

CIVILIAN BORDER PATROLS: ACTIVISTS, VIGILANTES, OR AGENTS OF GOVERNMENT?

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I. INTRODUCTION

Justice Jackson once asked:

Because [a person] has no right of entry, does it follow that he has no rights at all? Does the power to exclude mean that exclusion may be continued or effectuated by any means which happen to seem appropriate to the authorities? It would effectuate his exclusion to eject him bodily into the sea or to set him adrift in a rowboat. Would not such measures be condemned judicially as a deprivation of life without due process of law? Suppose the authorities decide to disable an alien from entry by confiscating his valuables and money. Would we not hold this a taking of property without due process of law?¹

The examples described above by Justice Jackson may seem extreme to most. However, deprivations of constitutional rights occur to countless numbers of migrants attempting to cross the border from Mexico into the United States and to others legally present within U.S. borders. These violations are not confined to the actions of official U.S. Border Patrol agents, but are committed by civilian border patrol groups as well. Civilian border patrols, as the name suggests, are groups of citizens that have given themselves the task of enforcing U.S. immigration laws and policies.

Undocumented migrants entering the United States across the Mexican border face countless natural and man-made dangers. Among those dangers are the civil patrol groups that have been very

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1. *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 226-27 (1953) (Jackson, J., dissenting) (stating that the Court's holding that no constitutional or statutory rights of an undocumented immigrant were violated when he was held indefinitely in Ellis Island without a hearing was incorrect and that the immigrant's due process rights were violated).

prominent in the media during the last few years.² Members of these groups consider themselves a modern day militia, while others characterize them as vigilantes. Regardless of what one chooses to call them, both the media—and civilian border patrol groups themselves—have documented incidents of illegal detention and physical and psychological abuse of migrants at the border and within various U.S. cities.³

The actions of these groups have not remained unnoticed and have been brought to the attention of the U.S. Border Patrol and local law enforcement officials.⁴ However, local and federal law enforcement agencies apparently make a conscious effort to ignore the various incidents of violence occurring at the border. Further, law enforcement agencies and legislators either indirectly, through acquiescence, or directly express support for these groups and their efforts.⁵

This Note argues that civilian border patrol groups currently operating in the area surrounding the southern border of the United States, and as far north as New York, are absorbing responsibilities that are exclusively reserved for the federal government. Additionally, law enforcement agencies have consciously permitted the active organization and participation of civilian border patrol groups for law enforcement purposes and thus allowed them to become agents of law enforcement. As such, civilian border patrol groups should be held liable for violating the constitutional rights of those they pursue, accost, or detain. Moreover, federal law enforcement agencies responsible for border and customs enforcement should be held liable for violations committed by these groups while assisting U.S. Border Patrol efforts.

Part II of this Note introduces the reader to the major groups involved in the civilian border patrol movement. Many small groups

2. See, e.g., Julia C. Mead, *Anti-Immigrant Group Active on East End*, N.Y. TIMES, Apr. 23, 2006, at LI3; see also Arthur H. Rotstein, *Minuteman Volunteers to Watch Border in 8 States*, DAILY BREEZE (Torrance, Cal.), Apr. 1, 2006, at A7.

3. For example, a member of the Minuteman Project detained and photographed an undocumented immigrant against his will and was dismissed from the Minutemen, but faced no other criminal or civil liability. Jerry Seper, *Border Project Declared Success*, WASH. TIMES, Apr. 13, 2005, at A9 [hereinafter *Border Project Declared Success*]; see also *Activist Cleared of Trespassing in Immigrant Detention Case*, KVOA TUCSON NEWS 4, June 13, 2007, <http://www.kvoa.com/global/story.asp?s=5075401> [hereinafter *Activist Cleared of Trespassing*].

4. See Randal C. Archibold, *A Border Watcher Finds Himself Under Scrutiny*, N.Y. TIMES, Nov. 24, 2006, at A1 [hereinafter *Border Watcher Under Scrutiny*].

5. See *Border Project Declared Success*, *supra* note 3, at A9, for one example of congressional support expressed by Representative Tom Tancredo, a Republican from Colorado; see also Daniel B. Wood, *What 'Minuteman' Vigil Accomplished*, CHRISTIAN SCI. MONITOR, May 2, 2005, at 1 [hereinafter *Minuteman Vigil*].

have developed throughout the country, but this Note will only focus on those garnering the most media attention. The three largest, in terms of size, influence, and press coverage, are the Minuteman Project, the Minuteman Civil Defense Corps (a splinter group of the Minuteman Project), and Ranch Rescue.⁶

Part III examines the legal doctrines that are the basis for this Note. Contrary to what many people might perceive, persons that are not citizens of the United States, but are present within its territory, are guaranteed certain constitutional protections. Therefore, the activities of civilian border patrol groups leading to detention or intimidation constitute violations of numerous constitutionally protected rights. Furthermore, not only should these organizations and their members be held accountable for such violations, but also federal law enforcement agencies that encourage such activity. This Note also discusses the legal avenues available to deter such violations. In conclusion, this Note argues that in order to deter the activities of civilian border patrol groups, immigrants and those who represent them will have to expand the causes of action initiated against these groups and law enforcement agencies beyond the methods that are currently employed.

II. MAJOR GROUPS IN THE CIVILIAN BORDER PATROL MOVEMENT

A. *The Minuteman Groups*

The Minuteman Project (MMP) was established on October 1, 2004, by Jim Gilchrist, a former newspaper reporter, U.S. Marine Corps veteran, and certified public accountant,⁷ and Chris Simcox, a former Tombstone, Arizona newspaper publisher.⁸ The MMP membership Web site describes the organization as “a citizens’ Vigilance Operation monitoring immigration, business, and government.”⁹ MMP members compare themselves to the minutemen of colonial America and claim to secure the border from foreign invasion, much like the original minutemen secured the thirteen

6. Minuteman Project—Official Web site, <http://www.minutemanproject.com> (last visited Feb. 16, 2008) [hereinafter MMP Web site]; Minuteman Civil Defense Corps, <http://www.minutemanhq.com> (last visited Feb. 16, 2008) [hereinafter MCDC Web site]; Ranch Rescue, <http://www.ranchrescue.com> (last visited Apr. 8, 2007) [hereinafter Ranch Rescue Web site].

7. Minuteman Project, About Jim Gilchrist, http://www.minutemanproject.com/organization/about_us.asp (last visited Feb. 16, 2008).

8. Jerry Seper, *Board Members Take Over Minuteman Border Group*, WASH. TIMES, Mar. 1, 2007, at A3 [hereinafter *Board Members Take Over*]. The MMP and the MCDC will be referred to as “Minuteman groups” when referenced jointly.

9. Atlanta Chapter of Minuteman Project, Inc., About Us, <http://www.atlantaminutemanproject.com/aboutus.html> (last visited May 9, 2008).

colonies hundreds of years ago.¹⁰ The group claims that their membership of a few hundred volunteers has grown to tens of thousands across several states.¹¹

The MMP's first significant endeavor was a month-long border watch in April 2005 along the Mexican border in southern Arizona.¹² Although the MMP profess to have "no affiliation with, nor will we accept any assistance by or interference from, separatists, racists, or supremacy groups,"¹³ fliers from hate groups began appearing days before the April 2005 event, and white-supremacist Web sites posted advertisements soliciting attendance at the event.¹⁴ Due in part to extensive advertising, the month-long border watch eventually attracted members of white-supremacist and neo-Nazi organizations.¹⁵ Well-recognized extremist posters were evident among the crowd, and undercover Southern Poverty Law Center workers reported being approached by members of white-supremacist organizations.¹⁶

In April 2005, three MMP volunteers detained a Mexican immigrant and forced him to pose for humiliating photos while the detained man held up a T-shirt that read, "Bryan Barton caught an illegal alien and all I got was this lousy T-shirt."¹⁷ The twenty-six-year-old Mexican immigrant, whose name was withheld but whose picture was released, recounted the incident to the U.S. Border Patrol and explained that "when he tried to get away, the volunteers

10. Raquel Aldana, *On Rights, Federal Citizenship, and the "Alien,"* 46 WASHBURN L.J. 263, 308 n.283 (2007).

11. See Mead, *supra* note 2 (chronicling the arrival of the MCDC in Long Island, New York).

12. Aldana, *supra* note 10, at 308 n.283.

13. *Id.* at 308 n.284.

14. *Id.*; Amy Argetsinger, *Immigration Opponents to Patrol U.S. Border; Rights Groups Condemn 'Minuteman' Protest*, WASH. POST, Mar. 31, 2005, at A3.

15. Southern Poverty Law Center, *Nazis, Racists Join Minuteman Project*, Apr. 22, 2005, <http://www.splcenter.org/intel/news/item.jsp?aid=13> [hereinafter *Nazis*].

16. *Nazis*, *supra* note 15. The film *Rights on the Line* chronicles the experience of American Civil Liberties Union legal observers who traveled to the Mexican border during the MMP's month-long border patrol mission. DVD: *Rights on the Line: Vigilantes at the Border* (American Civil Liberties Union 2006) [hereinafter *Rights on the Line*] (on file with author). The film also contains interviews with lawmakers, immigrants' rights activists, and MMP volunteers. *Id.* David Holthouse of the Southern Poverty Law Center infiltrated the MMP, and during an event a member of National Alliance (a white-supremacist organization) approached him to organize a "white power" patrol group within the MMP. *Id.*

17. *Immigrant Protests Border T-shirt Incident*, Apr. 7, 2005, <http://www.msnbc.msn.com/id/7424693> [hereinafter *Border T-shirt Incident*]; American Civil Liberties Union, *ACLU of Arizona Denounces Unlawful Imprisonment of Immigrants by Minuteman Volunteer*, Apr. 7, 2005, <http://www.aclu.org/immigrants/gen/11734prs20050407.html>.

ran in front of him and would not let him go by.”¹⁸ However, although the MMP volunteers documented the incident on videotape, local law enforcement authorities did not arrest or prosecute the MMP volunteers, determining that the men did not hold the immigrant against his will.¹⁹

Besides attracting national media attention, civilian border patrol groups have been successful in raising a large amount of revenue for their groups.²⁰ MMP founder Gilchrist is described as a very charismatic speaker and has proved to be a prolific fundraiser. For example, through HSP Direct, a direct-mail firm hired by Gilchrist, the MMP allegedly raised over \$750,000 in donations for the border project.²¹ But this figure cannot account for the group's total revenue, as it does not include any donations received through other channels.²²

Even with the existence of considerable financial backing and advertising, the MMP has not existed without turmoil. Simcox separated from Gilchrist in December 2005 over financial disagreements and formed the Minuteman Civil Defense Corps (MCDC).²³ This group appears to be more militant than the MMP, but nonetheless seems to follow the same tactics. Both groups purport only to observe undocumented immigrants, and the groups' posted policies advise volunteers not to initiate any physical contact.²⁴ Like the MMP, the MCDC encourages the use of concealed weapons, but has demonstrated enough media and legal savvy to publicly discourage members from taking rifles and shotguns to the

18. *Border T-shirt Incident*, *supra* note 17.

19. *Id.*

20. See Sonya Geis, *Minuteman Project in Turmoil over Financial Allegations; Leadership Fight Splits Border Group*, WASH. POST, Mar. 13, 2007, at A3 (detailing the allegations of fraud and financial improprieties that have caused much tension and many splits within the MMP).

21. *Id.*

22. See *id.* (mentioning only donations received through HSP Direct, although the MMP also requests donations at events and through its Web site); see also Minuteman Project—Official Web site, Join the Minuteman Project, <http://minutemanproject.com/organization/join.asp> (last visited Feb. 16, 2008).

23. *Board Members Take Over*, *supra* note 8; see also Rotstein, *supra* note 2.

24. MINUTEMAN CIVIL DEFENSE CORPS, VOLUNTEER TRAINING MANUAL 3-4 (2006), http://www.minutemanhq.com/pdf_files/training_manual2.pdf.

border.²⁵ However, video of the April 2005 border event shows numerous members flaunting their firearms.²⁶

In addition to its border patrol activities, the MCDC regularly conducts video surveillance of day laborer sites, including those that legally operate as recognized day labor centers.²⁷ The members of MCDC sit for hours outside various localities and videotape the activities of day laborers, potential employers, organizers, and passersby.²⁸

Recently, the MCDC has expanded its operations and now conducts "surveillance" outside of traditional immigrant areas.²⁹ Greg Thompson, training coordinator for the MCDC, stated that he photographs "people inside hospital emergency rooms" for apparently no other reason than to dissuade them from seeking medical attention.³⁰ Mr. Thompson stated, "I go in there and take pictures of them It makes them nervous."³¹ Video surveillance of persons the MCDC believes to be undocumented seems to be officially sanctioned by the MCDC.³² Russ Dove, a volunteer since 2005 from Tucson, Arizona, videotapes occurrences within polling stations in districts with a high percentage of people of color.³³ Mr. Dove conducts surveillance on the pretense of discouraging undocumented immigrants from voting, but does not offer any evidence that would

25. The MCDC has attempted to distance itself from the MMP and other civilian border patrol groups since several newspapers reported accusations of abuse made by immigrants' rights groups. Megan Feldman, *The Hunted: Minutemen Train Their Sights on a New Target: Hispanic Day Laborers*, DALLAS OBSERVER, Dec. 14, 2006. The MMP brandished weapons during their April 2005 "vigil." Rights on the Line, *supra* note 16.

26. Rights on the Line, *supra* note 16.

27. Day laborer organizations, including one in Garland, Texas, are housed in permanent buildings acquired for the purpose of helping "workers . . . set up centers providing legal, educational and health services, as well as set minimum hourly rates for skills such as painting, carpentry and drywall installation." Feldman, *supra* note 25.

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. See *id.* The MCDC official policy declares that ethnicity, race, and religion are irrelevant in the debate regarding immigration. The Minuteman Civil Defense Corps Border Operations Headquarter, The Minuteman Pledge, http://www.minutemanhq.com/hq/borderops_pledge.php (last visited Feb. 16, 2008). However, the MCDC's history suggests that it targets persons based on ethnicity, as the MCDC has no way of determining a person's immigration status. See, e.g., Feldman, *supra* note 25 (reporting that MCDC volunteers photograph people at day labor sites, where workers are predominately of Latin American descent but not necessarily undocumented, and in hospital emergency rooms, where a person's immigration status is impossible to determine on sight alone).

33. Rights on the Line, *supra* note 16.

lead one to suspect voter fraud in these areas.³⁴ Although the Minuteman groups are just two of several civilian border patrol groups, they encompass a wide spectrum of activity.

B. Ranch Rescue

Ranch Rescue describes itself as “a volunteer organization composed of people who . . . work[] to preserve and protect the individual private property rights of all our nation’s citizens.”³⁵ This organization purports to conduct its activities on private land and/or land that is leased from the state.³⁶ Moreover, Ranch Rescue claims to act solely with the consent of landowners.³⁷ The group, as well as its individual members—and in particular Roger Barnett—has received a significant amount of press coverage, mostly due to the organization’s aggressive tactics in detaining persons found near the border whether documented or not.³⁸

Roger Barnett, a former Cochise County, Arizona sheriff’s deputy and member of Ranch Rescue, is considered to be largely responsible for the emergence of civilian border patrols.³⁹ Barnett boasts to having detained more than 12,000 “illegal immigrants” since 1996 and has testified before Congress regarding immigration policy.⁴⁰ To further cement his self-appointed position as guardian of the U.S.-Mexico border, Mr. Barnett dresses in military attire with insignia resembling that of the U.S. Border Patrol.⁴¹ His attire and efforts in southern Arizona are well known and documented throughout the United States.⁴²

In 2003, Roger, Barbara, and Donald Barnett, members of Ranch Rescue, detained thirty adult and child immigrants at a ranch in Arizona.⁴³ The Barnetts were not on their own property, but instead detained the immigrants at a ranch belonging to the Summerland

34. *Id.*

35. Ranch Rescue USA mission statement, <http://www.ranchrescue.com/index.htm#missionstatement> (last visited Apr. 12, 2007).

36. Ranch Rescue Web site, *supra* note 6.

37. *Id.*

38. See, e.g., *Border Watcher Under Scrutiny*, *supra* note 4 (reporting that Mr. Barnett detained Mexican American hunters).

39. See Randal C. Archibold, *Immigrant Groups Sue to Curb Famous Civilian Border Guard/Lawsuits Allege Roger Barnett Has Illegally Detained Groups on His Land*, HOUSTON CHRON., Nov. 24, 2006, at A21 [hereinafter *Immigrant Groups Sue*].

40. *Activist Cleared of Trespassing*, *supra* note 3; *Border Watcher Under Scrutiny*, *supra* note 4.

41. *Border Watcher Under Scrutiny*, *supra* note 4.

42. *Activist Cleared of Trespassing*, *supra* note 3; *Border Watcher Under Scrutiny*, *supra* note 4.

43. *Activist Cleared of Trespassing*, *supra* note 3. The Barnetts were ultimately cleared of any trespassing allegations following a jury trial. *Id.*

Monastery.⁴⁴ The ranch caretaker stated that he left the immigrants in the Barnetts' care because they wore "law enforcement outfits" and he believed that they were U.S. Border Patrol agents.⁴⁵ In another incident, Roger Barnett allegedly held sixteen immigrants at gunpoint, threatened them with dogs, and kicked one of the women in the group.⁴⁶

On yet another occasion, Mr. Barnett used an assault rifle and racial epithets to threaten Mexican American hunters and the small children accompanying them.⁴⁷ Similar to the case of the MMP volunteers described above, both the Arizona attorney general and the Cochise County attorney declined to prosecute Mr. Barnett, citing lack of evidence.⁴⁸ In other incidents, as well, local law enforcement officials were contacted regarding Mr. Barnett's actions.⁴⁹ However, local officials declined to prosecute Mr. Barnett citing "lack of evidence or ambiguity about whether he had violated any laws."⁵⁰ Although no criminal prosecutions ensued, the hunters did file successful civil actions against Mr. Barnett.⁵¹ The issue proceeded to trial, and in an interview during a court break, Mr. Barnett stated that the civil suits brought against him would not dissuade his efforts.⁵²

Like Mr. Barnett, Casey Nethercott, a former leader of the Ranch Rescue group, held two Salvadoran immigrants against their will at gunpoint on a southern Arizona ranch.⁵³ The Salvadoran immigrants sued Mr. Nethercott and gained ownership of his ranch as a result.⁵⁴ Nonetheless, these rare instances of success in the judicial system are not the norm, as many more incidents of abuse on the border go unreported and unprosecuted.

44. *Id.*

45. *Id.* The defendants in this case claimed to have been on the property with the caretaker's consent. *Id.*

46. *Border Watcher Under Scrutiny*, *supra* note 4. An immigrants' rights group filed suits in federal court on behalf of the immigrants in this case and others against Mr. Barnett. *Id.*

47. *Id.* The hunters filed suit against Mr. Barnett and were awarded almost \$100,000 in damages by a jury. *Id.*

48. *See Border T-shirt Incident*, *supra* note 17; *Border Watcher Under Scrutiny*, *supra* note 4.

49. "Mr. Barnett has had several encounters with local law enforcement officials over detaining illegal immigrants, some of whom complained that he pointed guns at them." *Border Watcher Under Scrutiny*, *supra* note 4.

50. *Id.*

51. *See id.*

52. *Id.*

53. *Id.*

54. *Id.* Mr. Nethercott was also convicted of illegal gun possession due to this incident. *Id.*

III. LEGAL DOCTRINE

A. *Constitutional Protection of Foreign-Born Persons*

The members of the MMP, the MCDC, and Ranch Rescue would probably like the American public to believe that foreign, undocumented nationals are somehow a subset of persons without the civil rights and guarantees that people enjoy within U.S. borders. In this, they are wrong. The Supreme Court of the United States has clearly stated that the protections offered by the Fourteenth Amendment,⁵⁵ including the Equal Protection Clause, are equally applicable to all those present inside U.S. borders.⁵⁶ Additionally, the Court established that persons unauthorized to be present inside the United States “are protected by various provisions” of the Fourth,⁵⁷ Fifth,⁵⁸ and Sixth Amendments,⁵⁹ including the Due Process Clause.⁶⁰

Essentially, since the various states cannot classify persons subject to their own laws as exempt from these federal constitutional protections, undocumented immigrants physically present in the United States have been given access to the judicial system in order to dispute violations of their rights.⁶¹ In accordance with the line of

55. The Fourteenth Amendment requires that no state shall “deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” U.S. CONST. amend. XIV, § 1.

56. *Plyler v. Doe*, 457 U.S. 202, 213 (1982); see also Orde F. Kittrie, *Federalism, Deportation, and Crime Victims Afraid to Call the Police*, 91 IOWA L. REV. 1449, 1450 (2006) (“The Supreme Court regularly has rejected the proposition that a person’s unauthorized presence in the United States leaves that person without constitutional rights.”).

57. The Fourth Amendment protects against unreasonable search and seizure as well as warrantless arrest when no probable cause exists. U.S. CONST. amend. IV.

58. The Fifth Amendment protects against deprivations of “life, liberty, or property, without due process of law.” U.S. CONST. amend. V.

59. The Sixth Amendment applies in criminal prosecutions and requires that an accused receive “a speedy and public trial, by an impartial jury” and that he or she be “informed of the nature and cause of the accusation” and given the right to have assistance from counsel. U.S. CONST. amend. VI.

60. Kittrie, *supra* note 56, at 1459; see *Wong Wing v. United States*, 163 U.S. 228, 238 (1896) (holding that unauthorized aliens in the United States are protected by the Fifth, Sixth, Thirteenth, and Fourteenth Amendments, including the Equal Protection and Due Process Clauses). *But see INS v. Lopez-Mendoza*, 468 U.S. 1032, 1050 (1984) (holding that the exclusionary rule that is usually used as a deterrent to violations of the Fourth Amendment is not applicable in deportation proceedings, since these are considered civil, not criminal, matters). See also Lori A. Nessel, *Undocumented Immigrants in the Workplace: The Fallacy of Labor Protection and the Need for Reform*, 36 HARV. C.R.-C.L. L. REV. 345, 372 (2001).

61. *Plyler*, 457 U.S. at 230 (ruling that a Texas statute withholding funds from public schools due to the enrollment of undocumented children violated the Equal

Supreme Court decisions interpreting the constitutional rights of noncitizens, certain rights of undocumented migrants are protected once they cross the border and are physically present in the United States.⁶²

However, the rights of noncitizens, documented immigrants, and undocumented immigrants are afforded different levels of protection in the context of immigration law.⁶³ When it comes to undocumented immigrants detained at the border, the government is free to enforce its exclusion policy using summary procedures without due process constraints.⁶⁴ Additionally, courts have suggested that noncitizens arriving at the border for the first time may be excluded for any reason.⁶⁵ Nevertheless, this does not mean that noncitizens can be arbitrarily detained by the government. Reasonable suspicion must be present in order to justify stopping or detaining a person for the purpose of questioning his immigration status.⁶⁶ Thus, although a person seen crossing the border could be stopped and questioned immediately, reasonable suspicion is necessary at any other time.⁶⁷

The constitutional protections of undocumented immigrants change favorably once they enter the United States.⁶⁸ Noncitizens receive a greater level of constitutional protection "when they have established significant ties to the United States."⁶⁹ Furthermore,

Protection Clause of the Fourteenth Amendment). See generally AUSTIN T. FRAGOMEN, JR. & STEVEN C. BELL, *IMMIGRATION FUNDAMENTALS: A GUIDE TO LAW AND PRACTICE* § 9 (4th ed. 1996). Access to courts, both state and federal, depends on the court's jurisdiction and is generally contingent on physical presence or on service of process. *Id.*

62. See, e.g., *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886) (holding that the Fourteenth Amendment is applicable to all persons inside the territorial jurisdiction of the United States); *Wong Wing*, 163 U.S. at 238 (holding that undocumented immigrants are protected by the Fifth and Sixth Amendments); *Plyler*, 457 U.S. at 230 (holding that undocumented children could not be deprived of a public school education).

63. See Adam B. Cox & Eric A. Posner, *The Second-Order Structure of Immigration Law*, 59 STAN. L. REV. 809, 822 (2007).

64. *Id.*

65. Courts have suggested that exclusion at the border on the basis of ordinarily suspect grounds such as race would be permissible. *Id.* (citing *Chae Chan Ping v. United States*, 130 U.S. 581 (1889)).

66. "The Court in *Brignoni-Ponce* stated that 'the Fourth Amendment . . . forbids stopping or detaining persons for questioning about their citizenship on less than a reasonable suspicion . . .'" *Kittrie*, *supra* note 56, at 1461 (citing *United States v. Brignoni-Ponce*, 422 U.S. 873, 884 (1975)).

67. *Id.* at 1462 (noting the Constitution protects aliens from being "fair game" for relentless immigration enforcement).

68. See Cox & Posner, *supra* note 63, at 823.

69. *Id.*

constitutional protections apply more robustly to lawful residents.⁷⁰ Outside of the immigration context, lawful residents receive almost all of the protections guaranteed to U.S. citizens.⁷¹ Even within the immigration context, lawful residents receive a heightened level of constitutional security in comparison to undocumented immigrants.⁷² For example, unlike undocumented migrants detained at the border, the Due Process Clause prohibits expedited removal proceedings in the cases of lawful residents.⁷³

The distinction between immigrants apprehended at a border, undocumented immigrants within U.S. territory, and lawful residents is significant for two reasons. First, contrary to migrants detained at the border, questioning of immigrants within the United States regarding their immigration status must be preceded by reasonable suspicion.⁷⁴ Second, civilian border patrol groups are not just targeting undocumented migrants at the border.⁷⁵ They have expanded their operation to include persons of varying immigration status.⁷⁶ Therefore, immigrants' rights activists seeking to redress a constitutional violation must take into consideration the level of protection afforded to the client.

B. Can Civilian Border Patrol Groups Violate Constitutional Protections?

Now that the argument that noncitizens have constitutional protections has been presented, the consequences and privileges associated with those protections will be examined. The Constitution was designed to protect against government action and "erects no shield against merely private conduct, however discriminatory or wrongful."⁷⁷ Nevertheless, the Supreme Court of the United States

70. *Id.* at 823-24.

71. *See id.*

72. *Id.*

73. *Id.* at 823.

74. Kittrie, *supra* note 56, at 1462.

75. *See* Mead, *supra* note 2 (discussing an MCDC chapter active in New York).

76. MCDC, MMP, and Ranch Rescue volunteers have targeted persons who have been confirmed to be citizens of the United States or whose immigration status is unknown, such as persons at voting stations or in hospital emergency rooms. *See* Feldman, *supra* note 25; *see also* Rights on the Line, *supra* note 16; *Border Watcher Under Scrutiny*, *supra* note 4.

77. *Shelley v. Kraemer*, 334 U.S. 1, 13 (1948). In *Shelley*, a husband and wife were seeking to enforce a restrictive covenant against occupancy or ownership of property by African Americans. *Id.* at 4-6. The Court held that such an action would violate the Equal Protection Clause of the Fourteenth Amendment due to the fact that state courts would need to enforce the covenants. *Id.* at 20. Such enforcement would bring the private activity within the "state action" that the Constitution was designed to protect. *Id.* at 23.

has held "[c]onduct that is formally 'private' may become so entwined with governmental policies or so impregnated with a governmental character as to become subject to the constitutional limitations placed upon state action."⁷⁸ The conduct at issue here has become so "entwined with governmental policies" and so "impregnated with a governmental character" that civilian border patrol groups should be held liable not only for emotional distress, false imprisonment, assault, and other intentional torts, but also for the deprivations of constitutional rights they have caused.⁷⁹

1. What Activities Constitute State Action

When determining whether a private actor must comply with the requirements of the Constitution, courts examine the circumstances as a whole and weigh all of the relevant facts in the context in which they occurred.⁸⁰ The courts have not provided exact parameters within which to measure state action. Therefore, the question of whether a private actor has usurped the role of the state is very fact sensitive.⁸¹ Even so, the Supreme Court clarified that "state action [is] present in the exercise by a private entity of powers traditionally exclusively reserved to the State."⁸²

78. *Evans v. Newton*, 382 U.S. 296, 299 (1966) (holding that segregation in city park violated the Fourteenth Amendment where grantor's will stipulated that the land was to be used for the enjoyment of whites only, even if a private entity became trustee in lieu of the city); *see also* *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 724-26 (1961) (holding that the exclusion of a person solely because of his race from a restaurant operated by a private owner but leased from a Delaware state agency, was discriminatory state action that violated of the Equal Protection Clause of the Fourteenth Amendment); *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288 (2001) (holding that association's regulatory enforcement action was "state action" within the context of a Fourteenth Amendment analysis because there was a close nexus between the state and the organization's challenged action); *Griffin v. Maryland*, 378 U.S. 130, 135-37 (1964) (holding that a private amusement park violated the Equal Protection Clause of the Fourteenth Amendment because it employed, under contract, a deputized sheriff to ensure that a racial segregation policy that excluded African Americans from the park was enforced); *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 179 (1972) (holding that a private business's refusal to serve a person because of his race constituted state action due to the state liquor board's requirement that the club enforce its own racially discriminatory policy).

79. *Evans*, 382 U.S. at 299.

80. *See* *Burton*, 365 U.S. at 722 ("Only by sifting facts and weighing circumstances can the nonobvious involvement of the state in private conduct be attributed its true significance.").

81. *Id.* at 722 (finding that there is no "precise formula for recognition of state responsibility under the Equal Protection Clause").

82. *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 352 (1974); *see also* *Nixon v. Condon*, 286 U.S. 73 (1932) (election); *Terry v. Adams*, 345 U.S. 461 (1953) (election); *Marsh v. Alabama*, 326 U.S. 501, 507-08 (1946) (finding violation of First Amendment rights when company town prohibited distribution of religious literature on its land).

In addition, the public function doctrine classifies the actions of private citizens and takes into consideration the feature of exclusivity when determining how to do so.⁸³ The requirement of exclusivity dictated by the public function doctrine spells out further the distinction between private action and state action.⁸⁴ The doctrine maintains that “[w]hile many functions have been traditionally performed by governments, very few have been ‘exclusively reserved to the State.’”⁸⁵ In following precedent and the exclusivity doctrine, an individual may bring a suit against a private entity for constitutional violations if that entity is exercising some power reserved exclusively for the state.⁸⁶

As far as law enforcement and detention are concerned, the Supreme Court has long recognized that the power and the duty to “preserve the peace and to protect the privacy, the lives, and the property of its residents” lies with the state.⁸⁷ Although the Constitution grants persons within U.S. borders the right to “bear arms” and to be free from government infringement when doing so,⁸⁸ the power to police its citizens has always been the domain of the state.

In keeping with this tradition, the Immigration and Nationality Act (INA) gives the secretary of the Department of Homeland Security “the power and duty to control and guard the boundaries and borders of the United States against the illegal entry of aliens and shall, in his discretion, appoint for that purpose such number of employees of the Service as to him shall appear necessary and proper.”⁸⁹ The INA grants to the Department of Homeland Security the exclusive authority to patrol U.S. borders.⁹⁰ The attorney general must expressly grant authority to any other entity or agency that wishes to enforce U.S. customs and immigration laws.⁹¹ Aside from

83. *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 159 (1978).

84. *Id.* at 158.

85. *Id.* (holding that absent charges of participation by public officials, a warehouseman’s private sale of goods handed over to him for storage by an individual was not “state action” as required for a federal civil rights cause of action).

86. *Jackson*, 419 U.S. at 353.

87. *Thornhill v. Alabama*, 310 U.S. 88, 105 (1940).

88. “A well regulated militia, being necessary to the security of a free state, the right of the people to keep and bear arms, shall not be infringed.” U.S. CONST. amend. II.

89. 8 U.S.C. § 1103(a)(5) (2006).

90. *See id.*

91. *Id.* § 1103(a)(10) (limiting this authority to situations when “an actual or imminent mass influx of aliens arriving . . . near a land border[] presents urgent circumstances requiring an immediate Federal response”). The U.S. Customs and Border Protection is an agency within the Department of Homeland Security. U.S. Customs and Border Protection, This is CBP, <http://www.cbp.gov/xp/cgov/about/>

the explicit grant of power outlined in the INA, this additional responsibility to grant authority to others, vested in the attorney general, is further evidence that guarding U.S. borders is an activity that is exclusively reserved to the Department of Homeland Security.⁹² Therefore, any other entity that takes it upon itself to patrol the nation's borders is intruding into the federal government's—specifically the Department of Homeland Security's—exclusive duty.

2. State Action is Present in the Private Activities of Civilian Border Patrol Groups

As in the civil rights cases of the mid-twentieth century, private actors are covering themselves in the cloak of government action whenever it suits them.⁹³ While the groups spin themselves as civilian volunteer organizations⁹⁴ when describing their activities to the media, their actions indicate a desire to be perceived as official border guardians.

The Minuteman groups, as well as Ranch Rescue, purporting to be a second level of defense that secures the national border from “invasion,”⁹⁵ make a concerted attempt to engage in official state activity. They patrol the border (sometimes even entering private property), question individuals, make detentions, carry weapons, and attempt to determine whether individuals are documented.⁹⁶ Additionally, their members make a conscious effort to resemble U.S. Customs and U.S. Border Patrol agents by wearing military attire that bears similar insignia.⁹⁷

mission/cbp_is.xml (last visited May 9, 2008). Additionally, the U.S. Customs and Border Protection reports that it protects 6900 miles of land border that the United States shares with Canada and Mexico, as well as 95,000 miles of shoreline. U.S. CUSTOMS & BORDER PROTECTION, CBP: SECURING AMERICA'S BORDERS (2006), http://www.cbp.gov/linkhandler/cgov/newsroom/publications/mission/cbp_securing_borders.ctt/cbp_securing_borders.pdf

92. See 8 U.S.C. § 1103(a)(1), (10).

93. See, e.g., *Griffin v. Maryland*, 378 U.S. 130 (1964); see also *Burton v. Wilmington Parking Auth.*, 365 U.S. 715 (1961).

94. See *supra* note 6.

95. See Minuteman Project, About Jim Gilchrist, http://www.minutemanproject.com/organization/about_us.asp (last visited May 9, 2008); *Board Members Take Over*, *supra* note 8.

96. An additional problem with making such determinations is that civilian border patrols are not trained to detect or investigate individuals' immigration status, and therefore have a higher probability of error.

97. “Mr. Barnett [is] known for dressing in military garb and caps with insignia resembling the United States Border Patrol's . . .” *Border Watcher Under Scrutiny*, *supra* note 4.

Further, common sense dictates that the individuals that patrol the border should be aware that most, if not all, persons crossing the border do not speak English. By using such uniforms, civilian border patrol members take advantage of ignorance of the English language and/or U.S. government uniforms in order to confuse migrants, while at the same time protecting themselves from committing outright imposture. In fact, native residents as well as border crossers could easily confuse civilian border patrol volunteers wearing military attire with an insignia comparable to that of the U.S. Border Patrol with actual U.S. Border Patrol agents.⁹⁸

Additional evidence that civilian border patrol volunteers are trying to give the appearance of official conduct is the fact that they carry both concealed and clearly visible weapons in an effort to intimidate migrants by making a display of strength.⁹⁹ Further, civilian border patrol groups customarily use loud speakers, as does the U.S. Border Patrol.¹⁰⁰ In every facet of their organization, civilian groups make efforts that would obviously lead others to perceive them as law enforcement agents.

These groups have taken it upon themselves to police U.S. borders, which has always been a function of the federal government and should remain as such.¹⁰¹ But if these organizations are going to forcefully institute themselves as an extension of the U.S. Border Patrol, they should be held liable for violations of constitutional rights like other government entities. The consequences of such a finding will be discussed further.¹⁰²

*C. Civilian Patrol Groups are Acting as Agents or
Instrumentalities of Government*

In the sections above, this Note examines whether civilian border patrol groups are, as private actors, engaging in an activity that is exclusively reserved for the state. Consider another alternative: whether civilian border patrol groups are not acting in their capacity as private citizens, but are instead functioning as agents or instrumentalities of government.

When a civilian assisting law enforcement interferes with an individual's constitutional rights, the law enforcement agency is

98. See *Activist Cleared of Trespassing*, *supra* note 3.

99. Rights on the Line, *supra* note 16. Most MMP volunteers depicted in the documentary had at least one weapon, and several carried handguns as well as hunting rifles and shotguns. *Id.*

100. *Id.*

101. 8 U.S.C. § 1103 (2006); *Wong Wing v. United States*, 163 U.S. 228, 231 (1896) (stating that Congress has the power to exclude and expel individuals and classes of people from the United States).

102. See *infra* text accompanying notes 145-57.

accountable for the actions of that individual.¹⁰³ The courts will determine whether a private citizen is acting as an instrument or agent of government, and if he or she is acting as such, the civilian will not be permitted to engage in constitutional abuses for the benefit of law enforcement.¹⁰⁴

In deciding whether a private citizen is acting as an instrument or agent of government, courts must look at the actions of the government agency and the intent of the private citizen.¹⁰⁵ Private citizens may be acting as agents or instruments of government for Fourth Amendment purposes if the government has exhibited knowledge or acquiescence of the private citizen's actions, and the private citizen has performed a search or seizure for the sole purpose of assisting the government agent or agency.¹⁰⁶

In the case of *United States v. Walther*, the United States Court of Appeals for the Ninth Circuit granted a defendant's motion to suppress evidence after an illegal search by an airline employee because "[t]he DEA . . . had knowledge of a particular pattern of search activity [being conducted by a private citizen], dealing with a specific category of cargo, and had acquiesced in such activity."¹⁰⁷ The DEA did not instruct the private individual to perform this particular search, but the agency's acquiescence and direct or indirect encouragement of such activity in the past was sufficient for the court to determine that the airline employee was acting as a DEA agent.¹⁰⁸

Further, the Court of Appeals for the First Circuit observed that:

[A] party is subject to the fourth amendment only when he or she has formed the necessary intent to assist in the government's investigative or administrative functions . . . [h]owever, under this test, the fourth amendment will not apply

103. See *United States v. Walther*, 652 F.2d 788, 792 (9th Cir. 1981) (affirming lower court's decision granting motion to suppress evidence, a tool used to deter law enforcement officials from violating the Fourth Amendment, due to the actions of a civilian).

104. *Id.* at 790, 792.

105. *Id.* (holding that the defendant's Fourth Amendment right against unreasonable searches and seizures was violated when an airline employee acted as a government agent by opening the defendant's luggage with the sole expectation the he would receive a reward if it contained illegal drugs and a DEA agent confirmed that the expectation was reasonable, and though the DEA had no prior knowledge of this specific search and had not directed the airline employee to perform the search, the agency had encouraged the employee to engage in such activity in the past and did not discourage the employee from performing such searches).

106. *Id.* (listing standard of review for determining if a private citizen is acting as a government agent).

107. *Id.* at 793.

108. *Id.*

when the private party was acting for a reason that is independent of such a governmental purpose.¹⁰⁹

Additionally, the Court of Appeals for the Tenth Circuit also held that the application of the Fourth Amendment is triggered when the police affirmatively encourage, instigate, orchestrate, or exceed the scope of a private search.¹¹⁰ In *United States v. Smythe*, the Tenth Circuit held that when there is a history of conducting such activity and the police are aware or encourage the propensity to engage in constitutionally prohibited activity, the private citizen is acting as an agent or instrument of law enforcement.¹¹¹ In *Smythe*, unlike in *Walther*, the private citizen single-handedly decided to open a package for his own protection and not as an attempt to assist in an investigation, which gave a clear indication that he was not acting as an instrumentality of government.¹¹²

The actions of civilian border patrol groups instantly provoke the opposite conclusion. Not only are the members of civilian border

109. *United States v. Pervaz*, 118 F.3d 1, 6 (1st Cir. 1997) (quoting *United States v. Attonson*, 900 F.2d 1427, 1433 (9th Cir. 1990)) (holding that cellular telephone company employees were not acting as agents or instrumentalities of government when the employees tracked radio frequency of a cloned cellular telephone because the employees were acting for the purpose of obtaining a profit and not to assist law enforcement).

110. *United States v. Smythe*, 84 F.3d 1240, 1243 (10th Cir. 1996) (holding that a bus station owner was not acting as an agent or instrumentality of law enforcement when he searched a package because he had a legitimate, independent motive for searching the package and was not acting with the sole purpose of assisting law enforcement).

111. *Id.*

While a certain degree of governmental participation is necessary before a private citizen is transformed into an agent of the state, *de minimis* or incidental contacts between the citizen and law enforcement agents prior to or during the course of a search or seizure will not subject the search to fourth amendment scrutiny.

Id. (quoting *Walther*, 652 F.2d at 791) (holding *Smythe* was not an agent or instrumentality of law enforcement because he did not have a propensity to engage in constitutionally prohibited activities nor did agents of law enforcement encourage such activity).

112. *Id.* at 1242.

Once at the bus station, Sergeant Walker [the officer] informed Mr. McCartney [the bus station owner] that he, Sergeant Walker, believed that Mr. McCartney could open the package but that he, Sergeant Walker, could not. Sergeant Walker never touched the package, did not assist, ask or otherwise encourage Mr. McCartney to open the package and stepped away as Mr. McCartney opened the package. Mr. McCartney testified that the decision to open the package was entirely his [and] that he was not acting at the request or as an agent of the police in opening the package and that he would have opened the package regardless of whether the police responded to his call.

Id. (citations omitted).

patrol groups conducting themselves as agents of the U.S. government, but law enforcement agencies, the agents themselves, and several legislators have also given the groups recognition beyond that which is usually bestowed upon concerned citizens.¹¹³

Although a few law enforcement officials have expressed concerns that the MMP project will lead to vigilante violence, local law enforcement agencies have declined to prosecute such violence when it has occurred, and the U.S. Border Patrol has yet to make any significant efforts to combat vigilante violence.¹¹⁴ The U.S. Border Patrol has limited itself to issuing statements that some immigrants' rights activists may interpret as hollow warnings. For example, spokesman for the Tucson, Arizona office declared that it maintains no formal relationship with civilian groups, and agency commanders have warned the groups "not to take the law into their [own] hands."¹¹⁵ Even though the official response is to publicly express concern about civilian border patrols, numerous individual agents stated that they "welcome" the groups.¹¹⁶ Furthermore, in light of the highly publicized activities of civilian border patrol groups, the U.S. Border Patrol has not taken any direct action to curb their activities.

Moreover, the MMP even received support and praise from Border Patrol Union Local 2544.¹¹⁷ Aside from vocalizing support, U.S. Border Patrol agents are said to have requested assistance from MMP volunteers.¹¹⁸ For example, J.T. Ready, an MMP volunteer, gave a detailed account in the documentary *Rights on the Line: Vigilantes at the Border*, of how an agent asked him to assist in detaining two immigrants.¹¹⁹

Further, civilian border patrol groups have received support from legislators.¹²⁰ On May 24, 2006, Representative Virgil H. Goode, Jr., a Republican from Virginia, sponsored a resolution along with thirty other congressional representatives, including members representing states as far north as New Jersey and Pennsylvania, in an attempt to give "official" recognition to the work of civilian patrol

113. See *Border Project Declared Success*, *supra* note 3; *Minuteman Vigil*, *supra* note 5 (discussing Tucson Local 2544, a union of U.S. Border Patrol agents in Arizona that supports the MMP); H.R. Res. 839, 109th Cong. (2006) (praising the work of the MMP).

114. See *Border T-shirt Incident*, *supra* note 17.

115. *Border Watcher Under Scrutiny*, *supra* note 4 (statement by Chuy Rodriguez).

116. See Jerry Seper, *Border Vigil Rescues Ill Alien: Mexican Illegal is Repatriated*, WASH. TIMES, Apr. 4, 2005, at A1 [hereinafter *Border Vigil*].

117. See *Minuteman Vigil*, *supra* note 5, at 1.

118. *Rights on the Line*, *supra* note 16.

119. *Id.*

120. See *infra* text accompanying notes 121-125.

groups.¹²¹ The representatives were seeking to “[e]xpress[] the sense of the House of Representatives that officers of the Department of Homeland Security should not undermine the efforts of citizen groups such as the Minuteman Project to preserve the integrity of the borders of the United States and protect the Nation from intrusion.”¹²² Additionally, Representative John J. Duncan, Jr., a Tennessee Republican, is exceptionally vocal about his support and satisfaction with the MMP.¹²³ Representative Joseph Sweeney, an Arizona Republican and MMP volunteer since 2005, is obviously supportive of civilian border patrol efforts, as indicated by his membership in the group.¹²⁴ Even California Governor Arnold Schwarzenegger at one point invited the MMP to the Mexican border in his home state.¹²⁵

On the opposite side of the legislative spectrum, Arizona Representative Kyrsten Sinema, a Democrat, introduced a state bill that would allow prosecution for certain actions by armed civil patrols as acts of domestic terrorism.¹²⁶ The bill introduced by Representative Sinema did not receive the level of legislative support extended to the Goode bill.¹²⁷ In fact, in contrast to bills supporting civilian border patrol groups on the federal level, Representative Sinema’s bill has not even received a committee hearing.¹²⁸

As noted above, the two prongs of the agent or instrumentality of government test appear to be satisfied in this situation. First, the

121. H.R. Res. 839, 109th Cong. (2006). This resolution was cosponsored by Todd W. Akin (R-MO), Gresham Barrett (R-SC), Roscoe G. Bartlett (R-MD), Dan Burton (R-IN), John R. Carter (R-TX), Barbara Cubin (R-WY), John Abney Culberson (R-TX), Nathan Deal (R-GA), John T. Doolittle (R-CA), Tom Feeney (R-FL), Virginia Foxx (R-NC), Scott Garrett (R-NJ), Phil Gingrey (R-GA), John N. Hostettler (R-IN), Sam Johnson (R-TX), Walter B. Jones, Jr. (R-NC), Ric Keller (R-FL), Steve King (R-IA), Kenny Marchant (R-TX), Marilyn N. Musgrave (R-CO), Sue Myrick (R-NC), Ron Paul (R-TX), Joseph R. Pitts (R-PA), Tom Price (R-GA), Dana Rohrabacher (R-CA), John Sullivan (R-OK), Thomas G. Tancredo (R-CO), Zach Wamp (R-TN), Dave Weldon (R-FL), and Lynn A. Westmoreland (R-GA).

122. *Id.*

123. Congressman John J. Duncan, Jr. Homepage, E-Newsletter: The Minuteman Project, June 6, 2005, <http://www.house.gov/duncan/2005/en060605.htm>.

124. See Rights on the Line, *supra* note 16.

125. *Id.*; Jill Stewart, *Splitting the Difference at the Border*, N.Y. TIMES, July 31, 2006, at A17. Governor Schwarzenegger eventually expressed regret over his praise for civilian border patrols.

126. In addition to the lack of support, Representative Sinema has received threatening e-mails due to her opposition to the MMP. *Anti-Minuteman Arizona Lawmaker Reports Sexual Threats*, USA TODAY, Jan. 23, 2007, http://www.usatoday.com/news/nation/2007-01-23-border-threats_x.htm (last visited Feb. 16, 2008).

127. *Id.*

128. *Id.*

express intent of civilian border patrol groups is to assist the federal government in border patrol operations.¹²⁹ Second, the U.S. Border Patrol has acquiesced to the groups' activity at times and encouraged such activity at other times.¹³⁰ Furthermore, civilian border patrol groups have received extensive encouragement from Congress.¹³¹

D. *Constitutional and Civil Rights Violations*

If civilian border patrol groups are engaging in state action or acting as agents or instrumentalities of government, the question follows: What, if any, constitutionally protected rights are these organizations violating? Although the answer to this question is somewhat unknown, since fear of deportation prevents most migrants from coming forward with accusations,¹³² the following are some examples.

1. *Illegal Searches and Seizures by Civilian Border Patrol Groups*

The Fourth Amendment of the United States Constitution states:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.¹³³

As described above, courts have held that when the government uses a private citizen to attempt to circumscribe the protections afforded individuals, the government will be held responsible for the actions of the private citizens.¹³⁴ In *Walther*, the defendant's motion to suppress evidence was granted because a private citizen acting with the encouragement of law enforcement violated the defendant's Fourth Amendment rights.¹³⁵ The court reasoned that the DEA's encouragement and acceptance of an airline employee's custom of searching passengers' luggage transformed the private citizen into a

129. See *supra* text accompanying notes 93-100.

130. See *supra* text accompanying notes 114-19.

131. See *supra* text accompanying notes 120-25.

132. Vigilantes at the Mexican border abuse undocumented immigrants because the vigilantes are aware that the fear of deportation will dissuade those abused from testifying. Kittrie, *supra* note 56, at 1452-53.

133. U.S. CONST. amend. IV.

134. See, e.g., *United States v. Walther*, 652 F.2d 788, 792 (9th Cir. 1981); see also *United States v. Pervaz*, 118 F.3d 1, 5-6 (1st Cir. 1997); *United States v. Smythe*, 84 F.3d 1240, 1243 (10th Cir. 1996).

135. *Walther*, 652 F.2d at 792.

government agent, and thus his actions were restricted by the Fourth Amendment's guarantee of protection from unreasonable searches and seizures.¹³⁶ As noted above, this protection extends to noncitizens, with the exception of those detained at the border.¹³⁷

The recognition of migrants' right to be free from unreasonable searches and seizures will not be very helpful during deportation proceedings¹³⁸ because these are civil proceedings where the suppression of evidence works differently than in the criminal proceedings described in *Walther*.¹³⁹ However, once the courts recognize that members of civilian border patrols are agents or instrumentalities of law enforcement for purposes of the Fourth Amendment, they should extend that reasoning to causes of actions involving civil rights violations. Doing so might encourage the federal government, due to its requirement to uphold constitutional rights and the potential economic consequences of civil rights actions, to reign in the members of these groups.

2. Interference With Constitutionally Recognized Rights

Courts recognize that law enforcement officers cannot use intimidation to interfere with constitutional rights.¹⁴⁰ "Moreover, even legitimate . . . activities, if undertaken in conjunction with illegitimate activities in a manner which raises the inference that the motive was intimidation or coercion, would be subject to challenge."¹⁴¹ Therefore, a law enforcement agency could be held liable for civil rights violations if a plaintiff can prove that the actions of law enforcement—or its agents or instrumentalities—were undertaken for the sole purpose of intimidation.¹⁴²

As described above, MCDC volunteers not only patrol the borders, but they also engage in "surveillance" of voting polls and hospital emergency rooms.¹⁴³ By monitoring voting polls and accosting voters, they are interfering with the constitutionally

136. *Id.*

137. Kittrie, *supra* note 56, at 1461-63.

138. 25 EDWARD K. ESPING ET AL., OHIO JUR. 3D *Criminal Law* § 122 (2006) ("Illegally seized evidence, however, may be used in grand jury proceedings, in deportation proceedings, and in civil tax proceedings.").

139. See *supra* text accompanying notes 103-09.

140. See *Berlin Democratic Club v. Rumsfeld*, 410 F. Supp. 144, 151 (D.D.C. 1976) (holding persons could bring an action against army officials based on supposedly illegal opening of mail, electronic surveillance, organizational infiltration, and additional allegations of harassment and intimidation and could recover for violations of First and Sixth Amendment rights).

141. *Id.*

142. See *id.*

143. See *supra* text accompanying notes 29-34.

protected right to vote. Civilian border patrol volunteers have admitted to their attempts to intimidate voters and discourage them from participating in the democratic process.¹⁴⁴ One might even argue that they are interfering with the Constitution's protection of life and liberty by hindering access to urgent medical care.

E. Methods for Deterring Violations

A few reported cases of violence and illegal detention in the hands of civilian border patrol groups have led to civil suits against members of such groups.¹⁴⁵ However, the plaintiffs in these cases brought causes of action against individual members of civilian border patrol groups and not against the organizations themselves.¹⁴⁶ Additionally, these suits led to relatively low damage awards and do not seem to have deterred the occurrence of violence and illegal detention at the border.¹⁴⁷ The low damage awards may be due to the anti-immigrant sentiments extant within the areas in which the civilian patrol groups operate. This trend could be reduced by moving the civil suits from state to federal courts and by holding civilian patrol groups liable for violations of migrants' constitutional and federally protected rights. The burden of curtailing illegal actions would then shift from the individuals to the organizations.

1. Widen Causes of Action Available Against Civilian Border Patrol Groups

If courts were to find that members of civilian border patrol groups were engaging in state action, logic would dictate that such groups could not implement tactics with the sole purpose of interfering with constitutional rights. Section 1983 provides a cause of action where a person acting under color of state law "subjects, or causes to be subjected," any other person to a deprivation of rights secured by the Constitution and laws of the United States.¹⁴⁸ Any entity engaging in deprivation of rights protected under § 1983 is "liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."¹⁴⁹ Civilians who violate a person's

144. See *supra* text accompanying note 34.

145. See *supra* Part II.

146. See, e.g., *Border Watcher Under Scrutiny*, *supra* note 4.

147. *Id.* Mexican American hunters brought a suit against Roger Barnett for unlawful detention, emotional distress, and other claims and sought \$200,000 in damages. After a jury trial, the hunters were awarded \$98,750 in damages. *Id.*

148. 42 U.S.C. § 1983 (2006).

149. *Id.*

constitutional rights while acting under color of law should be held liable under § 1983.¹⁵⁰

The state of mind needed for liability under § 1983 varies among circuits.¹⁵¹ Most courts use the recklessness, deliberate indifference, or callous indifference test.¹⁵² Under this standard, which is usually the highest of the standards applied in these cases, a plaintiff must establish that "the defendant intentionally or recklessly deprived him of a constitutional right."¹⁵³ Given the level of press coverage and the willingness of civilian border patrol volunteers and organizers to express their anti-immigrant animus, any reasonable person would see that the actions of these groups are completely intentional.

Such deprivation may occur in search and seizure cases where an arresting officer lacks probable cause for a person's arrest or when an officer does not make reasonable efforts to identify the place to be searched.¹⁵⁴ As described above, civilian border patrol groups are detaining both documented and undocumented individuals, as well as U.S. citizens, without probable cause.¹⁵⁵ They have admitted to targeting people without knowledge or an indicator of immigration status, since, unlike law enforcement agents, they are not properly trained to engage in immigration law enforcement.¹⁵⁶ These actions could be reasonably interpreted as violations of constitutional rights under § 1983. Additionally, § 1983 would apply in instances where the rights to free speech, travel, and privacy, among others, are violated.¹⁵⁷

2. Extend Liability of Actions of Civilian Border Patrols to Governmental Agencies

Once federal courts recognize that civilian border patrol groups are acting as agents or instrumentalities of government, many other possible causes of action arise. The Supreme Court held that a governmental agency may be found liable of constitutional violations

150. See John R. Williams, *Representing Plaintiffs In Civil Rights Litigation Under Section 1983*, in 15TH ANNUAL SECTION 1983 CIVIL RIGHTS LITIGATION, at 127, 469-72 (PLI Litig. & Admin. Practice, Course Handbook Series No. 619, 1999).

151. *Id.* at 154-59.

152. *Id.* at 154 (most courts require a standard somewhere between negligence but lower than malicious or intentional violations); see, e.g., *Mosley v. Wilson*, 102 F.3d 85, 94-95 (3d Cir. 1996) (holding that deliberate indifference was a stringent standard in Fourth Amendment cases).

153. Williams, *supra* note 150, at 154.

154. *Id.* at 292-93 (citing *Hartsfield v. Lemacks*, 50 F.3d 950 (11th Cir. 1995); *Navarro v. Barthel*, 952 F.2d 331 (9th Cir. 1991)).

155. See *supra* Part II.

156. See *supra* note 32.

157. See generally Williams, *supra* note 150.

committed by its members or subordinates if the violations occurred with "such frequency that they cannot be dismissed as rare, isolated instances."¹⁵⁸ In the case of civilian border patrol groups, the frequency of the occurrences cannot be ignored. One Ranch Rescue volunteer boasts to having detained 12,000 migrants attempting to cross the border.¹⁵⁹ Two MMP volunteers live full-time on the border when the smuggling season is slow,¹⁶⁰ and that does not include the continuous flow of volunteers that visit the border on a temporary basis. As detailed above, law enforcement is well aware of the frequency of these occurrences.¹⁶¹

More importantly, civilian border patrol groups will be restricted by governmental regulations that are already in place as constitutional safeguards. For example, U.S. immigration authorities have rules restricting interrogation and arrest policies, which safeguard against violations of the Fourth Amendment.¹⁶² Immigration regulations require that persons should not be detained without reasonable suspicion of their illegal status.¹⁶³ Further, no one can be arrested unless there is strong evidence or an admission that the person is an undocumented immigrant.¹⁶⁴ Immigration authorities assert that they encourage adherence to regulations by requiring that immigration officers periodically attend courses in Fourth Amendment law.¹⁶⁵ The existence of these rules supports the view that, at least on paper, immigration authorities aim to respect the rights of all those present on U.S. soil. If violations of constitutionally protected rights committed by civilian border patrol groups become attributable to immigration authorities, such

158. *Rizzo v. Goode*, 423 U.S. 362, 386 (1976). The Court in *Rizzo* found for the defendants because:

In the instant case, the District Court found that although there was no departmental policy of racial discrimination, "such violations do occur, with such frequency that they cannot be dismissed as rare, isolated instances; and that little or nothing is done by the city authorities to punish such infractions, or to prevent their recurrence.

Id. at 386 (quoting Council of Org. on Philadelphia Police Accountability & Responsibility v. *Rizzo*, 357 F. Supp. 1289, 1319 (E.D. Pa. 1973)).

159. *Border Watcher Under Scrutiny*, *supra* note 4.

160. "[T]here are only two full-timers [Britt Craig and Robert Cook] living on this 10-mile stretch of the 2,000-mile border now that the smuggling season is slow, the temperatures are blistering and the news media have gone to other distractions." Charlie LeDuff, *Poised Against Incursions, a Man on the Border, Armed and Philosophical*, N.Y. TIMES, Aug. 14, 2006, at A16.

161. See *supra* text accompanying notes 114-19.

162. See *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1044-45 (1984).

163. *Id.*

164. *Id.* at 1045.

165. *Id.*

authorities would have an incentive to curb the actions of these groups.

Some proponents of immigrants' rights suggest that courts should consider that civilian border patrol volunteers are acting as government agents, and thus the federal government should be held accountable under the Federal Tort Claims Act.¹⁶⁶ However, the Federal Tort Claims Act applies exclusively to claims for injuries suffered as the result of negligence on the part of government employees and excludes claims arising out of several enumerated torts.¹⁶⁷ Therefore, the government is not liable under the Federal Tort Claims Act for the intentional torts of its agents.¹⁶⁸ Thus, claims due to assault, battery, false arrest, false imprisonment, and malicious prosecution are excluded from the Act.¹⁶⁹ As such, even if

166. Peter Yoxall, Comment, *The Minuteman Project, Gone in a Minute or Here to Stay? The Origin, History and Future of Citizen Activism on the United States-Mexico Border*, 37 U. MIAMI INTER-AM. L. REV. 517, 550 (2006). The Federal Tort Claims Act provides that:

The head of each Federal agency or his designee, in accordance with regulations prescribed by the Attorney General, may consider, ascertain, adjust, determine, compromise, and settle any claim for money damages against the United States for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the agency while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. § 2672 (2006).

167. The Federal Tort Claims Act would exclude lawsuits for a number of reasons, as it lists several areas to which the Act does not apply, including:

- (a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused

. . . .

- (h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights: *Provided*, That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution.

28 U.S.C. § 2680 (2006).

168. 35A AM. JUR. 2D *Federal Tort Claims Act* § 89 (2001).

169. *Id.*

the courts were to determine that the members of civilian patrol groups were acting as agents or instrumentalities of law enforcement, their actions might be considered intentional torts and would not be actionable under the Federal Tort Claims Act.¹⁷⁰ However, if groups of migrants were to bring claims against federal law enforcement agencies for violations of their civil rights, the actions of agents or instrumentalities of government would be covered by the civil rights statutes.

One example would be a *Bivens* action.¹⁷¹ Under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, immigrants who prove that they have suffered an injury resulting from violations of the Fourth Amendment can recover damages in federal court.¹⁷² If one follows the reasoning in *Walther*, *Smythe*, and *Pervaz*, one could conclude that if an agent or instrumentality of government can be found to have violated a person's Fourth Amendment rights in criminal proceedings, the same would follow in civil actions.¹⁷³ Possible defendants would then not only include groups such as the Minutemen groups or Ranch Rescue, but also federal law enforcement agencies. This course of action would serve a dual purpose. First, it would provide an avenue of redress for immigrants whose rights have been violated. Second, if law enforcement agencies begin to feel pressured by such suits, they might be more inclined to prosecute criminal offenders within these groups and to make an honest effort to curtail their abusive actions.

In addition to the constitutional guarantees that have already been discussed, scholars argue that the Equal Protection Clause "prohibits not only discrimination . . . [but also] prohibits creating socially and economically disadvantaged social groups that are forced to live at the margin of society, isolated from the mainstream, always at risk, seen in their own eyes and in those of the dominant group as inferior."¹⁷⁴ The U.S. government cannot, therefore, exclude

170. See 28 U.S.C. § 2680.

171. See, e.g., *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971) (noting Federal Bureau of Narcotics agents acting under federal authority entered the plaintiff's apartment without a warrant or probable cause, searched the apartment, and then arrested the plaintiff on narcotics charges).

172. *Id.* at 395-96 (holding that persons who suffer injuries due to federal agents' Fourth Amendment violations can bring action in federal courts to obtain damages to redress the violation).

173. The government cannot use private citizens to circumvent constitutional guarantees. See *United States v. Walther*, 652 F.2d 788, 792 (9th Cir. 1981); see also *United States v. Pervaz*, 118 F.3d 1, 6 (1st Cir. 1997); *United States v. Smythe*, 84 F.3d 1240, 1243 (10th Cir. 1996).

174. Owen Fiss, *The Immigrant as Pariah*, in *A COMMUNITY OF EQUALS: THE CONSTITUTIONAL PROTECTION OF NEW AMERICANS* 13 (1999). Owen Fiss, professor of

undocumented migrants from the equal protections of our laws. Although this Note concentrates on the liability of civilian border patrol groups and the federal government, one could make an argument that local law enforcement is violating the Equal Protection Clause by declining to prosecute physical violence against migrants at the border.

IV. CONCLUSION

Although civil suits for intentional torts do have some effect on deterring physical abuse on the border, immigrants' rights groups have stated that convincing the victims to come forward with complaints is difficult. Additionally, bringing claims against individual civilian border patrol volunteers for intentional torts can be time consuming and unproductive as this deters individuals and not organizations.

The purpose of civil suits against civilian border patrol groups and law enforcement agencies acting in conjunction with them would not only provide monetary compensation for those whose rights have been violated, but would also deter such action in the future. Unfortunately, since undocumented immigrants do not constitute a constituency for elected officials, few legislators and law enforcers are listening to the pleas of immigrants' rights groups. While millions of people participated in recent marches demanding that the rights of immigrants be respected,¹⁷⁵ their cries appear to have fallen on deaf ears. It looks as if the only way to make federal and local law enforcement agencies pay attention to these pleas is to affect their financial resources.

Once the heads of organizations such as the MMP, the MCDC, and Ranch Rescue begin to feel the financial consequences of the activities they are promoting, they will be more motivated to ensure that their individual members follow the law and adhere to constitutional restrictions. In the same way, governmental agencies will not recognize the harm that their acquiescence is causing until they have to defend their positions in court.

law at Yale University, reads Justice Brennan's opinion in *Plyler* as prohibiting the creation of a near-caste structure. *Id.*

175. See Ines Ferre et al., *Thousands March for Immigrant Rights*, CNN.COM, May 1, 2006, <http://www.cnn.com/2006/US/05/01/immigrant.day/index.html>.
