combatants.[234] The application of rules for aliens to a citizen seems to carve out a category of "pseudo-citizens"—formal citizens whose citizenship is deemed suspect and are therefore relegated to a lesser quantum of rights and protections.[235] If rights are the lens in which we see ourselves, the court saw Hamdi as alien despite his formal citizenship status.

---

227. *Id.* at 460.
228. *See* SCHMITT, *supra* note 148, at 26.
229. *Hamdi*, 316 F.3d at 460, 465.
230. *Id.* at 464.
231. *Id.* at 460, 475 (relying on *Ex parte* Quirin, 317 U.S. 1, 21, 37 (1942)).
232. *Id.* at 465.
233. Hamdi v. Rumsfeld, 296 F.3d 278, 281-82 (4th Cir. 2002) (quoting United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 320 (1936)).
234. Stumpf, *supra* note 164, at 122-23.
235. *Id.* at 123.

ii. *From Slippage to Stabilization?*

The Supreme Court's plurality decision in *Hamdi* and the separate opinions of Justices Souter and Scalia present fascinating counterpoints to the Fourth Circuit's citizenship perception strain and resulting reading of rights. The plurality opinion by Justice O'Connor, writing for Justices Rehnquist, Kennedy, and Breyer, navigated the tension between affect, citizenship perception, and the lens of rights through which we see ourselves with a compromise. The Court ruled that U.S. citizens designated enemy combatants could be detained without trial for the duration of a conflict, but that due process required "that a citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker."[236]

The strain of affect and citizenship perception presented by the case is evident from the outset of the plurality's opinion. The plurality opinion opened by referencing "this difficult time in our Nation's history," and foregrounding the affectively laden image of the "treacherous violence" of hijacked airliners crashing into the U.S. targets, killing thousands.[237]

The plurality's portrait of Hamdi's citizenship is less doubt-laden than the Fourth Circuit's decision, but it still takes notice of salient attributes of functional citizenship. While the Fourth Circuit says Hamdi was transferred to a naval brig in Norfolk, Virginia when it was discovered he "may not have renounced his . . . citizenship," the Supreme Court says quite plainly that the transfer occurred "upon learning that Hamdi is an American citizen."[238] The plurality majority took notice, however, of Hamdi's move to Saudi Arabia as a child, his residence abroad since 2000, and his capture in a foreign battlefield—certainly not citizenly attributes.[239] The capture on the foreign battlefield was particularly salient to the plurality's view that Hamdi could be detained outside the criminal process despite his citizenship.[240]

The plurality drew the line, however, in surrendering the citizen to the plenary power doctrine and out of reach of the Constitution. Though the plurality refused to part ways with *Quirin* in its ruling regarding the power to detain citizen enemies,[241] the plurality's due process holding has echoes of *Milligan*. The Court "reaffirm[ed] . . . the fundamental nature of a citizen's right to be free from involuntary confinement by his own government

236. Hamdi v. Rumsfeld, 542 U.S. 507, 531-33 (2004) (plurality opinion).
237. *Id.* at 509-10 (citations omitted).
238. Hamdi v. Rumsfeld, 316 F.3d 450, 460 (4th Cir. 2003); *Hamdi*, 542 U.S. at 510.
239. *Hamdi*, 542 U.S. at 524.
240. *Id.*
241. *Id.* at 522-23.

without due process of law."[242] The majority plurality underscored "[i]t is during our most challenging and uncertain moments that our Nation's commitment to due process is most severely tested; and it is in those times that we must preserve our commitment at home to the principles for which we fight abroad."[243] Accordingly, the calculus by which the powerful security interests of a nation at war and under siege by the threat of terrorism is calculated should "not give short shrift to the values that this country holds dear or to the privilege that is American citizenship."[244] Thus, while the plurality struggled to navigate the tension between *Milligan*'s conception of citizenship as the mast mooring us to our constitutional commitments and *Quirin*'s effacement of the citizen, it refused to relinquish *Milligan*'s ideals.

Justice Souter, joined by Justice Ginsburg, penned a concurrence in part and dissent in part that in style bears interesting rhythmic echoes of Justice Jackson's *Korematsu* dissent. Justice Souter's opening describes the habeas petition's allegation that the government was detaining "an American citizen, on American soil," and that "[i]t is undisputed that the Government has not charged him with espionage, treason, or any other crime under domestic law."[245] Justice Souter invoked history's cautionary example of the internments in World War II, *Korematsu*, and the need to ensure "an assessment by Congress before citizens are subject to lockup."[246] In Justice Souter's view, the Authorization for Use of Military Force (AUMF) resolution by Congress authorizing the President to "use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks"[247] or harbored such entities was hardly the "manifest authority" needed to authorize detention of citizens.[248]

Justice Scalia would have gone further and held that formal citizenship status binds the government to constitutionally mandated process for citizens unless proper procedures for suspension of habeas corpus are followed.[249] His dissent noted he shared "the plurality's evident unease" as it sought to reconcile the "competing demands of national security and our

---

242. *Id.* at 531.

243. *Id.* at 532.

244. *Id.*

245. *Id.* at 539-40 (2004) (Souter, J., concurring in part and dissenting in part). Jackson's dissent began: "Korematsu was born on our soil, of parents born in Japan. The Constitution makes him a citizen of the United States by nativity and a citizen of California by residence. No claim is made that he is not loyal to this country." Korematsu v. United States, 323 U.S. 214, 242-43 (1944) (Jackson, J., dissenting).

246. *Hamdi*, 542 U.S. at 544-45 (Souter, J., concurring in part and dissenting in part).

247. Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

248. *Hamdi*, 542 U.S. at 544-45 (Souter, J., concurring in part and dissenting in part).

249. *Id.* at 554 (Scalia, J., dissenting).

citizens' constitutional right to personal liberty," but he would adhere to the constitutional guarantees to the citizen.[250] Not one to be swayed by affect, and with a healthy devotion to formalism, Justice Scalia penned a scholarly opinion about the longstanding principle that citizens—even citizen traitors—are, unlike enemy aliens, subject to the criminal process absent suspension of the writ of habeas corpus.[251]

Thus, in the shadow of September 11 and the throes of conflict concerning how to permit a nation at war to protect itself, the Court agreed that citizenship mattered for the quantum of rights but fractured about how. The conflict in cognition is reflected in the plurality's compromise—through the lens of rights, citizenship is blurry. Strikingly, however, the fractured Court would come together four years later, in *Munaf v. Geren*,[252] unanimously adopting a version of Justice Scalia's vision that formal citizenship binds us to a baseline of protections and procedures, even for the uncitizenly.

iii. Munaf *and the Resurgence of* Milligan*'s Vision of Citizenship as Masthead?*

The question in *Munaf* was whether U.S. courts had jurisdiction over petitions for writs of habeas corpus on behalf of U.S. citizens held overseas by U.S. forces in Iraq.[253] The Government argued that the federal courts lacked jurisdiction over detainees held overseas by American forces operating as part of a multinational force and cited *Hirota v. MacArthur* as authority.[254] In *Hirota*, Japanese citizens convicted by the International Military Tribunal for the Far East, established by General Douglas MacArthur acting in his capacity as an agent of the Allied Powers, sought to file habeas corpus applications with the Supreme Court.[255] The Supreme Court concluded that because the Far East Tribunal was not a tribunal of the United States, U.S. courts had no power or authority to review or modify the judgments and sentences imposed and denied leave to file habeas corpus applications.[256]

In distinguishing *Hirota*, the Court noted first that the *Hirota* Court may have deemed it significant that General Macarthur was not subject to U.S. authority (even if it did not say so), whereas U.S. military commanders in the multinational forces in Iraq do answer to the President.[257] The Court then ruled that even if the international authority in *Hirota* was no different than in *Munaf*, "the present 'circumstances' differ in another respect"—the

250. *Id.*
251. *Id.* at 558-59.
252. 128 S. Ct. 2207 (2008).
253. *Id.* at 2213.
254. *Id.* at 2216-17 (citing Hirota v. MacArthur, 338 U.S. 197 (1948) (per curiam)).
255. *Hirota*, 338 U.S. at 198.
256. *Id.*
257. *Munaf*, 128 S. Ct. at 2217-18.

consolidated cases in *Munaf* "concern American citizens while *Hirota* did not, and the Court has indicated that habeas jurisdiction can depend on citizenship."[258]

The Court invoked *Johnson v. Eisentrager*, in which Justice Jackson, writing for the Court, emphasized the distinction between the privileges accorded to citizens and those accorded to aliens.[259] In ruling that jurisdiction was lacking over petitions for habeas corpus brought by German nationals held by U.S. forces in Germany, Justice Jackson wrote:

> With the citizen we are now little concerned, except to set his case apart as untouched by this decision and to take measure of the difference between his status and that of all categories of aliens. Citizenship as a head of jurisdiction and a ground of protection was old when Paul invoked it in his appeal to Caesar. The years have not destroyed nor diminished the importance of citizenship nor have they sapped the vitality of a citizen's claims upon his government for protection.[260]

The *Munaf* Court's cognition of citizenship was strikingly formal and spare, eschewing functional parsing. There was no exposition of citizenship substance, such as state of birth or whether a childhood was spent at home or abroad. Rather, the opinion tersely described petitioner Shawqi Omar as an American–Jordanian citizen and petitioner Mohammad Munaf as "a citizen of both Iraq and the United States."[261] And, as "American citizens held overseas by American soldiers subject to a United States chain of command," petitions on their behalf were not precluded by *Hirota*.[262] Formal citizenship assured even alleged enemy citizens the right to petition their government for protection.

As to the substance of the habeas claims, the Court applied the longstanding rule that "an American citizen [who] commits a crime in a foreign country . . . cannot complain if [he is] required to submit to such modes of trial and to such punishment as the laws of that country may prescribe for its own people."[263] The rule generally coheres with the basic notion that a criminal who chooses to commit a criminal act in a particular place faces that jurisdiction—he takes his jurisdiction as he finds it.

Variations of the principle are robust even in ordinary contexts of criminal law. For example, the Ninth Circuit, no slouch on protections for the accused in criminal contexts, declined to deny extradition of a U.S. citizen to Thailand where he faced the death penalty for drug trafficking.[264] The Ninth Circuit applied a rule of non-inquiry into the penal systems of

---

258. *Id.* at 2218.
259. 339 U.S. 763, 769 (1950).
260. *Id.*
261. *Munaf*, 128 S. Ct. at 2214-15.
262. *Id.* at 2218.
263. *Id.* at 2222 (citing Neely v. Henkel, 180 U.S. 109, 123 (1901)).
264. Prasoprat v. Benov, 421 F.3d 1009 (9th Cir. 2005).

foreign jurisdictions that is also inflected with the idea that it is the role of the Secretary of State to make such judgment calls affecting foreign relations.[265]

The petitioners in *Munaf*, however, alleged that their government of citizenship should intervene because they faced the likelihood of torture.[266] The Court applied a strong version of the rule of non-inquiry into claims of torture, ruling that the State Department had determined that the Iraqi Justice Ministry, to which the petitioners would be transferred, had "'generally met internationally accepted standards for basic prisoner needs,'" and it was up to the State Department to determine the likelihood of torture and whether to decline transfer on humanitarian grounds.[267] The Court noted that this was "not a more extreme case in which the Executive has determined that a detainee is likely to be tortured but decides to transfer him anyway"—leaving open the possibility of judicial intervention in such situations.[268] The Court declined to consider whether the Foreign Affairs Reform and Restructuring Act (FARR Act) implementing U.S. treaty obligations under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment—including its prohibition against expelling, returning or extraditing a person to another state where there are substantial grounds to believe there is a likelihood of torture[269]—required judicial intervention.[270] The petitioners had failed to assert a FARR Act claim in their petition for habeas and certiorari filings before the Court and their merits brief only scantly touched on the issue.[271]

Concurring, Justice Souter, joined by Justices Ginsberg and Breyer, underscored that nothing in the Court's opinion should be read as foreclosing relief for a citizen if the executive opts to transfer despite knowing the likelihood of torture, or even where the Executive fails to acknowledge a well-documented likelihood of torture.[272] The concurring justices wrote that where the government transfers despite likelihood of torture "it would be in

---

265. *Id.* at 1012.

266. *Munaf*, 128 S. Ct. at 2225.

267. *Id.* at 2226 (citation omitted).

268. *Id.*

269. *See* United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 3, Dec. 10, 1984, 1465 U.N.T.S. 85 ("No State Party shall expel, return ('refouler') or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture."); Foreign Affairs Reform and Restructuring Act, § 2242(a), 112 Stat. 2681-822 ("It shall be the policy of the United States not to expel, extradite, or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture, regardless of whether the person is physically present in the United States.").

270. *Munaf*, 128 S. Ct. at 2226 & n.6.

271. *Id.*

272. *Id.* at 2228 (Souter, J., concurring).

order to ask whether substantive due process bars the Government from consigning its own people to torture."[273] Therefore, while the torture question was bracketed in *Munaf*, there is the possibility that the Court will ensure that "the vitality of a citizen's claims upon his government for protection" will be vindicated.[274]

C. Rights-Citizenship and Everyday Crime

Intuitions about the substance of citizenship need not always be a rights-damping factor. They may also expand the scope of protections beyond the community of formal citizens. The illustration of this potential, oddly, is *United States v. Verdugo-Urquidez*,[275] which has often been critiqued as closing off the scope of rights, but has in practice, I contend, opened up the idea of the citizen that is our intuitive referent for the holder of rights belonging to the people.[276]

The Fourth Amendment begins: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ."[277] The central amendment of constitutional criminal procedure thus terms the protected "the people." Who constitutes the people protected by the Fourth Amendment? We must distinguish between intuitions and legal definitions. The intuitively embedded construct of the Fourth Amendment as regulating relations between government and citizen is demonstrated by the plethora of cases that refer to the "citizen" in Fourth Amendment analyses—though citizenship in the formal sense was not at issue.

M. Isabel Medina has catalogued the prevalent judicial practice that, in her view, "essentially treats 'citizen' as synonymous with person or

---

273. *Id.*

274. Johnson v. Eisentrager, 339 U.S. 763, 769 (1950).

275. 494 U.S. 259, 265-67 (1990) (plurality opinion) (ruling that "'the people' protected by the Fourth Amendment . . . refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community" and does not include "activities of the United States directed against aliens in foreign territory or in international waters").

276. *Compare* Al-Marri v. Wright, 487 F.3d 160, 171 (4th Cir. 2007), *vacated by en banc court sub nom.* Al-Marri v. Pucciarelli, 534 F.3d 213 (4th Cir. 2008) (per curiam), *vacated as moot because petitioner released from military custody*, 129 S. Ct. 1545 (2009) (mem.) (explaining that in enacting the Military Commissions Act, Congress understood both citizens and non-citizens in the nation with sufficient connections to have a *constitutional* rather than merely statutory right to habeas corpus, based on distinctions made by the Supreme Court in *Johnson v. Eisentrager*, 339 U.S. 763, 777-78 (1950), and *United States v. Verdugo-Urquidez*, 494 U.S. 259, 271 (1990)).

277. U.S. CONST., amend. IV.

'people,' the term actually used in the Amendment."[278] Medina found 707 cases in the LEXIS federal courts database in just two years between March 2001 and March 2003 that referred to the "citizen" in analyzing constitutional regulation of arrests or search or seizure.[279] Of these cases, five were some of the Supreme Court's landmark Fourth Amendment cases: *United States v. Drayton*, on consent searches;[280] *United States v. Knights*, on warrantless searches;[281] *Saucier v. Katz*, on alleged excessive force in political protests;[282] *Kyllo v. United States*, on thermal imaging;[283] and *Atwater v. City of Lago Vista*, on arrests for minor traffic offenses.[284]

The references to the "citizen" generally center on the construct of an individual suffused with rights against the state rather than citizen as a boundary-drawing device.[285] The cases vary between simply referencing the citizen as the subject of government intrusion and the substitution of "citizen" as synonym for the people protected by the Fourth Amendment. For example, the Supreme Court's decision in *Michigan v. Summers* deploys the oft-reiterated language regarding "'[t]he central importance of the probable-cause requirement to the protection *of a citizen's privacy* afforded by the Fourth Amendment's guarantees.'"[286] The Supreme Court's *Kyllo* opinion referred to "the degree of privacy *secured to citizens by the Fourth Amendment.*"[287]

The substitution of citizen for the people is an intuitive move rather than a deliberated-upon *decision* about the boundaries of protection. Intuition is a product of System 1 mental processing, which processes reality in metaphors, narratives, and images laden with affective feeling.[288] The Fourth Amendment's affectively charged narrative and metaphor is centered on its image as the central bulwark of the citizen against state overreach-

278. M. Isabel Medina, *Exploring the Use of the Word "Citizen" in Writings on the Fourth Amendment*, 83 IND. L.J. 1557, 1557 (2008).

279. *Id.* at 1561-62.

280. 536 U.S. 194, 204-07 (2002).

281. 534 U.S. 112, 119-21 (2001).

282. 533 U.S. 194, 197 (2001).

283. 533 U.S. 27, 33-34 (2001).

284. 532 U.S. 318, 323 (2001).

285. *See, e.g.*, Michigan v. Summers, 452 U.S. 692, 697 (1981) ("The central importance of the probable-cause requirement to the protection of a citizen's privacy afforded by the Fourth Amendment's guarantees cannot be compromised in this fashion." (quoting Dunaway v. New York, 442 U.S. 200, 213 (1979)); California v. Hodari D., 499 U.S. 621, 647 (1991) (Stevens, J., dissenting) ("The central message of *Katz* and *Terry* was that the protection the Fourth Amendment provides to the average citizen is not rigidly confined by ancient common-law precept.").

286. *Summers*, 452 U.S. at 697 (emphasis added) (quoting *Dunaway*, 442 U.S. at 213).

287. 533 U.S. 27, 33-34 (2001) (emphasis added).

288. *See* Kahneman, *supra* note 79, at 1452; Finucane, Peters & Slovic, *supra* note 11, at 346.

ing.[289] The petitioner invoking the Fourth Amendment is generally one singled out by the state as a potential criminal. Characterizing the object of Fourth Amendment protection and the petitioner singled out by the state as a citizen is a device to recall common commitments and community membership through the lens of rights.

The citizen is thus the intuitive rights-suffused construct deployed as a proxy for "the people" in Fourth Amendment jurisprudence. How capacious is this citizen construct? The Supreme Court in *United States v. Verdugo-Urquidez* ruled that "the people" protected by the Fourth Amendment "refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community."[290] The majority reasoned that the term "the people" was not just a stylistic choice; it was a term of art that contrasted with the use of the general signifiers "any person" or "accused" in the Fifth and Sixth Amendments.[291]

Whatever "sufficient connections" signifies, it did not embrace a citizen and resident of Mexico seized from Mexico against his will.[292] Verdugo-Urquidez "had no voluntary connection with this country that might place him among 'the people' of the United States," wrote the Court.[293] Verdugo-Urquidez was the leader of a large and violent narcotics-smuggling organization wanted for involvement with the torture and murder of a U.S. Drug Enforcement Agency (DEA) special agent, Enrique ("Kiki") Camarena Salazar.[294] Verdugo-Urquidez presented an easy case because he was the embodiment of the malevolent outsider.

But what *Verdugo-Urquidez* portends for the many non-citizens in the United States is unclear. As Justice Brennan underscored in his dissent, the majority "admit[ted] that 'the people' extends beyond the citizenry, but leaves the precise contours of its 'sufficient connection' test unclear."[295] At junctures, "the majority hints that aliens are protected by the Fourth Amendment only when they come within the United States and develop

---

289. *See, e.g.*, Graham v. Connor, 490 U.S. 386, 394 (1989) (describing Fourth Amendment as a "primary source[ ] of constitutional protection against physically abusive governmental conduct"); United States v. Leon, 468 U.S. 897, 972 n.27 (1984) (Stevens, J., dissenting) (describing "the central fact about the Fourth Amendment, namely, that it was a safeguard against recurrence of abuses so deeply felt by the Colonies as to be one of the potent causes of the Revolution" (quoting United States v. Rabinowitz, 339 U.S. 56, 69 (1950) (Frankfurter, J., dissenting)); United States v. Wilson, 953 F.2d 116, 126 (4th Cir. 1991) (describing the Fourth Amendment as the bulwark against "overbearing or harassing police conduct" (quoting Terry v. Ohio, 392 U.S. 1, 15 (1968)).

290. 494 U.S. 259, 265 (1990).

291. *Id.* at 265-66.

292. *See id.* at 262, 273.

293. *Id.* at 273.

294. *Id.* at 262.

295. *Verdugo-Urquidez*, 494 U.S. at 282 (Brennan, J., dissenting).

'substantial connections' with our country."[296] At other points, the majority opinion "suggests that an . . . alien must have 'accepted some societal obligations.'"[297]

The big question mark is what the Court's decision portends for undocumented aliens. The majority decision—in which Justice Kennedy cast the fifth vote—ruled that the Court's earlier decision in *I.N.S. v. Lopez-Mendoza*,[298] "where a majority of Justices assumed that the Fourth Amendment applied to illegal aliens in the United States" was "not dispositive of how the Court would rule on a Fourth Amendment claim by illegal aliens in the United States."[299] It sufficed for the majority to note that the illegal aliens in deportation proceedings in *Lopez-Mendoza* "presumably had accepted some societal obligations," whereas Verdugo-Urquidez had no voluntary connections with the nation.[300]

Despite comprising part of the five-person majority, Justice Kennedy wrote separately to explain that he could not "place any weight on the reference to 'the people' in the Fourth Amendment as a source of restricting its protections."[301] In his view, "the people" might just as well have been a rhetorical flourish "to underscore the importance of the right, rather than to restrict the category of persons who may assert it."[302] Rather, the linchpin of the case for Justice Kennedy was that adherence to the Fourth Amendment's warrant requirement would be "impracticable and anomalous" in searches of foreign homes of nonresident aliens.[303]

Justice Stevens's brief concurrence began with his view on the open question about the implications of the majority's Fourth Amendment ruling for non-citizens in the United States. His concurrence opened by stating: "In my opinion aliens who are lawfully present in the United States are among those 'people' who are entitled to the protection of the Bill of Rights, including the Fourth Amendment."[304] Verdugo-Urquidez was lawfully present because he was seized by U.S. authorities, and therefore, the Fourth Amendment question did not turn on the identity of the defendant for Justice Stevens.[305] Rather Justice Stevens concurred in the result because he

---

296. *Id.*

297. *Id.* at 282-83 (citation omitted).

298. INS v. Lopez-Mendoza, 468 U.S. 1032, 1034, 1040-41 (1984). The Supreme Court in *Lopez-Mendoza* declined to extend the Fourth Amendment exclusionary rule to civil deportation hearings, on a balancing of the deterrence benefits and costs of exclusion. *Id.* at 1046.

299. *Verdugo-Urquidez*, 494 U.S. at 272.

300. *Id.* at 273.

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

302. *Id.*

303. *Id.* at 278.

304. *Id.* at 279 (Stevens, J., concurring).

305. *Id.*

did not believe the Fourth Amendment's warrant requirement applied to searches of noncitizens' homes in foreign jurisdictions because American magistrates have no power to authorize such searches.[306] Justice Stevens, like the majority, bracketed the question of "'illegal aliens' entitlement to the protections of the Fourth Amendment."[307]

Before *Verdugo-Urquidez*, the general consensus among the lower courts that had decided the issue was that illegal aliens are protected under the Fourth Amendment.[308] After *Verdugo-Urquidez*, at least two district court decisions have held that undocumented aliens are not protected by the Fourth Amendment.[309]

The general trend, however, is apparently to continue to treat non-citizens in the United States as protected, including undocumented persons.[310] In practice, therefore, the decision in *Verdugo-Urquidez* might have the interesting impact of *opening up* our conception of who constitutes the people protected by the Fourth Amendment, who we intuitively associate with the capacious construct of the "citizen" suffused with rights.[311]

Indeed, *Verdugo-Urquidez* has been read in this way by Congress. As the Fourth Circuit detailed in a later-vacated panel opinion in *Al-Marri v.*

---

306. *Id.*

307. *Id.* at 279 & n.*.

308. *Id.* at 283 n.6 (Brennan, J., dissenting) (collecting cases).

309. *E.g.*, United States v. Esparza-Mendoza, 265 F. Supp. 2d 1254 (D. Utah 2003), *aff'd on other grounds*, 386 F. 3d 953 (10th Cir. 2004); United States v. Gutierrez-Casada, 553 F. Supp. 2d 1259, 1265 (D. Kan. 2008).

310. *See* United States v. Hernandez-Reyes, 501 F. Supp. 2d 852, 855-56 n.3 (W.D. Tex. 2007) (stating that "the Court is unaware of any case denying a criminal defendant's motion to suppress evidence obtained inside the United States on the grounds that the defendant, as an alien, does not possess rights under the Fourth Amendment" and collecting cases that continue to conduct Fourth Amendment analyses in cases involving illegal aliens) (citing United States v. Uscanga-Ramirez, 475 F.3d 1024, 1027 (8th Cir.2007) (affirming denial of motion to suppress by defendant charged with being an illegal alien in possession of a firearm based the consent and exigent-circumstances exception to the warrant requirement); United States v. Torres-Castro, 470 F.3d 992, 1000 (10th Cir. 2006) (affirming denial of motion to suppress by defendant charged with being an illegal alien in possession of a firearm in part based on the inevitable discovery doctrine); United States v. Herrera-Ochoa, 245 F.3d 495, 498 (5th Cir.2001) (affirming denial of motion to suppress filed by a defendant charged with illegal reentry after analyzing the fruit of the poisonous tree doctrine)). *Cf.* United States v. Barona, 56 F.3d 1087, 1094 (9th Cir. 1995) (expressing doubt over whether non-citizens were entitled to Fourth Amendment protection in light of *Verdugo-Urquidez* but not deciding question because even if the Fourth Amendment applied there was no violation). *See also* Jennifer M. Chacón, *A Diversion of Attention? Immigration Courts and the Adjudication of Fourth and Fifth Amendment Rights*, 59 DUKE L.J. 1563, 1621 (2010) (noting that it is "not yet a widespread phenomenon" to deny Fourth Amendment protections to certain non-citizens).

311. BOSNIAK, *supra* note 75, at 1286, 1290, 1293 (noting that linking citizenship to rights could also be a lever to open up our conception of citizenship by conferring rights associated with citizenship on aliens).

Pucciarelli,[312] when Congress enacted the Military Commission Act (MCA), it considered citizens *and aliens* with substantial voluntary connections as holders of the constitutional right to petition for a writ of habeas corpus:

> In enacting the MCA, Congress distinguished between those individuals it believed to have a *constitutional* right to habeas corpus, and those individuals it understood had been extended the right of habeas corpus only by *statute*, i.e., 28 U.S.C. § 2241. The supporters of the MCA consciously tracked the distinction the Supreme Court had drawn in *Johnson v. Eisentrager*, and *United States v. Verdugo-Urquidez* between aliens within the United States who become "'invested with the rights guaranteed by the Constitution to all people within our borders,'" . . . and aliens who have no lawful contacts with this country and are captured and held outside its sovereign territory. *See, e.g.*, 152 Cong. Rec. S10268 (daily ed. Sept. 27, 2006) (statement of Sen. Kyl); 152 Cong. Rec. S10406-07 (daily ed. Sept. 28, 2006) (statement of Sen. Sessions).
>
> Congress sought to eliminate the statutory grant of habeas jurisdiction for those aliens captured and held outside the United States who could not lay claim to constitutional protections, but to preserve the rights of aliens like al-Marri, lawfully residing within the country with substantial, voluntary connections to the United States, for whom Congress recognized that the Constitution protected the writ of habeas corpus.[313]

The Fourth Circuit's decision was later vacated by the court sitting en banc, which issued a terse per curiam decision holding that while Congress had empowered the President to detain lawfully present aliens like Ali Saleh Kahlah al-Marri as enemy combatants, he had not been afforded sufficient process to challenge his designation as an enemy combatant.[314] The per curiam opinion, laying out the votes of the fractured en banc panel, did not undermine the panel's reading of the MCA as embodying Congress's reading of *Eisentrager* and *Verdugo-Urquidez* to signify that aliens with sufficient connections to the United States were, like citizens, entitled to constitutional habeas protection.

Such a conception is striking because the constitutional right to petition for writ of habeas corpus was one of the few rights that the *Slaughterhouse Cases* deemed to be among the privileges and immunities of federal

---

312. 487 F.3d 160, 171 (4th Cir. 2007), *vacated*, 534 F.3d 213 (4th Cir. 2008) (en banc) (per curiam), *vacated as moot because pet'r released from military custody sub nom.* Al-Marri v. Spagone, 129 S. Ct. 1545 (2009) (mem.).

313. *Id.* (internal case citations omitted); *see also* H.R. REP. No. 109-664, pt. 2, at 5-6 (2006) (stating that "aliens receive constitutional protections when they have come within the territory of the United States and developed substantial connections with this country" and that the MCA "clarifies the intent of Congress that statutory habeas corpus relief is not available to alien unlawful enemy combatants held outside of the United States") (internal quotation marks and footnotes omitted).

314. Al-Marri v. Pucciarelli 534 F.3d 213 (4th Cir. 2008) (en banc) (per curiam), *vacated as moot because petitioner released from military custody sub nom.* Al-Marri v. Spagone, 129 S. Ct. 1545 (2009) (mem.).

citizenship, as defined in the Fourteenth Amendment, the lodestar of citizenship's formal definition.[315] *Verdugo-Urquidez* has therefore been a basis for expanding the reach of protection beyond formal status.

III. TOWARD STABILIZATION: HYBRIDIZING RULE AND INTUITION

Law's authority and accountability come from its making explicit the standards that regularize and render predictable and stable its application.[316] The challenge presented by the jurisprudence on the linkage between citizenship and rights in cases of crime and times of war is rendering explicit and regularizing our implicit intuitions and cognitions of citizenship and how they should affect our constitutional commitments. Regularizing and rendering explicit the standard for how citizenship matters does not mean discarding our intuitions about justice and our ethics of care. There is a place for intuitions and affect-mediated judgments in the law, but a disciplined intuition.

While affect and intuition have been portrayed as negative forces in cognition marring "rational" judgment, a new wave of research shows the myriad ways that affect and intuition are often useful and even essential to adaptively responding to complex social situations and lead to good judgments rather than serving as disruptive forces.[317] In the domain of morality, affectively laden intuition—"gut feelings"—may be "essential for proper moral functioning."[318] Indeed, research has challenged the idea that reasoned dispassionate decisions always trump intuitive judgments.[319]

The key is constraint to ensure that affect and intuition are cabined and regularized to police against uneven application and mistake.[320] The highly contextualized, intuitive mental processing of System 1 guided by images, metaphors, and narratives imbued with affect needs the cross-hatch of the

---

315. *See* Slaughter-House Cases, 83 U.S. 36, 79 (1872) (ruling that "the privilege of the writ of *habeas corpus*, are rights of the citizen guaranteed by the Federal Constitution").

316. *See* Ronald Dworkin, *The Original Position*, *in* READING RAWLS 16, 30 (Norman Daniels ed., 1975) (arguing that political morality and responsibility calls for coherence that constrains the law and its interpreters and implementers to consistency and "provide a public standard for testing or debating or predicting" what is done).

317. Forgas, *supra* note 10, at 596; Shane Frederick, *Automated Choice Heuristics*, *in* HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT 548 (Thomas Gilovich et al. eds., 2002).

318. Jonathan Haidt & Selin Kesebir, *In the Forest of Value: Why Moral Intuitions Are Different from Other Kinds*, *in* INTUITION IN JUDGMENT AND DECISION MAKING 209, 224 (Henning Plessner et al. eds., 2008).

319. Steve Catty & Jamin Halberstadt, *The Use and Disruption of Familiarity in Intuitive Judgments*, *in* INTUITION IN JUDGMENT AND DECISION MAKING 295, 298 (Henning Plessner et al. eds., 2008).

320. George Loewenstein & Jennifer S. Lerner, *The Role of Affect in Decision Making*, *in* HANDBOOK OF AFFECTIVE SCIENCES 619 (Richard J. Davidson ed., 2003).

rational, rules-based System 2 that decontextualizes and depersonalizes problems. We need a rule hybridized with our intuitions.

The Supreme Court's decisions in *Milligan*, *Munaf*, and *Verdugo-Urquidez* offer the bases for deriving a principle that accommodates both the intuitions that lead us to slip between formal and functional ideas about citizenship, and the need for explicit, regularized rules that render law predictable, stable, and publicly accountable. *Milligan* is hailed as "one of the great landmarks in this Court's history" by the Supreme Court,[321] and it underscores citizenship as the mast to which we bind ourselves, despite the temptation to slip below baselines of constitutional commitments in troubled times with alleged enemies in our midst. *Munaf* signifies the potential for retrenchment and reaffirmation of that commitment even for uncitizenly formal citizens alleged to be enemies after a tumultuous and fractured period in jurisprudence and history.

Taken together, *Milligan* and *Munaf* illustrate the rationale and potential resurgence of the fundamental principle that we may not dip below the baselines of protections for formal citizens, even if we suspect the substance of an alleged enemy's citizenship as a functional matter. We are bound to constitutional commitments that, at a minimum, adhere to formal citizenship. We cannot dilute protections because of intuitions stemming from confounded categorical cognition and affectively charged contexts.

Verdugo-Urquidez stands for a complementary proposition that we may, however, go above the baseline of formal citizenship to extend the scope of protection. The Court has signaled willingness to parse attributes of functional citizenship despite formal non-citizenship status in enlarging conceptions of the people protected by constitutional commitments. Rather than the basis for exclusion, *Verdugo-Urquidez* might be a lever for opening up our conceptions of citizenship and protections, such as the constitutional right to petition for a writ of habeas corpus. *The Slaughter-house Cases* held that the constitutional right to petition for writ of habeas corpus was one of the privileges and immunities of citizenship, as formally defined in the citizenship clause of the Fourteenth Amendment.[322] Yet, as detailed above, Congress, on the strength of *Verdugo-Urquidez* and *Eisentrager*, deemed aliens present in the United States with sufficient connections to be among the community of those constitutionally entitled to petition for a writ of habeas corpus.

The two-part principle that emerges implicitly from the Court's jurisprudence is one of protection. First, strain in citizenship cognition and conceptions of how citizenship ought to look and feel cannot be the basis for dipping below the baseline of protections assured those who are formal-

321. Reid v. Covert, 354 U.S. 1, 30 (1957) (plurality opinion).
322. *Slaughter-House Cases*, 83 U.S. at 79.

ly citizens. Citizenship positivism is the bond that links the alleged citizen–enemy with the ordinary citizenly subject, ensuring that dilution does not seep inward and erode the fabric of constitutional protection in times of turmoil. The second part of the principle is that we can use functional conceptions of citizenship to extend protections beyond formal citizens. We cannot dip below the baseline of protection, but we can extend protection based on ideas of the functional attributes of belonging. Most saliently, for example, the attribute of allegiance can be a lever for opening up our notions of belonging and the embrace of the principle of protection—having rights under law—as Philip Hamburger recently argued.[323] While allegiance is formally a separate criterion from citizenship as defined in law, our intuitions make allegiance a salient attribute of belonging, and this intuitive notion can provide a basis upon which to enlarge the scope of protections.

This hybridization of intuition and rule standardizes the switching between formal and functional conceptions of citizenship in interpreting the scope of rights. The protective principle accommodates our best intuitions to extend law's protective embrace, while disciplining us to adhere to the baselines of protection for formal citizens who do not look citizenly in substance.

The import of switching to a functional conception of citizenship to extend the baselines of protection is illustrated by an international case. In interpreting the scope of protections for civilians during armed conflict under Article 4 of Geneva Convention IV, which on its face is limited to nonnationals of the occupying authority, the International Criminal Tribunal for the Former Yugoslavia (ICTY)—the first war-crimes tribunal since the World War II-era military tribunals—eschewed adherence to formally defined nationality. Instead, it extended the scope of protection by adopting a "teleological" interpretation of the scope of citizenship representing "[a] more purposive and realistic approach."[324] The ICTY Appeals Chamber reasoned that the nationality requirement must be "ascertained within the context of the object and purpose of humanitarian law, which 'is directed to the protection of civilians to the maximum extent possible,'" and "within the context of the changing nature of the armed conflicts since 1945, and in particular of the development of conflicts based on ethnic or religious grounds."[325] National linkage could not be used to deny victims regarded as enemies by their own State and detained because of their ethnicity the pro-

323. Philip Hamburger, *Beyond Protection*, 109 COLUM. L. REV. 1823, 1834-60 (2009).

324. Prosecutor v. Delalic (*Čelibici* case), Case No. IT-96-21-A, Appeals Chamber Judgment, ¶¶ 57, 68, 73, 81-82 (Feb. 20, 2001).

325. *Id.* ¶ 73 (footnote omitted).

tections of international humanitarian law.[326] Switching to a functional conception of nationality—citizenship's international analogue—widened law's embrace and furthered its purposes.

CONCLUSION

Since *Milligan*'s landmark vision of citizenship as the mast that moors us to our constitutional commitments, the jurisprudence on the linkage between citizenship and rights has struggled with citizenship cognition, intuition and the impact of affectively charged contexts. At times, the nation and the jurisprudence have appeared to slip beneath the baseline of constitutional commitments when faced with formal citizens who challenged our cognition of citizenship's functional attributes. The jurisprudence has also, however, signaled a willingness to go beyond the baseline of citizenship positivism when extending the embrace of protections to those who bear the functional attributes of citizenship, even if they lack the formal status. The result of the interplay of citizenship cognition and intuition with the scope of rights has been jurisprudential blurriness. The instability and uncertainty stem in part from the lack of an explicit rule to regulate slippage between citizenship formalism and the parsing of functional citizenship.

Excavating the impact of categorical cognition of citizenship and affect-laden intuitions on the blurriness of jurisprudence is a foundation for formulating a principle to regularize and render transparent and stable the switching between citizenship formalism and the parsing of functional citizenship in determining the scope of protection in cases of crime and times of war. Perfect coherence between competing moral principles and intuitions is unlikely, but we can aim for a reflective equilibrium in which the sets of principles we apply are mutually consistent and also cohere with our most firmly held intuitions.[327] In the process of deliberation toward reflective equilibrium, some intuitions that do not cohere will be revised.[328]

The two-part protective principle this Article proposes moors us to our constitutional commitments even when confronted with uncitizenly formal citizens. The principle binds us against slippage in protection despite confounded intuitions and categorical cognition and the distortion of negatively charged affective contexts. Intuitions about the lack of citizenship's functional attributes cannot be the basis for dilution of protection for formal citizens. We may be guided by our intuitions about citizenship, however, in

---

326. *Id.* ¶ 79.

327. ANDREI MARMOR, INTERPRETATION AND LEGAL THEORY 64-65 (1992); *see also* John Rawls, *Outline of a Decision Procedure for Ethics*, *in* JOHN RAWLS, COLLECTED PAPERS 1 (1991) (outlining a decision procedure for adjudicating competing interests).

328. JOHN RAWLS, A THEORY OF JUSTICE 43 (rev. ed. 1971); MARMOR, *supra* note 327, at 65.

expanding the embrace of protections beyond the group of formal citizens. This principle permits disciplined hybridization of our intuitions and the transparent, stable, and explicit standards required for law's accountability and moral authority.