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## Guns and Alienage: Correcting a Dangerous Contradiction

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# Guns and Alienage: Correcting a Dangerous Contradiction

D. McNair Nichols, Jr.\*

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### I. Introduction

On February 24, 2011, Immigration and Customs Enforcement agents arrested Nicolas Carpio-Leon because he had two firearms in his home's master bedroom.<sup>1</sup> Nicolas had not shot or harmed anyone with his guns.<sup>2</sup> Rather, federal agents arrested him due to the convergence of two circumstances in his life: (1) Nicolas lacked legal status, and (2) Nicolas owned firearms.<sup>3</sup> For many U.S. residents, gun ownership is the norm.<sup>4</sup> In 1986, however, Congress passed 18 U.S.C. § 922(g)(5),<sup>5</sup> colloquially known as the federal alien-in-possession statute, which makes it unlawful for an undocumented resident to possess a firearm.<sup>6</sup> For Nicolas, his undocumented status made him an exception to the Second Amendment right to bear arms.<sup>7</sup>

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1. See *United States v. Carpio-Leon*, 701 F.3d 974, 976 (4th Cir. 2012) (describing the consensual search of Carpio-Leon's home, which led to his arrest after Immigration and Customs Enforcement agents recovered a rifle and pistol in his master bedroom), *cert. denied*, 134 S. Ct. 58 (2013).

2. See *id.* (discussing the charge as unlawful possession rather than unlawful use of the firearm).

3. See *id.* (noting that Nicolas was charged with "possession of a firearm by an alien illegally or unlawfully in the United States, in violation of 18 U.S.C. § 922(g)(5)(A)").

4. See *One in Three Americans Own Guns; Culture a Factor, Study Finds*, NBC NEWS (June 29, 2015, 7:09 PM), <http://www.nbcnews.com/news/us-news/one-three-americans-own-guns-culture-factor-study-finds-n384031> (last visited Dec. 5, 2016) ("A new study aimed at figuring out who owns gun in the United States and why suggests that about a third of Americans have at least one.") (on file with the Washington and Lee Law Review).

5. 18 U.S.C. § 922(g)(5) (2012).

6. See *id.* (providing in part that "[i]t shall be unlawful for any person . . . being an alien . . . illegally or unlawfully in the United States . . . to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition"). Congress passed 18 U.S.C. § 922(g)(5) as part of the Gun Control Act of 1968. *Id.*

7. See *United States v. Carpio-Leon*, 701 F.3d 974, 976 (4th Cir. 2012)

Nicolas and his wife lived in Orangeburg, South Carolina, for thirteen years before his arrest.<sup>8</sup> While residing in the United States, they had three children, regularly filed income tax returns, and did not have criminal records.<sup>9</sup> Indeed, the firearms found in Nicolas's home were the sort owned by many Americans to protect their homes and families.<sup>10</sup> Nevertheless, a Fourth Circuit panel reviewing his conviction under 18 U.S.C. § 922(g)(5) determined as a threshold matter that Nicolas, as an "illegal alien," does "not fall in the class of persons for the purpose of defining the Second Amendment's scope."<sup>11</sup>

The Second Amendment provides, "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."<sup>12</sup> At the heart of the debate over alienage and the Second Amendment is conflict over the meaning of "the people" contemplated by the Second Amendment.<sup>13</sup> The phrase "the people" also appears in the First,<sup>14</sup> Fourth,<sup>15</sup> Ninth,<sup>16</sup> and Tenth Amendments.<sup>17</sup> The

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("[T]he scope of the Second Amendment does not extend to provide protection to illegal aliens, because illegal aliens are not law-abiding members of the political community and . . . have no more rights under the Second Amendment than do aliens outside of the United States seeking admittance.").

8. *See id.* (discussing the facts presented by Carpio-Leon at the hearing on his motion to dismiss).

9. *See id.* (recounting the evidence that Carpio-Leon presented at the motion to dismiss hearing to prove these assertions).

10. *See id.* (noting that Carpio-Leon owned a .22 caliber and a 9mm pistol).

11. *Id.* at 981.

12. U.S. CONST. amend. II.

13. *See infra* Part IV (explaining that differing interpretations of "the people" has split the circuits).

14. *See* U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.").

15. *See id.* amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . .").

16. *See id.* amend. IX ("The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.").

17. *See id.* amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.").

Supreme Court has noted that the phrase “the people” is a “term of art” employed selectively throughout the Constitution to specify to whom certain rights and privileges apply.<sup>18</sup> Undocumented persons<sup>19</sup> have been considered part of “the people” for purposes of the First, Fourth, Ninth, and Tenth Amendments.<sup>20</sup> For example, the government may not censor undocumented persons’ free expression,<sup>21</sup> may not conduct unreasonable searches and seizures of undocumented persons,<sup>22</sup> and may not abrogate the rights and privileges reserved to undocumented persons under the Ninth and Tenth Amendments.<sup>23</sup> Furthermore, it is settled law that the Fifth, Sixth, and Fourteenth Amendments guarantee due process of law

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18. See *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990) (noting that the term applies to persons who are considered part of the national community).

19. When possible, this Note will use terms such as “undocumented persons,” “unauthorized persons,” or “undocumented immigrants” to refer to those persons dubbed “illegal aliens” by 18 U.S.C. § 922(g)(5). It seems prudent during academic discussion to avoid using the term “illegal alien,” which has potentially pejorative and inflammatory implications. See Pratheepan Gulasekaram, “*The People*” of the Second Amendment: Citizenship and the Right to Bear Arms, 85 N.Y.U. L. REV. 1521, 1523 n.11 (2010) (suggesting that the term “alien” may connote “the assumed foreignness and difference of otherwise law-abiding persons living in the United States”); Gerald M. Rosberg, *The Protection of Aliens from Discriminatory Treatment by the National Government*, 1977 SUP. CT. REV. 275, 303 (1977) (“The very word, ‘alien,’ calls to mind someone strange and out of place, and it has often been used in a distinctly pejorative way.”).

20. See *infra* notes 21–23 and accompanying text (mentioning the application of the First, Fourth, Ninth, and Tenth Amendments to noncitizens).

21. See, e.g., *Bridges v. Wixon*, 326 U.S. 135, 149 (1945) (determining that resident aliens are part of “the people” of the First Amendment).

22. See, e.g., *Verdugo-Urquidez*, 494 U.S. at 265

‘[T]he people’ protected by the Fourth Amendment, and by the First and Second Amendments, and to whom rights and powers are reserved in the Ninth and Tenth Amendments, 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.

See generally *INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984) (presuming that undocumented persons present in the United States have Fourth Amendment rights).

23. See, e.g., *Plyler v. Doe*, 457 U.S. 202, 211–12 (1982) (finding that the Equal Protection Clause applies to undocumented immigrants).

to undocumented persons.<sup>24</sup> The Supreme Court has reasoned, “Whatever his status under the immigration laws, an alien is surely a ‘person’ in any ordinary sense of that term.”<sup>25</sup>

As a general rule, the Supreme Court has noted that “aliens receive constitutional protections when they have come within the territory of the United States and developed substantial connections with this country.”<sup>26</sup> Despite the recognition that undocumented persons may qualify as “the people” throughout the Bill of Rights, the meaning of “the people” in the Second Amendment specifically has created significant friction.<sup>27</sup>

The paradox is striking: the prevailing view amongst the federal circuits posits that undocumented persons are part of “the people” for purposes of the First, Fourth, Ninth, and Tenth Amendments but not for purposes of the Second Amendment. As

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24. See *id.* at 215 (concluding that “the illegal aliens who are plaintiffs in these cases may claim the benefit of the Fourteenth Amendment’s guarantee of equal protection”); *Mathews v. Diaz*, 426 U.S. 67, 77 (1976)

There are literally millions of aliens within the jurisdiction of the United States. The Fifth Amendment, as well as the Fourteenth Amendment, protects every one of these persons from deprivation of life, liberty, or property without due process of law. Even one whose presence in this country is unlawful, involuntary, or transitory is entitled to that constitutional protection.

*Japanese Immigrant Case*, 189 U.S. 86, 101 (1903)

[I]t is not competent for the Secretary of the Treasury or any executive officer, at any time within the year limited by the statute, arbitrarily to cause an alien who has entered the country, and has become subject in all respects to its jurisdiction, and a part of its population, although alleged to be illegally here, to be taken into custody and deported without giving him all opportunity to be heard upon the questions involving his right to be and remain in the United States. No such arbitrary power can exist where the principles involved in due process of law are recognized.

*Wong Wing v. U.S.*, 163 U.S. 223, 238 (1896)

Applying this reasoning to the Fifth and Sixth Amendments, it must be concluded that all persons within the territory of the United States are entitled to the protection guaranteed by those amendments, and that even aliens shall not be held to answer for a capital or other infamous crime, unless on a presentment or indictment of a grand jury, nor be deprived of life, liberty or property without due process of law.

25. *Plyler*, 457 U.S. at 210.

26. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 271 (1990).

27. See *infra* Part III (discussing the disagreement among the federal circuits on this issue).

this Note discusses, the prevailing interpretation of “the people” excludes Nicolas Carpio-Leon—as well as millions of other similarly situated individuals<sup>28</sup>—from invoking Second Amendment protection to challenge the constitutionality of the federal alien-in-possession statute.<sup>29</sup> As of late, however, the prevailing view has been challenged.<sup>30</sup>

A circuit split has developed over the meaning of “the people” in the Second Amendment.<sup>31</sup> The disagreement centers on whether undocumented persons are part of “the people” protected by the Second Amendment right to bear arms.<sup>32</sup> According to the Fourth, Fifth, and Eighth Circuits, the Second Amendment *does not* afford undocumented persons the right to purchase or possess firearms.<sup>33</sup> The Seventh Circuit, however, has articulated a more nuanced view, whereby undocumented immigrants may conceivably have Second Amendment rights, contingent on a showing of “substantial connections” to this nation.<sup>34</sup>

The Fifth Circuit’s decision in *United States v. Portillo-Munoz*<sup>35</sup> to exclude undocumented persons from “the

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28. See Jeffrey S. Passel & D’vera Cohn, *Unauthorized Immigrant Population Stable for Half a Decade*, PEW RESEARCH CTR. (July 22, 2015), <http://www.pewresearch.org/fact-tank/2015/07/22/unauthorized-immigrant-population-stable-for-half-a-decade/> (last updated Sept. 21, 2016) (last visited Dec. 5, 2016) (“An estimated 11.1 million unauthorized immigrants lived in the U.S. in 2014, according to a new preliminary Pew Research Center estimate based on government data.”) (on file with the Washington and Lee Law Review); see also Elizabeth M. Grieco, *The Foreign-Born Population in the United States: 2010*, U.S. CENSUS BUREAU (May 2012), <https://www.census.gov/prod/2012pubs/acs-19.pdf> (estimating that approximately 22.48 million noncitizens reside in the United States, which comprises 7.3% of the population).

29. See *infra* Part III.A (explaining that the prevailing view in the federal circuits excludes undocumented persons from “the people” protected in the Second Amendment).

30. See *infra* Part III.B (explaining how the Seventh Circuit’s decision in *United States v. Meza-Rodriguez* departs from the prevailing view).

31. See *United States v. Meza-Rodriguez*, 798 F.3d 664, 672 n.1 (7th Cir. 2015) (specifying that the decision created a split between the Seventh Circuit and the Fourth, Fifth, and Eighth Circuits).

32. See *infra* Parts III.A–B (contrasting the legal reasoning and corresponding conclusions, which have led to the circuit split).

33. See *infra* Part III.A (discussing one side of the circuit split).

34. See *infra* Part III.B (detailing the Seventh Circuit’s holding and reasoning).

35. 643 F.3d 437 (5th Cir. 2011).

people” of the Second Amendment has serious implications for the meaning of “the people” throughout the Bill of Rights.<sup>36</sup> If undocumented persons categorically do not qualify as “the people” for Second Amendment purposes, then the door is wide open to strip them of other protections guaranteed by the Bill of Rights.<sup>37</sup> Indeed, the Fifth Circuit panel in *Portillo-Munoz* specifically questioned whether persons illegally present in the United States should have Fourth Amendment rights.<sup>38</sup> In the wake of *Portillo-Munoz*, some commentators have suggested that undocumented immigrants should not qualify as part of “the people” for purposes of the entire Bill of Rights.<sup>39</sup> One

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36. See Gerard N. Magliocca, *The Bill of Rights and Illegal Immigrants*, BALKINIZATION (June 16, 2011, 9:04 AM), <http://balkin.blogspot.com/2011/06/bill-of-rights-and-illegal-immigrants.html> (last visited Dec. 5, 2016) (expressing fear that a narrow reading of “the people” threatens the current interpretation of other amendments containing the phrase “the people”) (on file with the Washington and Lee Law Review).

37. See *id.* (“Since the term ‘people’ is also used in the First, Fourth, and Ninth Amendments, [the *Portillo-Munoz*] decision has sweeping implications.”); see also *United States v. Portillo-Munoz*, 643 F.3d 437, 444–45 (5th Cir. 2011) (Dennis, J., dissenting) (“[T]he majority’s reasoning renders [persons like *Portillo-Munoz*] vulnerable—to governmental intrusions on their homes and persons, as well as interference with their rights to assemble and petition the government for redress of grievances—with no recourse.”); Karen N. Moore, *Aliens and the Constitution*, 88 N.Y.U. L. REV. 801, 844 (2013) (“The jurisprudence surrounding whether and to what extent Second Amendment rights extend to aliens will thus continue to evolve and take shape in the coming years.”).

38. See *Portillo-Munoz*, 643 F.3d at 440 (“[N]either this court nor the Supreme Court has held that the Fourth Amendment extends to a native and citizen of another nation who entered and remained in the United States illegally.”); see also Brief of Amicus Curiae ACLU Foundation in Support of Petition for Rehearing *En Banc* at 1–3, *Portillo-Munoz*, 643 F.3d 437 (No. 11-10086) (“In rejecting Appellant’s claim, the majority panel opinion questions whether the Fourth Amendment, which also refers to the right of ‘the people,’ should apply to searches and seizures of a ‘native and citizen of another nation who entered and remained in the United States illegally.”); *Recent Case*, *United States v. Portillo-Munoz*, 643 F.3d 437 (5th Cir. 2011), 125 HARV. L. REV. 835, 841 (2012) [hereinafter *Recent Case*] (“[The court in *Portillo-Munoz*] inaccurately represents the unresolved nature of this issue to say that the Supreme Court has never held that the Fourth Amendment applies to undocumented immigrants.”).

39. See, e.g., Olesya A. Salnikova, Comment, “*The People*” of *Heller* and *Their Politics: Whether Illegal Aliens Should Have the Right to Bear Arms After United States v. Portillo-Munoz*, 103 J. CRIM. L. & CRIMINOLOGY 625, 627 (2013) (“*Heller* explicitly extended its reading of ‘the people’ to the other amendments, thereby excluding illegal aliens from membership in ‘the people’ across the Bill



commentator has even suggested that the *Portillo-Munoz* court should have taken the next logical step to extend the restrictive definition of “the people” to other constitutional amendments.<sup>40</sup> If such views continue to gain acceptance, millions of persons unlawfully present in the United States would effectively become “non-persons,” vulnerable to unreasonable searches and seizures and other government abuses.<sup>41</sup> If courts have erroneously concluded that “the people” of the Second Amendment excludes undocumented immigrants, then it is imperative to unhinge the argument before courts apply that flawed reasoning to exclude undocumented persons from other protections guaranteed by the Bill of Rights.<sup>42</sup> Therefore, resolution of the circuit split regarding the meaning of “the people” in the Second Amendment is crucial to preserve the rights historically afforded to undocumented immigrants through the First, Fourth, Ninth, and Tenth Amendments.<sup>43</sup>

This Note proceeds on the following course: Part II lays the necessary foundation to understand the debate over the scope of “the people” contemplated by the Second Amendment. Part III discusses the circuit split that has developed over whether undocumented persons are part of “the people” protected by the Second Amendment. Part IV offers three main critiques of the “Restrictive View” held by the Fourth, Fifth, and Eighth Circuits,

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of Rights. Illegal aliens are not part of ‘the people’ for the purposes of the . . . Bill of Rights guarantees generally . . .”).

40. See *id.* (“*Portillo-Munoz*’s refusal to extend *Heller*’s definition of ‘the people’ to other constitutional amendments, however, is misplaced.”).

41. See *United States v. Portillo-Munoz*, 643 F.3d 437, 443 (5th Cir. 2011) (Dennis, J., dissenting) (noting that undocumented persons will have no recourse against government abuses); accord Mathilda McGee-Tubb, Comment, *Sometimes You’re in, Sometimes You’re out: Undocumented Immigrants and the Fifth Circuit’s Definition of “The People”* in *United States v. Portillo-Munoz*, 53 B.C. L. REV. E. SUPP. 75, 84 (2012) (“*Portillo-Munoz* opens the door for arbitrary classifications of constitutional rights to achieve exclusions that may not otherwise have a basis in precedent.”).

42. See Pratheepan Gulasekaram, *Noncitizen Participation in the American Polity: Guns and Membership in the American Polity*, 21 WM. & MARY BILL RTS. J. 619, 653 (2012) (“[J]udicial limitations on ‘the people,’ and the continued existence of immigrant gun restrictions suggest that we will resist noncitizen inclusion and participation in the polity.”).

43. See Salnikova, *supra* note 39, at 626 (stressing the importance of solidifying the meaning of “the people” in the Second Amendment because it informs the scope of other constitutionally protected rights).

namely that: (1) those courts have conflated the two relevant issues, causing them to improperly narrow the scope of “the people” to exclude undocumented persons; (2) those courts have also relied too heavily on dicta from the Supreme Court’s decision in *District of Columbia v. Heller*<sup>44</sup> to justify a narrow reading of “the people” in the Second Amendment; and (3) the Fifth Circuit in particular erred by relying on an arbitrary distinction between the Second and Fourth Amendments to conclude that the Second Amendment excludes undocumented persons. Part V recommends resolving the circuit split by reading “the people” of the Second Amendment consistently with “the people” of the Fourth Amendment.<sup>45</sup> Also, this Note recommends that courts apply the “substantial connections” test—in the same way courts currently apply that test to interpret “the people” in the Fourth Amendment—to determine on a case-by-case basis whether a specific undocumented person qualifies as part of “the people” for Second Amendment purposes.

## II. “The People” Contemplated in the Bill of Rights

The Second Amendment provides, “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.”<sup>46</sup> Despite

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44. 554 U.S. 570 (2008).

45. Scholars have expended extensive textual and historical analyses to uncover the meaning of “the people” and to determine whether the Second Amendment embodies an individual or collective right. *See generally, e.g.*, DAVID E. YOUNG, THE ORIGIN OF THE SECOND AMENDMENT: A DOCUMENTARY HISTORY OF THE BILL OF RIGHTS 1787–1792 (1995); Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131 (1991); Randy E. Barnett, *The Ninth Amendment: It Means What It Says*, 85 TEX. L. REV. 1 (2006); David Gray, *Dangerous Dicta*, 72 WASH. & LEE L. REV. 1181 (2015); William Michael Treanor, *Taking Text Too Seriously: Modern Textualism, Original Meaning, and the Case of Amar’s Bill of Rights*, 106 MICH. L. REV. 487 (2007); Eugene Volokh, *The Amazing Vanishing Second Amendment*, 723 N.Y.U. L. REV. 831 (1998); David Yassky, *The Second Amendment: Structure, History, and Constitutional Change*, 99 MICH. L. REV. 588 (2000); Note, *The Meaning(s) of “The People” in the Constitution*, 126 HARV. L. REV. 1078 (2013). This Note does not aim to contribute directly to those inquiries. Rather, this Note focuses on alienage in the context of “the people” of the Second Amendment by recommending a comprehensive approach to resolve the circuit split over the orientation of undocumented persons to the Second Amendment.

46. U.S. CONST. amend. II.

the amendment's brevity, its words do not offer a clear meaning.<sup>47</sup> For years, the contours of this right have remained elusive.<sup>48</sup> The Supreme Court endeavored to clarify the Second Amendment's ambiguity when it confronted a challenge to the D.C. handgun ban in its landmark case, *District of Columbia v. Heller*.<sup>49</sup> In *Heller*, the Court held that the Second Amendment confers an individual right to own guns for the lawful purpose of self-defense rather than solely a collective right necessarily connected to militia service.<sup>50</sup> Despite the Court's textual and historical analysis in *Heller*, many unresolved ambiguities surrounding the Second Amendment remained, including the extent to which the government may regulate the right.<sup>51</sup> More importantly for the

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47. See Glenn H. Reynolds, *A Critical Guide to the Second Amendment*, 62 TENN. L. REV. 461, 464 (1995) (explaining that the somewhat archaic terms used in the Second Amendment are relatively unfamiliar and unclear to the modern reader); Dorothy J. Hernaez, Note, *Parker v. District of Columbia: Understanding the Broader Implications for the Future of Gun Control*, 6 GEO. J.L. & PUB. POL'Y 693, 696 (2008) (describing the Second Amendment as "the most cryptic and debatable provision in the Bill of Rights").

48. See Michael P. O'Shea, *The Right to Defensive Arms After District of Columbia v. Heller*, 111 W. VA. L. REV. 349, 353 (2009) (noting that *United States v. Miller*, the seminal Second Amendment case, was "an opaque and open-ended opinion that left a great deal of ambiguity concerning the nature of its holding and its conception of the Second Amendment right").

49. See 554 U.S. 570, 628 (2008) (explaining that D.C. Code §§ 7-2501.01(12), 7-2502.01(a), and 7-2502.02(a)(4) amounted to an absolute ban on handguns).

50. See *id.* at 595 (emphasizing the individualized nature of the right and thereby expanding the scope of the right beyond an organized, governmental context). The Court also held that the city's handgun ban and the trigger-lock requirement (as applied to self-defense) both run afoul of this individual right to bear arms. *Id.* at 629.

51. See *id.* at 665 ("[S]ince this case represents this Court's first in-depth examination of the Second Amendment, one should not expect it to clarify the entire field . . ."); *United States v. Boffil-Rivera*, No. 08-20437-CR, 2008 WL 8853354, at \*5 (S.D. Fla. Aug. 12, 2008) ("The Court left open for another day the extent to which government could enact statutes 'regulating' the right to bear arms, other than to reaffirm that 'the right was not unlimited, just as the First Amendment's right of free speech was not . . .'" (quoting *Heller*, 554 U.S. at 2799)), *aff'd*, 607 F.3d 736 (11th Cir. 2010); see also Lindsay Colvin, Note, *History, Heller, and High-Capacity Magazines: What Is the Proper Standard of Review for Second Amendment Challenges?*, 41 FORDHAM URB. L.J. 1041, 1043 (2014) ("The proper analytical framework for statutes challenged as an unconstitutional infringement on individual Second Amendment rights after *District of Columbia v. Heller* has emerged as both a hotly contested and imprecise zone of jurisprudence for lower courts.").

purposes of this Note, the Court did not answer who is included in “the people” of the Second Amendment.<sup>52</sup>

In 1968, Congress passed the Gun Control Act<sup>53</sup> for the purpose of “establishing a federal scheme” to govern the “distribution of firearms.”<sup>54</sup> As part of the scheme, Congress barred certain categories of persons from possessing firearms.<sup>55</sup> In 1986, Congress amended the Gun Control Act to include § 922(g)(5), prohibiting an “alien” unlawfully present in the United States from possessing a firearm.<sup>56</sup> Since then, numerous undocumented persons convicted under § 922(g)(5) have challenged the constitutionality of the alien-in-possession statute. In fielding constitutional challenges to § 922(g)(5), courts have generally applied a form of intermediate scrutiny.<sup>57</sup>

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52. See *United States v. Meza-Rodriguez*, 798 F.3d 664, 666 (7th Cir. 2015) (“While some of *Heller*’s language does link Second Amendment rights with the notions of ‘law-abiding citizens’ and ‘members of the political community,’ those passages did not reflect an attempt to define the term ‘people.’”); see also Note, *The Meaning(s) of “the People” in the Constitution*, 126 HARV. L. REV. 1078, 1086 (2013) [hereinafter *The Meaning(s) of “the People”*] (“The question before the Court was whether the Second Amendment codified an individual or collective right, not which particular individuals possessed that right.”).

53. 18 U.S.C. §§ 921–931 (2012).

54. *Printz v. United States*, 521 U.S. 898, 902 (1997).

55. See 18 U.S.C. § 922(g) (prohibiting, for example, drug addicts, felons, and the mentally insane from possessing, shipping, transporting, or receiving firearms).

56. See *id.* at § 922(g)(5) (providing in part that “[i]t shall be unlawful for any person who, being an alien . . . illegally or unlawfully in the United States . . . to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition”); see also DEP’T OF JUSTICE, MEMORANDUM OPINION FOR THE CHIEF COUNSEL, BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES: NONIMMIGRANT ALIENS AND FIREARMS DISABILITIES UNDER THE GUN CONTROL ACT 2 (2011), [http://www.justice.gov/sites/default/files/olc/opinions/2011/10/31/nonimmigrant-firearms-opinion\\_0.pdf](http://www.justice.gov/sites/default/files/olc/opinions/2011/10/31/nonimmigrant-firearms-opinion_0.pdf) (discussing Congress’s decision to add a firearm disability for persons who are “illegally or unlawfully in the United States”).

57. See *Meza-Rodriguez*, 798 F.3d at 672 (noting that courts should apply a heightened form of scrutiny); see also *United States v. Huitron-Guizar*, 678 F.3d 1164, 1169 (10th Cir. 2012) (explaining that the alien-in-possession statute must survive intermediate scrutiny, assuming as a threshold matter that the individual has demonstrated inclusion in “the people” of the Second Amendment); *United States v. Reese*, 627 F.3d 792, 802 (applying intermediate scrutiny to a Second Amendment challenge to § 922(g)(8) brought by a United States citizen). *But see* *United States v. Portillo-Munoz*, 643 F.3d 437, 443 (5th Cir. 2011) (Dennis, J., dissenting) (advocating for the case to be remanded to the district court to determine “in the first instance the applicable level of scrutiny

The Supreme Court has not directly scrutinized the meaning of “the people” in the context of the Second Amendment.<sup>58</sup> In *United States v. Verdugo-Urquidez*,<sup>59</sup> however, the Supreme Court addressed the meaning of “the people” referenced in the Fourth Amendment.<sup>60</sup> Verdugo-Urquidez, a citizen of Mexico, challenged the legality of a search of his Mexican home conducted by U.S. law enforcement.<sup>61</sup> In the plurality decision, Chief Justice Rehnquist explicated the following understanding of “the people,” as used in the Constitution generally:

“[T]he people” seems to have been a term of art employed in select parts of the Constitution . . . . [Its uses] suggest[] that ‘the people’ protected by the Fourth Amendment, and by the First and Second Amendments, and to whom rights and powers are reserved in the Ninth and Tenth Amendments, 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.<sup>62</sup>

Accordingly, the Court rejected Verdugo-Urquidez’s claim under the Fourth Amendment. The Court explained that the Fourth Amendment did not apply to him because, at the time of the search, he was a resident of Mexico, had no voluntary attachment to the United States, and was brought to the United States against his will.<sup>63</sup>

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under the Second Amendment”).

58. See Gulasekaram, *supra* note 42, at 623 (“The Supreme Court denied certiorari, both allowing the Fifth Circuit’s strained reading to stand, and prolonging confusion of the scope of those who may claim the right to bear arms.”); see also *United States v. Huitron-Guizar*, 678 F.3d 1164, 1167 (2012) (recognizing the ambiguity in the phrase “the people”).

59. 494 U.S. 259 (1990).

60. See *id.* at 261 (“The question presented by this case is whether the Fourth Amendment applies to the search and seizure by United States agents of property that is owned by a nonresident alien and located in foreign country.”).

61. See *id.* at 262 (explaining that the search occurred because federal agents suspected Verdugo-Urquidez of involvement in drug trafficking into the United States).

62. *Id.* at 265.

63. See *id.* at 274 (stating that Verdugo-Urquidez “had no voluntary connection with this country that might place him among ‘the people’” protected by the Constitution).

Nevertheless, the Court acknowledged that an undocumented person's voluntary presence in the United States, coupled with acceptance of "some societal obligations," might qualify him or her as part of "the people."<sup>64</sup> Although the Court did not squarely address whether the Fourth Amendment applies to undocumented immigrants, it did adopt a test that considers "substantial connections" to the United States rather than legal status in the United States to determine the scope of "the people."<sup>65</sup> *Verdugo-Urquidez* stands for the proposition that "the people" encompasses a broader class of individuals than American citizens.<sup>66</sup> Since then, courts have debated who qualifies for Second Amendment protection.<sup>67</sup>

### *III. Confusion over Who Qualifies as "the People" for Second Amendment Protection*

A circuit split has developed over the meaning of "the people" in the Second Amendment.<sup>68</sup> Specifically, courts disagree whether undocumented persons are part of "the people" to whom the right to bear arms belongs.<sup>69</sup> The Fourth, Fifth, and Eighth Circuits

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64. See *id.* at 272 (noting that Fourth Amendment protections extended to the "illegal aliens in *Lopez-Mendoza*" because they "were in the United States voluntarily and presumably had accepted some societal obligations").

65. See *id.* at 265 (1990) (noting that "the people" refers to persons characterized by "sufficient connections to this country" rather than characterized by legal status); see also *Meaning(s) of "The People," supra* note 52, at 481 ("[T]he *Verdugo-Urquidez* test for inclusion among 'the people' never mentions legal presence as a requirement. Instead, that test emphasizes 'substantial connections' to America, 'voluntary' presence, and acceptance of 'societal obligations.'").

66. See Moore, *supra* note 37, at 803 (discussing the "substantial connections" approach taken by the Court in *Verdugo-Urquidez*); see also *District of Columbia v. Heller*, 554 U.S. 570, 579–81 (2008) (discussing the relatively wide scope of those included in the term "the people," in contrast to other terms such as citizens and militia).

67. See *infra* Part III (discussing the disagreement on the issue); see also Moore, *supra* note 37, at 842–45 (explaining how courts have taken different approaches in applying language from *Verdugo-Urquidez* to Second Amendment challenges to the alien-in-possession statute).

68. See *United States v. Meza-Rodriguez*, 798 F.3d 664, 672 n.1 (7th Cir. 2015) (noting that the holding on the Second Amendment created a split between the Seventh Circuit and the Fourth, Fifth, and Eighth Circuits).

69. See *infra* Part III.A–B (contrasting the legal reasoning and

have concluded that undocumented persons as a class do not qualify as “the people” for purposes of the Second Amendment.<sup>70</sup> On the other hand, the Seventh Circuit determined that undocumented immigrants might conceivably have Second Amendment rights, contingent on a showing of “substantial connections” to this nation.<sup>71</sup> The Supreme Court has not directly spoken on who constitutes “the people” afforded Second Amendment rights,<sup>72</sup> or on the constitutionality of the alien-in-possession statute.<sup>73</sup>

*A. Restrictive View: Undocumented Persons Are Not Part of “the People” Contemplated by the Second Amendment*

In *United States v. Portillo-Munoz*, the Fifth Circuit became the first federal circuit to tackle whether the Second Amendment’s scope extends to immigrants unlawfully present in the United States.<sup>74</sup> The district court convicted Portillo-Munoz<sup>75</sup> of unlawful possession of a firearm in violation of 18 U.S.C. § 922(g)(5).<sup>76</sup> Portillo-Munoz appealed his conviction to the Fifth

corresponding conclusions, which have led to the circuit split).

70. See *infra* Part III.A (discussing one side of the circuit split).

71. See *infra* Part III.B (detailing the Seventh Circuit’s holding and reasoning).

72. See *Meza-Rodriguez*, 798 F.3d at 669 (“[N]either *Heller* nor any other Supreme Court decision has addressed the issue whether unauthorized noncitizens (or noncitizens at all) are among ‘the people’ on whom the Amendment bestows this individual right.”).

73. See, e.g., *United States v. Meza*, No. 13-CR-192, 2014 WL 1406301, at \*4 (E.D. Wis. Apr. 11, 2014) (“[T]he [*Heller*] Court did not discuss the constitutionality of the various other categories of prohibitions contained in § 922, and in particular, the Court did not address the prohibition at issue here—that is, § 922(g)(5)’s ban on illegal aliens possessing firearms.”), *aff’d on other grounds sub nom*, *United States v. Meza-Rodriguez*, 798 F.3d 664 (7th Cir. 2015).

74. See *United States v. Portillo-Munoz*, 643 F.3d 437, 439 (5th Cir. 2011) (mentioning that no other circuits have addressed the constitutionality of a federal prohibition on gun ownership for undocumented immigrants).

75. See *id.* (“He admitted that he is a citizen and native of Mexico illegally present in the United States and that he knowingly possessed a firearm . . . which had been shipped or transported in interstate commerce. The district court sentenced him to ten months imprisonment . . .”).

76. See 18 U.S.C. § 922(g)(5) (2012) (providing in part that “[i]t shall be unlawful for any person who, being an alien . . . illegally or unlawfully in the

Circuit, arguing in part that the federal alien-in-possession statute violated his Second Amendment right as a member of “the people.”<sup>77</sup> He relied on *United States v. Verdugo-Urquidez*,<sup>78</sup> in which the Supreme Court interpreted the Fourth Amendment’s use of “the people” to conceivably include noncitizens having a certain threshold of connections to the United States.<sup>79</sup> Drawing an analogy between the use of “the people” in the Second and Fourth Amendments, Portillo-Munoz posited that the Second Amendment affords illegal immigrants the right to bear arms.<sup>80</sup>

Relying heavily on *District of Columbia v. Heller*, a divided panel of the Fifth Circuit affirmed the district court and concluded that Portillo-Munoz’s conviction under § 922(g)(5) did not violate the Second Amendment.<sup>81</sup> More specifically, the court addressed the scope of the Second Amendment, concluding that “[w]hatever else the term means or includes, the phrase ‘the people’ . . . does not include aliens illegally in the United States such as Portillo.”<sup>82</sup>

The Fifth Circuit panel justified its decision on several grounds. First, the court interpreted *Heller* as restricting Second Amendment protection to “law-abiding, responsible citizens” or “members of the political community.”<sup>83</sup> The Fifth Circuit

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United States . . . to possess in or affecting commerce, any firearm or ammunition”).

77. See *Portillo-Munoz*, 643 F.3d at 439 (5th Cir. 2011) (stating that Portillo-Munoz posited that a federal prohibition of firearm possession by illegal immigrants violated the Second Amendment).

78. 494 U.S. 259 (1990).

79. See *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990) (“[T]he people’ protected by the Fourth Amendment, and by the First and Second Amendments . . . refers to a class or persons who are part of a national community or who have otherwise developed sufficient connections with this country to be considered part of that community.”).

80. See *United States v. Portillo-Munoz*, 643 F.3d 437, 440 (5th Cir. 2011) (“Portillo relies on *Verdugo-Urquidez* and argues that he has sufficient connections with the United States to be included in this definition of ‘the people’ . . .”).

81. See *id.* at 442 (“[W]e hold that section 922(g)(5) is constitutional under the Second Amendment.”).

82. *Id.*

83. See *Portillo-Munoz*, 643 F.3d at 440 (arguing that the *Heller* Court’s reference to “the right of law-abiding, responsible citizens to use arms in defense of hearth and home” may reveal an intent to define “the meaning of the term ‘the people’ as it is used in the Second Amendment” (quoting *District of*



reasoned that unauthorized immigrants by default do not satisfy the “law-abiding, responsible citizen” requirement.<sup>84</sup> Second, the court rejected Portillo-Munoz’s “attempt[] to precisely analogize the scope” of the Second and Fourth Amendments.<sup>85</sup> Instead, the court argued that the purposes of the Second and Fourth Amendments differed; the Second Amendment is an affirmative right and has a narrower scope than the Fourth Amendment, which is a protective right.<sup>86</sup> The court concluded that the differing purposes of the Second and Fourth Amendments permit a distinct interpretation of “the people” in each amendment.<sup>87</sup> By creating this novel dichotomy between affirmative and protective rights,<sup>88</sup> the Fifth Circuit panel managed to exclude categorically illegal immigrants from the Second Amendment’s scope.<sup>89</sup> Finally, the Fifth Circuit justified its conclusion in light of Congress’s judicially affirmed power to make laws “that distinguish between lawful and illegal aliens.”<sup>90</sup>

Judge James Dennis dissented in *Portillo-Munoz*.<sup>91</sup> He applied the “substantial connections” test from *Verdugo-Urquidez*

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Columbia v. Heller, 554 U.S. 570, 635 (2008))).

84. See *id.* at 440 (“[A]liens who enter or remain in this country illegally and without authorization are not Americans as that word is commonly understood.”).

85. *Id.* at 441.

86. See *id.* at 440–41 (“The purposes of the Second and the Fourth Amendment are different. The Second Amendment grants an affirmative right to keep and bear arms, while the Fourth Amendment is at its core a protective right against abuses by the government.”).

87. See *id.* at 441 (finding it “reasonable that an affirmative right” such as the Second Amendment “would be extended to fewer groups than would a protective right” like the Fourth Amendment).

88. See McGee-Tubb, *supra* note 41, at 87 (“The Fifth Circuit’s categorization of constitutional amendments by the types of rights they grant and use of this categorization to determine the beneficiaries of those rights signals a departure from traditional approaches to defining ‘the people’ in the constitutional amendments.”).

89. See *United States v. Portillo-Munoz*, 643 F.3d 437, 440 (5th Cir. 2011) (justifying its conclusion on the grounds that the use of “the people” in the Second and Fourth Amendments does not “mandate[] a holding that the two amendments cover exactly the same group of people”).

90. *Id.* at 442.

91. See *id.* at 442–48 (Dennis, J., dissenting) (concurring in the majority’s dismissal of Portillo-Munoz’s Fifth Amendment claim but dissenting from the majority’s dismissal of his Second Amendment claim).

to determine that Portillo-Munoz had the requisite connections to the United States to be considered part of the Second Amendment’s “the people.”<sup>92</sup> Judge Dennis rejected the “affirmative versus protective rights” dichotomy erected by the majority and argued that “the people” in the Second and Fourth Amendments necessarily refers to the same group of persons.<sup>93</sup> Furthermore, he emphasized that who qualifies as “the people” turns on an individual’s connections to the United States rather than legal status in the United States.<sup>94</sup>

*Portillo-Munoz* set the tone for discussing inclusion and exclusion with respect to “the people” of the Second Amendment.<sup>95</sup> Before long, other federal circuits followed the Fifth Circuit’s lead by categorically excluding undocumented persons from the Second Amendment.<sup>96</sup> Several months after the *Portillo-Munoz* decision, the Eighth Circuit aligned with the Fifth Circuit’s exclusion of undocumented immigrants through its brief per curiam decision in *United States v. Flores*.<sup>97</sup>

For reasons similar to those enunciated in *Portillo-Munoz*, the Fourth Circuit also upheld § 922(g)(5) against a Second Amendment challenge.<sup>98</sup> In *United States v. Carpio-*

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92. See *id.* at 443 (explaining that Portillo-Munoz voluntarily entered the United States, resided here, and accepted a variety of societal obligations).

93. See *id.* at 444–45 (noting that such a characterization is incongruous with the Supreme Court’s reasoning in *Heller* and *Doe*).

94. See *id.* at 446 (“Nothing in *Verdugo-Urquidez* requires that the alien must be lawfully present in the United States in order to establish substantial connections.”).

95. See *United States v. Portillo-Munoz*, 643 F.3d 437, 439 (5th Cir. 2011) (noting that the Fifth Circuit is the first federal circuit to address whether the Second Amendment extends to undocumented persons).

96. For example, the Eighth Circuit, which was the next circuit to address this question, relied wholly on the Fifth Circuit’s reasoning in reaching its conclusion. *Infra* note 97.

97. See 663 F.3d 1022, 1023 (8th Cir. 2011) (per curiam), *cert. denied*, 133 S. Ct. 28 (2012) (“Agreeing with the Fifth Circuit that the protections of the Second Amendment do not extend to aliens illegally present in this country, we affirm.”).

98. See *United States v. Carpio-Leon*, 701 F.3d 974, 976 (4th Cir. 2012) (“[T]he scope of the Second Amendment does not extend to provide protection to illegal aliens, because illegal aliens are not law-abiding members of the political community and . . . have no more rights under the Second Amendment than do aliens outside of the United States seeking admittance.”), *cert denied*, 134 S. Ct. 58 (2013).

*Leon*,<sup>99</sup> the defendant argued that “the Second Amendment could not have been intended to exclude illegal aliens from its scope” because the Founders held immigrants in high-esteem.<sup>100</sup> To conduct a historical analysis like that employed in *Heller*,<sup>101</sup> the court surveyed English and colonial history to determine what groups of persons were permitted to possess firearms.<sup>102</sup> In so doing, the Fourth Circuit concluded, “[I]llegal aliens do not belong to the class of law-abiding members of the political community to whom the Second Amendment gives protection.”<sup>103</sup> Reminiscent of the Fifth Circuit’s reasoning in *Portillo-Munoz*, the court emphasized that undocumented persons inherently do not qualify as “members of the political community” for the purpose of the Second Amendment because of their “crime of illegal entry.”<sup>104</sup>

Confronted with the constitutionality of the federal alien-in-possession statute in *United States v. Huitron-Guizar*,<sup>105</sup> the Tenth Circuit flirted with the substantive Second Amendment arguments before ultimately passing on the legal question.<sup>106</sup> Although the court noted the frequency with which the *Heller* Court “connected arms-bearing and citizenship,” it hesitated to assume the converse by inferring that “the right to bear arms is categorically inapplicable to non-citizens.”<sup>107</sup> Nevertheless, the Tenth Circuit hinted that it would be willing to

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99. *Id.*

100. *Id.* at 976.

101. *See id.* at 979 (“Even though the *Heller* Court . . . did not face a law prohibiting firearms possession by a particular class of persons . . . we can employ the historical analysis it prescribed to apply its observations to this case . . .”).

102. *See id.* at 980 (discussing, for example, how colonial governments prohibited suspect groups from possessing firearms).

103. *Id.* at 981.

104. *See id.* (specifying that the holding is limited “as to illegal aliens by their particular relationship to the United States,” which is characterized by “the crime of illegal entry”).

105. 678 F.3d 1164 (10th Cir. 2012).

106. *See id.* at 1169 (“We think we can avoid the constitutional question by *assuming*, for purposes of this case, that the Second Amendment, as a ‘right of the people,’ could very well include, in the absence of a statute restricting such a right, at least some aliens unlawfully here—and still easily find § 922(g)(5) constitutional.”).

107. *Id.* at 1168.

defer to Congress on the Second Amendment issue.<sup>108</sup> Ultimately, the Tenth Circuit upheld 18 U.S.C. § 922(g)(5) under intermediate scrutiny,<sup>109</sup> having assumed, *arguendo*, that “the people” could conceivably include undocumented immigrants.<sup>110</sup>

In uniformly upholding § 922(g)(5) against constitutional challenges,<sup>111</sup> the Fourth, Fifth, and Eighth Circuits all held that undocumented immigrants are not part of “the people” protected by the Second Amendment,<sup>112</sup> and the Tenth Circuit avoided the issue altogether.<sup>113</sup> Accordingly, a plethora of federal district courts have also concluded that noncitizens illegally present in the United States are not part of “the people” and therefore are not afforded Second Amendment rights.<sup>114</sup>

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108. *See id.* at 1169 (“That Congress saw fit to exclude illegal aliens from carrying guns may indicate its belief, entitled to our respect, that such aliens, as a class, possess no such constitutional right.”).

109. *See id.* at 1170 (concluding that § 922(g)(5) survives intermediate scrutiny in light of Congress’s lawful interest in promoting public safety and security).

110. *See id.* at 1169 (explaining how the court dodged the Second Amendment issue).

111. *See* *United States v. Carpio-Leon*, 701 F.3d 974, 975 (4th Cir. 2012) (“Concluding that § 922(g)(5) is constitutional, we affirm.”), *cert denied*, 134 S. Ct. 58 (2013); *United States v. Huitron-Guizar*, 678 F.3d 1164, 1170 (10th Cir. 2012) (“On this record, § 922(g)(5) withstands Mr. Huitron-Guizar’s Second Amendment and Equal Protection challenges.”); *United States v. Portillo-Munoz*, 643 F.3d 437, 442 (5th Cir. 2011) (“[W]e hold that section 922(g)(5) is constitutional under the Second Amendment.”); *United States v. Flores*, 663 F.3d 1022, 1023 (8th Cir. 2011) (“Flores moved to dismiss the indictment, arguing that § 922(g)(5)(A) was facially unconstitutional . . . . The district court denied the motion . . . we affirm.”).

112. *See Carpio-Leon*, 701 F.3d at 976 (concluding that the Second Amendment does not extend to “illegal aliens”); *Portillo-Munoz*, 643 F.3d at 442 (concluding that “the people” does not include “aliens illegally” in the United States); *Flores*, 663 F.3d at 1023 (concluding in its per curiam decision that the Second Amendment does not afford “aliens illegally present in this country” gun ownership rights).

113. *See Carpio-Leon*, 701 F.3d at 977 (“[T]he Tenth Circuit avoided the question of whether illegal aliens are protected by the Second Amendment and upheld § 922(g)(5) because it passed intermediate scrutiny.”); *supra* notes 105–110 and accompanying text (discussing the Tenth Circuit’s approach and reasoning).

114. *See, e.g., United States v. Martinez-Guillen*, No. 2:10cr192-MEF, 2011 WL 588350, at \*3 (M.D. Ala. Jan. 12, 2011) (“Defendant’s motion fails to counter in any meaningful way the weight and reasoning of the case law discussed above, which has uniformly concluded that § 922(g)(5)(A) is a ‘presumptively lawful’ prohibition on the possession of firearms.”); *United States v.*

*B. Expansive View: Undocumented Persons Are Contingently Included in “The People” Contemplated by the Second Amendment*

The Seventh Circuit’s ruling in *United States v. Meza-Rodriguez*<sup>115</sup> created the circuit split over the meaning of “the people” in the Second Amendment.<sup>116</sup> The Seventh Circuit separated itself from the Fourth, Fifth, and Eighth Circuits, finding that there is no way to differentiate the “the people” of the Second Amendment from “the people” referenced in other amendments.<sup>117</sup> Although the Seventh Circuit panel ultimately upheld the constitutionality of § 922(g)(5), it uniquely determined that undocumented immigrants who have substantial connections to the United States qualify as “the people” for Second Amendment purposes.<sup>118</sup>

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Adame-Najera, No. 2:10-CR-10-01-RWS-SSC, 2010 WL 6529643, at \*3 (N.D. Ga. Nov. 24, 2010) (“[T]he Second Amendment does not bar the Government’s prosecution of Defendant under 18 U.S.C. § 922(g)(5).”); *United States v. Flores*, Crim. No. 10-178, 2010 WL 4720223, at \*1 (D. Minn. Nov. 15, 2010) (“Nothing argued by Defendant, or in *Heller* itself, persuades this Court that § 922(g)(5)(A) is different from the other status-based exceptions listed under § 922(g).”), *aff’d*, 663 F.3d 1022 (8th Cir. 2011); *United States v. Luviano-Vega*, No. 5:10-CR-184-BO, 2010 WL 3732137, at \*3 (E.D.N.C. Sept. 20, 2010) (“[A]n alien cannot claim a right to bear arms under the Constitution. Section 922(g)(5), which criminalizes the possession of firearms by illegal aliens, is therefore a valid exercise of Congressional power.”); *United States v. Yanez-Vasquez*, No. 09-40056-01-SAC, 2010 WL 411112, at \*5 (D. Kan. Jan. 28, 2010) (“The court thus finds that the challenged statute survives Second Amendment scrutiny.”); *United States v. Boffil-Rivera*, No. 08-20437-CR, 2008 WL 8853354, at \*8 (S.D. Fla. Aug. 12, 2008) (“Clearly, under any historical interpretation of the enactment of the Second Amendment or the interpretation of any similar right under the Constitution, the individual right to bear arms defined by *Heller* does not apply to an illegal and unlawful alien.”), *aff’d*, 607 F.3d 736 (11th Cir. 2010).

115. 798 F.3d 664 (7th Cir. 2015).

116. *See id.* at 672 n.1 (noting that the holding on the Second Amendment created a split between the Seventh Circuit and the Fourth, Fifth, and Eighth Circuits).

117. *See id.* at 672 (determining that there is “no principled way to carve out the Second Amendment and say that the unauthorized (or maybe all noncitizens) are excluded”).

118. *See id.* at 673 (“Congress’s interest in prohibiting persons who are difficult to track and who have an interest in eluding law enforcement is strong enough to support the conclusion that 18 U.S.C. § 922(g)(5) does not impermissibly restrict *Meza-Rodriguez’s* Second Amendment right to bear arms.” (emphasis added)). Importantly, the Seventh Circuit did not hold that undocumented immigrants categorically, as a group, qualify as part of “the people” for Second Amendment purposes. *Id.* at 670. Rather, the legitimacy of

In August 2013, Mariano Meza-Rodriguez was arrested for unlawful possession of a firearm in violation of the federal alien-in-possession statute.<sup>119</sup> Defendant Meza-Rodriguez moved to dismiss the indictment, alleging that § 922(g)(5) unconstitutionally infringed on his Second Amendment right.<sup>120</sup> The U.S. District Court for the Eastern District of Wisconsin denied Meza-Rodriguez's motion to dismiss on the grounds that immigrants unlawfully present in the United States do not receive Second Amendment protection.<sup>121</sup>

Chief Judge Diane P. Wood, writing for the majority, affirmed the district court's denial of the motion to dismiss, but on different grounds—holding that undocumented immigrants as a group are neither categorically included nor excluded from Second Amendment protection.<sup>122</sup> First, the Seventh Circuit's panel found the *Heller* Court's "passing references" purportedly linking gun ownership to citizenship unpersuasive.<sup>123</sup>

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an undocumented immigrant-defendant's claim to Second Amendment protection is a case-by-case analysis, contingent on a showing of "substantial connections" with the United States. *Id.* If the unlawful immigrant shows "substantial connections," then the Second Amendment rights attach. *Id.*

119. *Id.* Meza-Rodriguez's family brought him to the United States when he was four or five years old. *Id.* From then on, he remained in the United States and did not regularize his status. *Id.*

120. *Id.* Meza-Rodriguez filed three motions: (1) to dismiss the indictment for failure to allege an element of the offense; (2) to dismiss the indictment on constitutional grounds; and (3) to suppress statements. *Id.* The only motion of relevance to this Note is the constitutional argument.

121. *See* United States v. Meza, No. 13-CR-192, 2014 WL 1406301, at \*4 (E.D. Wis. Apr. 11, 2014) (noting that Meza-Rodriguez's facial challenge to the alien-in-possession statute must fail because Second Amendment protection does "not extend to aliens illegally present in the United States"), *aff'd on other grounds sub nom.*, United States v. Meza-Rodriguez, 798 F.3d 664 (7th Cir. 2015). As a part of his constitutional claim, Meza-Rodriguez also asserted an as-applied challenge to § 922(g)(5). *Id.* at \*14–18. The court applied intermediate scrutiny and rejected his claim in light of his "criminal history and evasive conduct." *Id.* at \*18.

122. *See* United States v. Meza-Rodriguez, 798 F.3d 664, 666 (7th Cir. 2015) (noting that the court would not endorse the district court's rationale, which swept too far in categorically denying undocumented immigrants access to Second Amendment protections). Nevertheless, the court affirmed on the grounds that "the Second Amendment does not preclude certain restrictions on the right to bear arms, including the one imposed by § 922(g)(5)." *Id.*

123. *See id.* at 669 (recognizing that "those passages did not reflect an attempt to define the term 'the people,'" and therefore are mere dicta). The *Meza-Rodriguez* majority also cited additional language from *Heller*, which

Next, the *Meza-Rodriguez* majority argued that one may properly draw an analogy between the use of “the people” in the Second Amendment and in the other parts of the Bill of Rights.<sup>124</sup> The court decided to interpret identical terms in an identical manner.<sup>125</sup> Accordingly, it applied the *Verdugo-Urquidez* Fourth Amendment standard for determining whether unauthorized non-citizens are entitled to invoke constitutional protections as members of “the people.”<sup>126</sup> Despite Meza-Rodriguez’s “unsavory traits,” which included several run-ins with the law, the panel concluded that he had developed the requisite “substantial connections”<sup>127</sup> as a resident in this country to garner Second Amendment protection.<sup>128</sup> Meza-Rodriguez developed “extensive ties” with the U.S. through twenty years of residency, public school attendance, and periodic employment.<sup>129</sup> Ultimately, the

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supports the notion that “all people including non-U.S. citizens, whether or not they are authorized to be in the country, enjoy at least some rights under the Second Amendment.” *Id.*

124. *See id.* at 670 (concluding that “the people” in the Second Amendment has the same meaning as “the people” in other parts of the Bill of Rights); *supra* notes 85–89 and accompanying text (explaining that the Fifth Circuit rejected this argument).

125. *See id.* (“An interpretation of the Second Amendment as consistent with the other amendments passed as part of the Bill of Rights has the advantage of treating identical phrasing in the same way and respecting the fact that the first ten amendments were adopted as a package.”).

126. *See United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990) (“[T]he people’ protected by the Fourth Amendment, and by the First and Second Amendments . . . refers to a class of persons who are part of a national community or who have otherwise developed sufficient connections with this country to be considered part of that community.” (citing *United States ex rel. Turner v. Williams*, 194 U.S. 279, 292 (1904))).

127. *See Meza-Rodriguez*, 798 F.3d at 671 (discussing Meza-Rodriguez’s continuous and voluntary presence in the United States for over twenty years, his public school attendance, contributions through work, and family relationships in the nation).

128. *See id.* at 672 (“During [Meza-Rodriguez’s time in the United States], his behavior left much to be desired, but as we have said, that does not mean that he lacks substantial connections with this country.”). The court also rejected the government’s argument that unauthorized non-citizens’ status by default excludes them from the people referred to in the Second Amendment. *Id.* Referencing the Supreme Court’s decision in *Plyler v. Doe*, 467 U.S. 202 (1982), the Seventh Circuit noted that “unauthorized status (reflected in the lack of documentation) cannot support a *per se* exclusion from ‘the people’ protected by the Bill of Rights.” *Id.*

129. *See id.* at 670–71 (listing the manifestations of Meza-Rodriguez’s

Seventh Circuit found that § 922(g)(5) satisfies intermediate scrutiny.<sup>130</sup> Nonetheless, the *Meza-Rodriguez* decision represents the first and only time that a federal circuit has concluded that an undocumented non-citizen is entitled to invoke Second Amendment protection.<sup>131</sup>

#### IV. Critique of the Restrictive View

This Note posits that the Fourth, Fifth, and Eighth Circuits erroneously concluded that undocumented immigrants are not part of “the people.” Those circuits erred in three prominent ways. First, they conflated the two distinct issues raised by constitutional challenges to the alien-in-possession statute.<sup>132</sup> Courts holding to the Restrictive View have often invoked Congress’s power to restrict access to guns to justify their conclusion.<sup>133</sup> Although public policy arguments are pertinent when § 922(g)(5) is subject to intermediate scrutiny, they have no relevance to the threshold issue of who qualifies as part of “the people” for Second Amendment purposes.<sup>134</sup> Second, the Restrictive-View courts’ reliance on *Heller*’s references to “citizenship” is misguided because those references, at best, amount to dicta.<sup>135</sup> Finally, the Fifth Circuit’s attempt to construe “the people” of the Second Amendment as narrower than “the people” of the Fourth Amendment contradicts precedent and amounts to a thinly-veiled, artificial attempt to bar

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connections to the U.S.).

130. *See id.* at 673 (“18 U.S.C. § 922(g)(5) satisfies intermediate scrutiny and thus passes constitutional muster.”).

131. *See United States v. Cordoba*, No. 3:15-CR-067, 2015 WL 6680890, at \*2 (S.D. Ohio Oct. 30, 2015) (noting that the court in *Meza-Rodriguez* took “the lead” in holding that the Second Amendment applies to an undocumented immigrant who has sufficient connections to this nation).

132. *See infra* Part IV.A (discussing the unwarranted reliance on congressional power and public policy to determine the scope of “the people” of the Second Amendment).

133. *Infra* Part IV.A.

134. *Infra* Part IV.A.

135. *See infra* Part IV.B (explaining why *Heller* should not be construed to support a restrictive reading of the scope of “the people” contemplated by the Second Amendment).



undocumented persons from the panoply of rights reserved to “the people.”<sup>136</sup>

### A. *The Critical Error of Conflation*

Constitutional challenges to the alien-in-possession statute implicate two distinct issues: (1) whether “the people” referred to in the Second Amendment includes undocumented persons and, if so, (2) whether § 922(g)(5) constitutes a permissible infringement on undocumented persons’ Second Amendment rights.<sup>137</sup> The circuits holding to the Restrictive View relied heavily on reasoning and precedent that are inapposite to the threshold issue of whether undocumented immigrants are part of “the people.”<sup>138</sup>

As the first federal circuit to consider the issue, the Fifth Circuit panel erred in its reasoning.<sup>139</sup> It is evident that the majority in *Portillo-Munoz* conflated the two issues because it in part justified its conclusion that Portillo-Munoz was not part of “the people” in light of Congress’s power to make “laws that distinguish between citizens and aliens and between lawful and illegal aliens.”<sup>140</sup> The majority explicitly stated that it considered Congress’s aforementioned power to be “persuasive in interpreting the text of the Second Amendment.”<sup>141</sup> Although

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136. See *infra* Part IV.C (explaining how the Fifth Circuit’s rights-based approach conflicts with the interpretative paradigm outlined in *Verdugo-Urquidez* and affirmed by reference in *Heller*).

137. See *United States v. Carpio-Leon*, 701 F.3d 974, 977 (4th Cir. 2012) (noting that this two-part approach to Second Amendment claims is appropriate (citing *United States v. Chester*, 628 F.3d 673, 680 (4th Cir. 2010))).

138. See *infra* notes 139–162 and accompanying text (discussing how the Fourth, Fifth, and Eighth Circuits have conflated the main issues).

139. Importantly, the Eighth Circuit’s per curiam opinion in *United States v. Flores* essentially incorporated by reference the reasoning from the majority opinion in *Portillo-Munoz*. See *United States v. Flores*, 663 F.3d 1022, 1023 (8th Cir. 2011). Therefore, this Note’s critique of the Fifth Circuit’s reasoning also applies to the Eighth Circuit’s reasoning.

140. See *United States v. Portillo-Munoz*, 643 F.3d 437, 443 (5th Cir. 2011) (“[T]he Supreme Court has long held that Congress has the authority to make laws governing the conduct of aliens that would be unconstitutional if made to apply to citizens.” (citing *Mathews v. Diaz*, 426 U.S. 67, 96 (1976))).

141. *Id.* at 442.

congressional power is highly relevant—maybe even dispositive—to the second issue of whether the alien-in-possession statute violates the Second Amendment, it is inapposite to whether “the people” includes undocumented persons like Portillo-Munoz.<sup>142</sup> Even if Congress may discriminate between aliens and citizens, this authority does not come to bear on the scope of “the people.”<sup>143</sup> Defining the “who” of the Second Amendment is an interpretative question, not a policy matter.<sup>144</sup> In essence, the majority relied on an argument that should have been irrelevant to the inquiry.

Similarly, the Tenth Circuit suggested in *Huitron-Guizar* that the fact that Congress prohibited undocumented persons from possessing guns might be dispositive that, as a class, undocumented persons categorically do not have any rights under the Second Amendment.<sup>145</sup> The court even suggested that such an inference is “entitled to our respect.”<sup>146</sup> The Tenth Circuit also assumed that the existence of the alien-in-possession statute is *prima facie* evidence that undocumented persons are properly excluded from “the people.”<sup>147</sup> Oddly enough, the court subsequently assumed, *arguendo* for the purposes of the case at hand, that the Second Amendment could include undocumented persons.<sup>148</sup> Nevertheless, the damage was already done in that the Tenth Circuit perpetuated the problem of conflation that has

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142. *See id.* at 448 (Dennis, J., dissenting) (explaining how the majority opinion reached the wrong conclusion by appealing to Congress’s power to make laws that distinguish based on alienage).

143. *Id.*

144. *See id.* (emphasizing the irrelevance of applying intermediate scrutiny to determine the threshold question about the scope of the right).

145. *See United States v. Huitron-Guizar*, 678 F.3d 1164, 1169 (10th Cir. 2012) (“That Congress saw fit to exclude illegal aliens from carrying guns may indicate its belief, entitled to our respect, that such aliens, as a class, possess no such constitutional right.”).

146. *Id.*

147. *See id.* (arguing that it can avoid deciding the scope of “the people” by assuming “for the purpose of this case, that the Second Amendment, as a ‘right of the people,’ could very well include, *in the absence of a statute restricting such a right*, at least some aliens unlawfully here” (emphasis added)).

148. *See id.* (“The apparent inconsistency in assuming the existence of a right before sustaining a law that acts as a blanket prohibition on it is, we believe, outweighed by the prudence of abstaining on a question of such far-reaching dimensions . . .”).

plagued this discussion, even while making a concerted effort to keep the two issues distinct.<sup>149</sup>

The Fourth Circuit made a similar error when it confronted a challenge to the alien-in-possession statute.<sup>150</sup> In *United States v. Carpio-Leon*,<sup>151</sup> the panel stated that it would probe only the first issue—whether the Second Amendment right extends to the undocumented—and would not reach the second step of the analysis.<sup>152</sup> Yet, in its attempt to define the scope of “the people,” the court discussed the theory that historically “the government could disarm unvirtuous citizens.”<sup>153</sup> Contrary to the Fourth Circuit’s analysis, the government’s authority to disarm persons who are not law-abiding is not dispositive of whether undocumented immigrants qualify as “the people.”<sup>154</sup> That is an important inquiry in the second step of the analysis—a step that the Fourth Circuit claimed it would not reach in *Carpio-Leon*.<sup>155</sup>

Perhaps the most blatant example of the senseless conflation of the issues comes out of the U.S. District Court for the Northern District of California in *United States v. Torres*.<sup>156</sup> During the motion to dismiss proceedings, Judge Edward J. Davila stated that the Second Amendment does not apply to undocumented individuals “because of 922.”<sup>157</sup> Indicative of the strained

149. See *id.* (recognizing that the issue of alienage and the Second Amendment implicates two distinct issues while also emphasizing the importance of deferring to Congress).

150. See *infra* notes 152–155 (discussing the Fourth Circuit’s inability to avoid conflating the analysis under the two issues).

151. 701 F.3d 974 (4th Cir. 2012).

152. See *id.* at 982 (“[W]e hold that the Second Amendment right to bear arms does not extend to *illegal* aliens, and therefore, without the need of proceeding to the second step of *Chester*, we conclude that [the constitutional challenge] must fail.”).

153. *Id.* at 980.

154. See *id.* at 980–81 (justifying its conclusion that “illegal aliens do not fall in the class of persons” for Second Amendment protection based on historical evidence that “the government could disarm individuals who are not law-abiding members of the political community”).

155. See *supra* note 152 and accompanying text (referencing the two-step inquiry and explaining that the court would address only the first issue).

156. See *generally* *United States v. Torres*, CV-14-00255-EJD (N.D. Cal. Feb. 22, 2015).

157. See Transcript of Record at 15, *United States v. Torres*, CV-14-00255-EJD, 15 (N.D. Cal. Feb. 22, 2015) (“There’s a rational basis for the Second Amendment and troubling as it is, perhaps define that there is at least

reasoning used to justify alienage exclusions from the Second Amendment, Judge Davila employed circular reasoning to explain his conclusion. At the heart of these verbal gymnastics lies a futile attempt to justify something that is inherently unjustifiable.

In sum, the courts embracing the Restrictive View have often engaged in a classic game of begging the question.<sup>158</sup> First, they purport to address the scope of “the people” contemplated by the Second Amendment.<sup>159</sup> Second, they pontificate about Congress’s authority to exclude undocumented persons due to the legitimate policy concerns of safety and security, which ultimately led to passage of the alien-in-possession statute.<sup>160</sup> Next, the courts have assumed the conclusion—that the undocumented are not part of “the people”—by the very existence of the alien-in-possession statute.<sup>161</sup> Finally, the courts complete the analysis by justifying the constitutionality of the alien-in-possession statute by reminding the reader how it just concluded that the undocumented are not part of “the people.”<sup>162</sup> The conclusion and the premise are indistinguishable because each is invariably invoked to validate the other.

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one amendment that doesn’t apply because of 922, doesn’t apply to undocumented individuals when all of the other important amendments do and there is somewhat of a—it’s not fair.”).

158. See *infra* notes 158–162 and accompanying text (explaining the fallacy in which these courts have engaged).

159. See, e.g., *United States v. Portillo-Munoz*, 643 F.3d 437, 439 (5th Cir. 2011) (framing the issue as whether the Second Amendment protection extends to undocumented persons present in the United States).

160. See *id.* at 441 (“[T]he Supreme Court has long held that Congress has the authority to make laws governing the conduct of aliens that would be unconstitutional if made to apply to citizens.”); *United States v. Carpio-Leon*, 701 F.3d 974, 980 (4th Cir. 2012) (relying on the idea that Congress historically had the authority to disarm persons who are not law-abiding).

161. See *Portillo-Munoz*, 643 F.3d at 442 (relying on Congress’s authority to make laws, which distinguish based on alienage, to interpret the text of the Second Amendment).

162. See, e.g., *id.* at 442 (“Whatever else the term means or includes, the phrase ‘the people’ in the Second Amendment of the Constitution does not include aliens illegally in the United States such as Portillo, and we hold that section 922(g)(5) is constitutional under the Second Amendment.”).

*C. The Unwarranted Reliance on Heller Dicta*

Some courts have relied on the following passage from *District of Columbia v. Heller* to support the idea that “the people” of the Second Amendment refers exclusively to a specific subset of citizens:

We know of no other enumerated constitutional right whose core protection has been subjected to a freestanding ‘interest-balancing’ approach . . . . The First Amendment contains the freedom-of-speech guarantee that the people ratified, which included exceptions for obscenity, libel, and disclosure of state secrets, but not for the expression of extremely unpopular and wrong-headed views. The Second Amendment is no different. Like the First, it is the very *product* of an interest balancing by the people—which Justice Breyer would now conduct for them anew. And whatever else it leaves to future evaluation, it surely elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home.<sup>163</sup>

Relying on this language from *Heller*, the majority in *Portillo-Munoz* determined that the Second Amendment applied only to those “law-abiding, responsible citizens” who qualify as part of the “political community.”<sup>164</sup> In the wake of *Portillo-Munoz*, other courts have also emphasized the Supreme Court’s reference to “law-abiding citizens” to reject constitutional challenges to the alien-in-possession statute.<sup>165</sup> One commentator has even asserted that the *Heller* Court did implicitly define “the people” of the Second Amendment as excluding all non-citizens.<sup>166</sup>

163. *District of Columbia v. Heller*, 554 U.S. 570, 634–35 (2008).

164. *Portillo-Munoz*, 643 F.3d at 440 (quoting *Heller*, 554 U.S. at 580, 635).

165. See, e.g., *United States v. Carpio-Leon*, 701 F.3d 974, 976 (4th Cir. 2012) (recounting how the district court denied Carpio-Leon’s motion because “*Heller* foreclose[s] [his] argument that aliens illegally present in the United States are among those protected by the Second Amendment.”); *United States v. Guerrero-Leco*, No. 3:08CR118, 2008 WL 4534226, at \*1 (W.D.N.C. Oct. 6, 2008) (relying on *Heller* to conclude that the right belongs to only citizens), *vacated*, 446 F. App’x 610 (4th Cir. 2011); *United States v. Boffil-Rivera*, No. 08-20437-CR, 2008 WL 8853354, at \*8 (S.D. Fla. Aug. 12, 2008) (“Clearly, under any historical interpretation of the enactment of the Second Amendment or the interpretation of any similar right under the Constitution, the individual right to bear arms defined by *Heller* does not apply to an illegal and unlawful alien.”), *aff’d*, 607 F.3d 736 (11th Cir. 2010).

166. See Salnikova, *supra* note 39, at 626 (“The Court defined ‘the people’ as

Furthermore, it has been argued that “*Heller* explicitly extended its reading of ‘the people’ to the other amendments, thereby excluding illegal aliens from membership in ‘the people’ across the Bill of Rights.”<sup>167</sup>

Reliance on *Heller* to resolve the precise scope of “the people” in the Second Amendment is unwarranted for several reasons. First, the issue of whether undocumented persons are part of “the people” was not before the Court in *Heller*.<sup>168</sup> In fact, *Heller* intended only to resolve whether the Second Amendment conferred an individual or collective right.<sup>169</sup> Importantly, the Court did not mention any form of the words “immigrant” or “alien” in the opinion.<sup>170</sup> Boiled down, *Heller* focused on the “what” of the Second Amendment, while the important issue here is the “who” of the Second Amendment.<sup>171</sup> Amidst its reliance on *Heller*, the Fifth Circuit even admits that *Heller* did not intend to reach the question of the scope of “the people.”<sup>172</sup>

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‘all members of the political community’ who are ‘law-abiding, responsible citizens.’ The terms ‘political,’ ‘law-abiding,’ and ‘citizen’ seem to exclude deliberately those who broke the law or those who are non-American citizens . . . .” (quoting *Heller*, 554 U.S. at 635)).

167. *Id.* at 627.

168. *See Heller*, 554 U.S. at 570 (framing the issue as “[w]hether the following provisions—D.C. Code §§ 7-2502.02(a)(4), 22-4504(a), and 7-2507.02—violate the Second Amendment rights of individuals who are not affiliated with any state-regulated militia, but who wish to keep handguns and other firearms for private use in their homes?”); *see also* *United States v. Meza-Rodriguez*, 798 F.3d 664, 666 (7th Cir. 2015) (“This issue was not, however, before the Court in *Heller*.”); *Carpio-Leon*, 701 F.3d at 979 (“Even though the *Heller* Court stressed that the core right of the Second Amendment protects law-abiding members of the political community, it did not face a law prohibiting firearms possession by a particular class of persons.”); *Portillo-Munoz*, 643 F.3d at 445 (Dennis, J., dissenting) (“*Heller* did not address the question of whether noncitizens, lawfully or unlawfully present in the United States, have Second Amendment rights.”).

169. *See United States v. Huitron-Guizar*, 678 F.3d 1164, 1168–69 (10th Cir. 2012) (“[T]he question in *Heller* was the amendment’s *raison d’être*—does it protect an individual or collective right?—and aliens were not part of the calculus.”).

170. *See id.* at 1168 (“Neither the majority nor dissents mentioned ‘aliens,’ ‘immigrants,’ or ‘non-citizens.’”).

171. *See id.* at 1166 (explaining that attempts to define the scope of “the people” concerns the “who” rather than the “what” of the Second Amendment).

172. *See United States v. Portillo-Munoz*, 643 F.3d 437, 440 (5th Cir. 2011) (“[T]he question of whether an alien, illegal or legal, has the right to bear arms was not presented [*in Heller*] . . . .”).

Furthermore, there is no indication that the Court's passing references to "law-abiding citizens" were intentionally calculated to inform the meaning of "the people."<sup>173</sup> Several alternative explanations deserve consideration. First, the references to "law-abiding citizens" may have been merely inadvertent.<sup>174</sup> Another possibility is that the Court used that language to indicate who definitely was a part of "the people," rather than using that language to define the limits of "the people." Nothing indicates that the Court in *Heller* used the "law-abiding, responsible citizen" phrase to the exclusion of "irresponsible citizens" or "responsible noncitizens."<sup>175</sup> Regardless, this discussion, at the very least, indicates that what the *Heller* Court did and why they did it is far from clear.<sup>176</sup>

The majority opinion in *Heller* recognized that their decision hardly represents an exhaustive interpretation of the entire Second Amendment.<sup>177</sup> As one commentator has noted, *Heller* admitted that its survey of the Second Amendment is "capacious enough to permit future growth."<sup>178</sup> The *Meza-Rodriguez* court took the proper approach, noting that it was "reluctant to place more weight on these passing references than the Court itself did."<sup>179</sup>

Notably, the Fourth and Tenth Circuits also did not find the *Heller* dicta persuasive. The Tenth Circuit noted how "frequently [*Heller*] connected arms-bearing and citizenship" but refused to "infer from *Heller* a rule that the right to bear arms is

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173. See *Fletcher v. Haas*, 851 F. Supp. 2d 287, 298 (D. Mass. 2012) (noting that reading *Heller* as restricting the Second Amendment to law-abiding citizens "requires a considerable analytical strain").

174. See *Huitron-Guizar*, 678 F.3d at 1168 ("Nor can we say that the word 'citizen' was used deliberately to settle the question, not least because doing so would conflict with *Verdugo-Urquidez*, a case *Heller* relied on.").

175. See *Meaning(s) of "the People," supra* note 52, at 1086 ("Because *Heller* did not hold that only law-abiding, responsible citizens have Second Amendment rights, it is possible that irresponsible citizens—or responsible noncitizens—could have such rights, too.").

176. See *id.* at 1079 ("[D]ue to its many ambiguities, *Heller* has not resolved the meaning of 'the people' in the Second Amendment.").

177. See *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008) (acknowledging that it does not "clarify the entire field" by leaving some Second Amendment questions open to future inquiry).

178. *Id.*

179. *United States v. Meza-Rodriguez*, 798 F.3d 664, 669 (7th Cir. 2015).

categorically inapplicable to non-citizens.”<sup>180</sup> *Heller* does not provide clear guidance in interpreting the scope of “the people,” and, therefore, courts should avoid relying on the passing references to “law-abiding citizens” in *Heller*.<sup>181</sup> At best, the Court’s references to law-abiding citizens are dicta.<sup>182</sup>

*C. The Misguided Reliance on an “Affirmative Versus Protective Rights” Dichotomy*

In *Portillo-Munoz*, the Fifth Circuit went to great lengths to distinguish the seemingly identical uses of “the people” in the Second and Fourth Amendments.<sup>183</sup> Specifically, the majority opinion endeavored to distinguish the two amendments by inventing an alleged divergence in their purposes.<sup>184</sup> The opinion argued that the Second Amendment grants an affirmative right, while the Fourth Amendment grants protective rights.<sup>185</sup> According to the court, the scope of protective rights is more expansive than the scope of affirmative rights.<sup>186</sup> A protective right—and, presumably, a relatively narrow right—such as the right to bear arms as codified in the Second Amendment does not

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180. *United States v. Huitron-Guizar*, 678 F.3d 1164, 1168 (10th Cir. 2012).

181. *See, e.g., Fletcher v. Haas*, 851 F. Supp. 2d 287, 298 (D. Mass. 2012) (refusing to rely on the references to citizenship in *Heller* as a limiting of the scope of “the people” because it is unsupported by the historical meaning of “the people,” contradicts the Constitution’s structure, and conflicts with *Verdugo-Urquidez*, which *Heller* cited with approval).

182. *See id.* (concluding that the “citizenship” terminology in *Heller* represented mere dicta).

183. *See infra* notes 184–187 and accompanying text (explaining the Fifth Circuit’s reasoning).

184. *See McGee-Tubb, supra* note 41, at 87 (“The Fifth Circuit’s categorization of constitutional amendments by the types of rights they grant and use of this categorization to determine the beneficiaries of those rights signals a departure from traditional approaches to defining ‘the people’ in the constitutional amendments.”).

185. *See United States v. Portillo-Munoz*, 643 F.3d 437, 441 (5th Cir. 2011) (arguing that the Second and Fourth Amendments have divergent purposes because the Second Amendment grants an affirmative right to bear arms and the Fourth Amendment protects against government abuses).

186. *See id.* (“[W]e find it reasonable that an affirmative right would be extended to fewer groups than would a protective right.”).



extend to the class of undocumented persons.<sup>187</sup> The Fifth Circuit's affirmative versus protective rights dichotomy, so to speak, diverges substantially from the Supreme Court's decisions in *Verdugo-Urquidez* and *Heller*.<sup>188</sup> In *Heller*, the Supreme Court approvingly quoted from *Verdugo-Urquidez* that the Second and Fourth Amendments protect the same set of "people."<sup>189</sup> In contrast, the Fifth Circuit's rights-based approach represents a departure from *Heller* by "limit[ing] the constitutional rights' applicability according to the types of rights they grant rather than by the definition of 'the people' shared by the constitutional amendments employing the term."<sup>190</sup> *Heller*, which stands as the seminal Second Amendment case, made no mention of the Second Amendment as an "affirmative right."<sup>191</sup> Rather, *Heller* opined that the First, Second, and Fourth Amendments functioned similarly in that they codified "pre-existing right[s]."<sup>192</sup> Therefore, it is reasonable to conclude that the Supreme Court did not find it necessary to split hairs and further delineate between the purposes of the Second and Fourth Amendments.

Even if the Fifth Circuit was correct in its argument that the two amendments' purposes differ, the court did not offer any justification—much less an argument grounded in *stare decisis*—for why affirmative rights might generally have a more limited scope than protective rights.<sup>193</sup> The Fifth Circuit failed to provide a reason for why this "affirmative right" to bear arms, although more narrow, does not extend to undocumented immigrants.

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187. See *id.* (explaining the practical effects of the rights-based approach).

188. See *id.* at 444 (Dennis, J., dissenting) ("The majority's characterization of the Second Amendment as an affirmative right is contradicted by *Heller*."); see also McGee-Tubb, *supra* note 41, at 84 (laying out the contradicting precedent).

189. *District of Columbia v. Heller*, 554 U.S. 570, 580 (2008) (citing *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990)).

190. McGee-Tubb, *supra* note 41, at 85.

191. See *United States v. Portillo-Munoz*, 643 F.3d 437, 444 (5th Cir. 2011) (Dennis, J., dissenting) ("The majority's characterization of the Second Amendment as an affirmative right is contradicted by *Heller*.").

192. See *Heller*, 554 U.S. at 592 (noting similarities, rather than differences, between the three amendments discussed).

193. See *Portillo-Munoz*, 643 F.3d at 441 (mentioning only that it is "reasonable" to think that protective rights extend to more persons than do affirmative rights).

Agreeing *arguendo* with the Fifth Circuit's rights-based premise, it does not necessarily follow that the undocumented would be excluded from "the people" as a part of this narrower reading of the Second Amendment.

The distinction that the Fifth Circuit concocted between the Second and Fourth Amendments is artificial, unclear, and misguided.<sup>194</sup> Indeed, the Fifth Circuit's attempt to construe "the people" of the Second Amendment as narrower than "the people" of the Fourth Amendment reflects, in one scholar's words, "the unique undercurrent of gun rights as a symbol of belonging to America."<sup>195</sup> If courts continue to invent these arbitrary classifications as a means of narrowing the scope of "the people," they will perpetuate judicial activism at the expense of well-defined precedent.<sup>196</sup> Precedent does not support the Fifth Circuit panel's analysis,<sup>197</sup> and the court's "strained reading" of the Second and Fourth Amendments has only served to further obscure the meaning of "the people."<sup>198</sup>

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194. See Eugene Volokh, *The Constitutional Rights of Illegal Aliens, Under the First, Second, and Fourth Amendments*, VOLOKH CONSPIRACY (June 13, 2011, 6:01 PM), <http://volokh.com/2011/06/13/the-constitutional-rights-of-illegal-aliens-under-the-first-second-and-fourth-amendments/> (last visited Dec. 5, 2016) (noting that the court's reasoning is "not sound") (on file with the Washington and Lee Law Review); see also Magliocca, *supra* note 36

It may be that illegal aliens should get no protection from the Bill of Rights or less than what those who are lawfully here get, but I don't see any support for the proposition that illegal aliens would, for example, get Fourth Amendment rights but no First or Second Amendment rights.

McGee-Tubb, *supra* note 41, at 86 (describing the Fifth Circuit's distinction between affirmative and protective rights as "unclear").

195. Gulasekaram, *supra* note 42, at 622.

196. See McGee-Tubb, *supra* note 41, at 86–87 (explaining that the use of an unclear, ambiguous distinction such as the affirmative versus passive dichotomy welcomes judicial activism on the issue of alienage and the Second Amendment).

197. See *id.* at 86 ("The Fifth Circuit's conclusion—that constitutional rights can be categorized and that this grouping can determine those to whom a right applies—would require abandoning the dominant understanding that the Bill of Rights serves both affirmative and protective purposes and would define constitutional rights more narrowly than ever before.")

198. See Gulasekaram, *supra* note 42, at 623 (suggesting that the Supreme Court's refusal to review the Fifth Circuit's decision in *Portillo-Munoz* has prolonged confusion surrounding the scope of "the people").

V. Recommendation to Resolve the Circuit Split

A. The Meaning of “the People” Matters

Gun ownership is a politically potent issue, and the question of who is sufficiently “American” to bear arms has become a divisive topic.<sup>199</sup> Nevertheless, the issue of alienage and the Second Amendment has received surprisingly little attention in the courts until recently.<sup>200</sup> Undocumented persons’ orientation to the Second Amendment and the Bill of Rights at large is profoundly important for three main reasons.

First, the way that courts interpret “the people” in the Second Amendment necessarily affects the interpretation of “the people” currently protected by the First, Fourth, Ninth, and Tenth Amendments.<sup>201</sup> Interpreting the scope of the Second Amendment narrowly to exclude undocumented persons threatens the current and more expansive interpretation of “the people” in other amendments.<sup>202</sup> If, as argued here, courts have erred in their narrow interpretation of “the people” in the Second Amendment, then it is imperative to correct the interpretation before it infects the meaning of “the people” throughout the Bill of Rights to exclude undocumented persons from the First, Fourth, Ninth, and Tenth Amendments.<sup>203</sup>

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199. See Pratheepan Gulasekaram, *Aliens with Guns: Equal Protection, Federal Power, and the Second Amendment*, 92 IOWA L. REV. 891, 893–94 (2007) (“The marriage between firearms and America traces its roots to the country’s founding era . . . . Since that time, gun ownership has occupied a distinct position in the American popular, political, and legal landscape.”).

200. See *id.* at 893 (“In this era of increased attention to immigration, national security, and terrorism, often overlooked is a constitutional nexus where equal-protection principle, the federal foreign-affairs power, and the Second Amendment coalesce: alienage and the right to bear arms.”).

201. See Salnikova, *supra* note 39, at 626 (noting the importance of correctly defining “the people” of the Second Amendment because it necessarily informs the scope of other Bill of Rights guarantees).

202. See *supra* notes 36–40 and accompanying text (explaining how the symbiotic nature of “the people” throughout the Bill of Rights renders the interpretation of “the people” of the Second Amendment critical to the construal of the Bill of Rights generally).

203. See *supra* notes 41–43 and accompanying text (underscoring the importance of interpreting “the people” uniformly throughout the Bill of Rights to conceivably include undocumented persons).

Second, the prevailing interpretation of “the people” to exclude undocumented persons reflects the possibility that partisanship is shaping Second Amendment jurisprudence at the expense of consistent constitutional interpretation.<sup>204</sup> In light of the tortured reasoning of the majority circuits,<sup>205</sup> it is hard to deny the possibility “that something deeper than interpretive disagreement is bubbling beneath the surface in contests” over the scope of “the people” in the Second Amendment.<sup>206</sup> Indeed, Harvard Law Professor Mark V. Tushnet has written that “[d]isagreements over the Second Amendment and its meaning are no longer fought on legal and policy grounds alone.”<sup>207</sup> Rather, he submits that “disputes over gun policy have become deeply enmeshed in the culture wars” because “[t]he Second Amendment is one of the arenas in which we as Americans try to figure out who we are.”<sup>208</sup> Another legal scholar has noted that the Fifth Circuit’s eagerness to read “the people” more narrowly in the Second Amendment than in the Fourth Amendment underscores “the unique undercurrent of gun rights as a symbol of belonging in America.”<sup>209</sup> Simply put, the Fifth Circuit’s decision reflects a cultural feeling characterized by uneasiness at the possibility of extending gun rights to noncitizens.<sup>210</sup> Regrettably, the Second Amendment has become ripe territory for political power plays.

Constitutional jurisprudence governing the confluence of alienage and the Second Amendment is still in its nascent stages,

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204. See *infra* notes 205–210 and accompanying text (explaining why such an inference is plausible).

205. See *supra* Part IV (arguing that federal circuits holding to the Restrictive View of “the people” have strained to reach that outcome).

206. See Gulasekaram, *supra* note 42, at 623 (noting an alternative explanation for the incongruity between the courts’ decisions and the actual meaning of “the people”).

207. MARK V. TUSHNET, *OUT OF RANGE: WHY THE CONSTITUTION CAN’T END THE BATTLE OVER GUNS* xiv (2007).

208. See *id.* (acknowledging the role that culture has played in shaping the contemporary conception of the Second Amendment).

209. See Gulasekaram, *supra* note 42, at 623 (explaining the cultural hesitancy to extend gun rights to undocumented persons).

210. See *id.* at 627 (“*Portillo-Munoz* makes explicit what many may find implicitly or silently disquieting about guns and noncitizens in our constitutional order—that there is just something unsettling about extending gun rights to those who are not full members of the American polity.”).

and it is critical to correct its trajectory now.<sup>211</sup> Fortunately, hope remains that Second Amendment jurisprudence may be shaped by reasoned legal analysis rather than by unfettered allegiance to an arbitrary cultural undercurrent.<sup>212</sup> Intellectual honesty should characterize interpretations of the Second Amendment, so that the judiciary may focus on what the Second Amendment truly means instead of how it may interpret the Second Amendment for its own political and cultural ends.<sup>213</sup> By resolving this circuit split without regard for partisan perspectives or political consequences, courts may begin the process of restoring integrity to their Second Amendment jurisprudence.<sup>214</sup>

Third, clarification of the meaning of “the people” is important in the context of constitutional challenges to the alien-in-possession statute.<sup>215</sup> A successful constitutional challenge to § 922(g)(5) would demonstrate, as a threshold matter, that the Second Amendment protects unauthorized immigrants within the United States.<sup>216</sup> If so, a reviewing court

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211. See Moore, *supra* note 37, at 844 (stating that jurisprudence governing the application of the Second Amendment to noncitizens will evolve and take shape in the near future).

212. See *infra* Part V.B (explaining that the Seventh Circuit employed sound legal analysis to conclude that undocumented persons might qualify as “the people,” contingent on a showing of substantial connections to the United States).

213. See TUSHNET, *supra* note 207, at xix (“Like all battles in culture wars, then, the fights over the Second Amendment are really about something else—not about what the Second Amendment means . . . but . . . about how we understand ourselves as Americans. And so the battle over the Second Amendment will continue.”); Gulasekaram, *supra* note 42, at 652 (“[We] remain only partially committed to the constitutional goal of equality, retreating from that vision when citizenship status becomes the dividing line and when distribution of our uniquely American ‘advantage’ is in question.”).

214. See *infra* Part V.B (discussing why a consistent interpretation of “the people” throughout the Bill of Rights is the superior interpretive approach).

215. See 18 U.S.C. § 922 (2012) (providing in relevant part that undocumented persons may not possess firearms).

216. See, e.g., *United States v. Portillo-Munoz*, 643 F.3d 437, 443 (5th Cir. 2011) (Dennis, J., dissenting) (“Of course, whether 18 U.S.C. § 922(g)(5) violates the Second Amendment is a separate question from whether Portillo-Munoz is part of ‘the people’ who have First, Second, and Fourth Amendment rights.”). If undocumented immigrants categorically do not qualify as “the people” for Second Amendment purposes, then the constitutionality of § 922(g)(5) is automatically settled. *Id.* In other words, even reviewing the statute under strict scrutiny would prove superfluous because Congress need not justify gun

must determine whether § 922(g)(5) represents a constitutional infringement on an undocumented immigrant's Second Amendment rights.<sup>217</sup> The Seventh Circuit's holding in *Meza-Rodriguez* has potentially laid a more robust foundation for a constitutional challenge to § 922(g)(5) because the initial question in that inquiry is no longer settled against undocumented immigrants.<sup>218</sup> If the Seventh Circuit is on the right side of the legal argument, as this Note argues, then the stage is set for a more focused debate on the constitutionality of the alien-in-possession statute.<sup>219</sup>

Finally, resolution of this issue is an important first step in restoring a semblance of clarity to the phrase "the people" in the general context of the Bill of Rights. In considering the Second Amendment specifically, resolution of this split would solve an important piece of the Second Amendment puzzle, one that has been shrouded in confusion for years.<sup>220</sup> Resolving the circuit split in favor of the Seventh Circuit's approach will restore consistency to the interpretation of "the people" throughout the Bill of Rights.<sup>221</sup>

### *B. Interpret "the People" of the Second and Fourth Amendments Consistently*

This Note urges a resolution to the circuit split in favor of the Seventh Circuit. A consistent reading of "the people" in both the Second and Fourth Amendments makes sense for several

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regulations targeting persons who are members of a class that inherently lacks Second Amendment rights. *Id.*

217. See *United States v. Chester*, 628 F.3d 673, 680 (4th Cir. 2010) (noting that, if the regulation at issue burdens conduct protected by the Second Amendment, then the next step is to apply the appropriate level of scrutiny).

218. Due to the Seventh Circuit's decision in *Portillo-Munoz*, undocumented immigrant defendants finally have a precedential leg on which to stand when challenging the constitutionality of § 922(g)(5).

219. See Moore, *supra* note 37, at 844 (noting that, although courts have consistently struck down challenges to the alien-in-possession statute, courts will continue to confront this issue).

220. See Gulasekaram, *supra* note 42, at 622 ("Recent Supreme Court cases have exacerbated confusion over the inclusiveness of the Second Amendment.").

221. See *infra* Part V.B (arguing that a consistent interpretation of "the people" is best).

reasons. First, the terms are identical in both Amendments, and, unless there is a compelling reason for interpreting the terms differently, the same terms should be construed in the same way.<sup>222</sup> The default position should be a consistent reading of “the people” throughout the Bill of Rights, which the Framers adopted as a package.<sup>223</sup> There is no intellectually honest way to carve out a distinction in the scope of “the people” in the Bill of Rights.<sup>224</sup> Contrary to the affirmative versus protective rights dichotomy posited by the Fifth Circuit, Supreme Court precedent does not support the idea that “the people” of the Second Amendment represents a narrower right than the Fourth Amendment.<sup>225</sup> As the Seventh Circuit keenly noted, “[a]n interpretation of the Second Amendment as consistent with the other amendments passed as part of the Bill of Rights has the advantage of treating identical phrasing in the same way.”<sup>226</sup>

Second, there is no evidence in the Constitution’s text that the term “the people” should be interpreted in more than one way.<sup>227</sup> To the contrary, the Court in both *Heller* and

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222. See *Powerex Corp. v. Reliant Energy Servs., Inc.*, 551 U.S. 224, 232 (2007) (explaining that a standard principle of interpretation holds that “identical words and phrases within the same statute should normally be given the same meaning”).

223. See *United States v. Meza-Rodriguez*, 798 F.3d 664, 670 (7th Cir. 2015) (noting that references to “the people” in parts of the Constitution other than the Bill of Rights may have a different meaning because they appear in a different context, such as in reference to elections rather than individual rights).

224. See *id.* at 672 (“In the post-*Heller* world, where it is now clear that the Second Amendment right to bear arms is no second-class entitlement, we see no principled way to carve out the Second Amendment and say that the unauthorized (or maybe all noncitizens) are excluded.”); see also *Parker v. District of Columbia*, 478 F.3d 370, 381 (D.C. Cir. 2007) (explaining that such disparate interpretations of “the people” does not square with the idea that the Bill of Rights should be construed uniformly); *United States v. Emerson*, 270 F.3d 203, 227 (5th Cir. 2001) (“There is no evidence in the text of the Second Amendment, or any other part of the Constitution, that the words ‘the people’ have a different connotation within the Second Amendment than when employed elsewhere in the Constitution.”).

225. See *supra* Part IV.C (dispelling the Fifth Circuit’s rights-based approach as arbitrary and unsupported by relevant Supreme Court precedent); *Parker*, 478 F.3d at 381 (“Indeed, the Supreme Court has recently endorsed a uniform reading of ‘the people’ across the Bill of Rights.”).

226. *Meza-Rodriguez*, 798 F.3d at 670.

227. See *Emerson*, 270 F.3d at 227 (“In fact, the text of the Constitution, as a whole, strongly suggests that the words “the people” have precisely the same

*Verdugo-Urquidez* discussed the similarities between the First, Second, and Fourth Amendments.<sup>228</sup> For example, the Court observed, “it has always been widely understood that the Second Amendment, like the First and Fourth Amendments, codified a pre-existing right.”<sup>229</sup> More compelling, however, was the Court’s evident approval of the passage in *Verdugo-Urquidez*, which stated that “the people” is a term of art used in the same manner throughout the Bill of Rights.<sup>230</sup> From the Court’s language, it is reasonable to infer that the First, Second, and Fourth Amendments protect the identical group of people.<sup>231</sup>

Interpreting “the people” differently depending on the specific right would lead to a parade of horrors. To begin, it would violate a leading principle of interpretation, which provides that identical terms should be interpreted in an identical manner.<sup>232</sup> Second, interpreting “the people” in the Second Amendment as a small subset of “the people” referred to in other Amendments would contradict the Supreme Court’s understanding of “the people” as described in

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meaning within the Second Amendment as without.”).

228. See *The Meaning(s) of “the People,” supra* note 52, at 1088 (“*Verdugo-Urquidez* and *Heller* both suggest that ‘the people’ has a consistent meaning throughout the Constitution.”).

229. *District of Columbia v. Heller*, 554 U.S. 570, 592 (2008).

230. See *id.* at 580

[Its uses] suggest[] that ‘the people’ protected by [the First, Second, and Fourth Amendments], and to whom rights and powers are reserved in the Ninth and Tenth Amendments, refers to a class of persons who have . . . developed sufficient connection with this country to be considered part of that community.

(quoting *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990)).

231. See *United States v. Meza-Rodriguez*, 798 F.3d 664, 669–70 (7th Cir. 2015) (arguing that *Heller*, by quoting *United States v. Verdugo-Urquidez*, affirmed that “the people” has the same meaning in the First, Second, and Fourth Amendments); *United States v. Portillo-Munoz*, 643 F.3d 437, 444–45 (5th Cir. 2011) (Dennis, J., dissenting) (“[T]he Supreme Court recognized in *District of Columbia v. Heller* . . . the same set of ‘people’ protected by the Second Amendment are also protected by the First and Fourth Amendments.”).

232. See *Powerex Corp. v. Reliant Energy Servs., Inc.*, 551 U.S. 224, 232 (2007) (underscoring the importance of giving the same meaning to identical phrases in the same body of law); *Sorenson v. Sec’y of Treasury*, 475 U.S. 851, 860 (1986) (noting that identical words, even when used in different parts of a statute or constitution, should be given the same meaning (citing *Atlantic Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 433 (1932))).



*Verdugo-Urquidez*.<sup>233</sup> Third, it would leave undocumented persons vulnerable to the arbitrary whims of the judiciary.<sup>234</sup> For example, Judge Davila in *Torres* considered whether undocumented persons should be considered part of “the people” of the Second Amendment.<sup>235</sup> He stated that the concept of categorically excluding undocumented persons is “troubling” and “unfair,” considering that the other important amendments do apply to that class of persons.<sup>236</sup> Despite acknowledging the inconsistency and unfairness inherent in excluding undocumented persons from “the people,” Judge Davila concluded that the Second Amendment “doesn’t apply to undocumented individuals.”<sup>237</sup>

The following excerpt from Judge Dennis’s dissenting opinion in *Portillo-Munoz* offers a poignant illustration of the harm caused by interpreting “the people” in disparate manners:

There are countless persons throughout Texas, Louisiana, and Mississippi, who, like Portillo-Munoz, work for employers, pay rent to landlords, and support their loved ones, but are unlawfully residing in the United States. The majority’s reasoning renders them vulnerable—to governmental intrusions on their homes and persons, as well as interference with their rights to assemble and petition the government for redress of grievances—with no recourse.<sup>238</sup>

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233. See *Parker v. District of Columbia*, 478 F.3d 370, 381 (D.C. Cir. 2007) (“[W]e should not regard ‘the people’ in the Second Amendment as somehow restricted to a small subset of ‘the people’ meriting protection under the other Amendments’ use of that same term.” (citing *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990))).

234. See *supra* note 196 and accompanying text (explaining why an inconsistent interpretation of “the people” in the Bill of Rights welcomes arbitrary classifications for inclusion and exclusion).

235. See Transcript of Record at 15, *United States v. Torres*, CV-14-00255-EJD (N.D. Cal. Feb. 22, 2015) (conducting the motion to dismiss proceedings under 922(g)(5)).

236. See *id.* at 15 (acknowledging the contradiction inherent to the constitutional jurisprudence governing the scope of “the people”).

237. See *id.* (“There’s a rational basis for the Second Amendment and troubling as it is, perhaps define that there is at least one amendment that doesn’t apply because of 922, doesn’t apply to undocumented individuals when all of the other important amendments do and there is somewhat of a—it’s not fair.”).

238. *United States v. Portillo-Munoz*, 643 F.3d 437, 444–45 (5th Cir. 2011) (Dennis, J., dissenting).

Narrowing the meaning of “the people” in the Second Amendment has the effect, whether intended or not, of potentially nullifying other rights currently available to undocumented persons.<sup>239</sup> If undocumented persons categorically do not qualify as “the people” for Second Amendment purposes, then the door is ajar to strip them of other Bill of Rights protections.<sup>240</sup> Indeed, the Fifth Circuit panel in *Portillo-Munoz* specifically questioned whether persons illegally present in the United States should have Fourth Amendment rights.<sup>241</sup> Even the Tenth Circuit acknowledged that excluding undocumented persons from “the people” would unjustifiably leave them at the mercy of “burglars and assailants.”<sup>242</sup>

For the sake of consistent interpretation and preservation of the rights owed to noncitizens, “the people” must be given the same meaning “when used in the exact same phrase in the

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239. See *id.* at 448 (“Because Portillo-Munoz has substantial connections with this country, and because the majority’s holding effectively nullifies the rights of countless others like him, I dissent from the majority’s dismissal of Portillo-Munoz’s Second Amendment claim.”).

240. See *id.* at 444–45 (“[T]he majority’s reasoning renders [persons like Portillo-Munoz] vulnerable—to governmental intrusions on their homes and persons, as well as interference with their rights to assemble and petition the government for redress of grievances—with no recourse.”); see also Magliocca, *supra* note 36 (“Since the term ‘people’ is also used in the First, Fourth, and Ninth Amendments, [the *Portillo-Munoz*] decision has sweeping implications.”); Moore, *supra* note 37, at 844 (“The jurisprudence surrounding whether and to what extent Second Amendment rights extend to aliens will thus continue to evolve and take shape in the coming years.”).

241. See *Portillo-Munoz*, 643 F.3d at 440 (majority opinion) (“[N]either this court nor the Supreme Court has held that the Fourth Amendment extends to a native and citizen of another nation who entered and remained in the United States illegally.”); see also Brief of Amicus Curiae ACLU Foundation in Support of Petition for Rehearing *En Banc* at 1–3, *Portillo-Munoz*, 643 F.3d 437 (5th Cir. 2011) (No. 11-10086) (“In rejecting Appellant’s claim, the majority panel opinion questions whether the Fourth Amendment, which also refers to the right of ‘the people,’ should apply to searches and seizures of a ‘native and citizen of another nation who entered and remained in the United States illegally.’”); *Recent Case*, *supra* note 38, at 841 (“[The court in *Portillo-Munoz*] inaccurately represents the unresolved nature of this issue to say that the Supreme Court has never held that the Fourth Amendment applies to undocumented immigrants.”).

242. See *United States v. Huitron-Guizar*, 678 F.3d 1164, 1170 (10th Cir. 2012) (“If the right’s ‘central component,’ as interpreted by *Heller*, is to secure an individual’s ability to defend his home, business, or family (which often includes children who are American citizens), why exactly should all aliens who are not lawfully resident be left to the mercies of burglars and assailants?”).

contemporaneously submitted and ratified First and Fourth Amendments.”<sup>243</sup> If the right to defend one’s home and family from thieves and murderers is as important as the right to defend one’s home and self from unreasonable government searches and seizures, then the Second Amendment—like the Fourth—must confer protection on undocumented persons.

*C. Apply Relevant Fourth Amendment Jurisprudence to  
Determine when One’s Connections to the United States Are  
Substantial*

For now, the Supreme Court’s decision in *United States v. Verdugo-Urquidez* governs the interpretation of “the people” in a Fourth Amendment context.<sup>244</sup> In *Verdugo-Urquidez*, the Supreme Court was willing to include undocumented persons who have chosen to accept some societal obligations as part of “the people” for purposes of invoking rights against government intrusions forbidden by the Fourth Amendment.<sup>245</sup> “The people” of the Second and Fourth Amendments are indistinguishable.<sup>246</sup> It follows that undocumented persons should be considered part of “the people” if they possess “substantial connections” to the United States to be considered part of the national community.<sup>247</sup> This Note recommends that reviewing courts apply evolving Fourth Amendment case law—discussing and solidifying when an undocumented person’s connections are sufficiently substantial—

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243. *United States v. Emerson*, 270 F.3d 203, 227 (5th Cir. 2001).

244. *See United States v. Meza-Rodriguez*, 798 F.3d 664, 670 (7th Cir. 2015) (“At a minimum, *Verdugo-Urquidez* governs the applicability of the Fourth Amendment to noncitizens.”).

245. *See Huitron-Guizar*, 678 F.3d at 1167–68 (“The [*Verdugo-Urquidez*] Court seemed unwilling to say that illegal aliens, who reside here voluntarily and who accept some social obligations, have *no* rights the government is bound to respect when, say, they protest a raid or detention.”)

246. *See* Christopher Chrisman, Note, *Constitutional Structure and the Second Amendment: A Defense of the Individual Right to Keep and Bear Arms*, 43 ARIZ. L. REV. 439, 449 (2001) (arguing that the Court’s holding in *Verdugo-Urquidez* is significant because it establishes that the principle that the uses of “the people” in the Bill of Rights are indistinguishable).

247. *See supra* Part V.B (explaining why a consistent interpretation of “the people” makes sense).

to similarly resolve undocumented persons' constitutional challenges to the alien-in-possession statute.

To be clear, use of the "substantial connections" test would neither categorically include nor exclude undocumented persons from "the people" of the Second Amendment. Rather, courts would determine, using the *Verdugo-Urquidez* substantial connections test, whether the particular undocumented person at issue demonstrated sufficient connections to the national community to qualify for inclusion in "the people." Adoption of this case-by-case inquiry has the benefit of recognizing the diverse circumstances that undoubtedly surround undocumented persons present in the United States.

The Seventh Circuit panel in *Meza-Rodriguez* correctly applied the *Verdugo-Urquidez* substantial connections analysis to Mariano Meza-Rodriguez.<sup>248</sup> The court determined that Meza-Rodriguez had substantial connections to the United States.<sup>249</sup> Since the age of four, he lived in Wisconsin and developed connections to this nation by regularly attending school in Milwaukee, building relationships, and working periodically in the U.S.<sup>250</sup> The Seventh Circuit concluded that Meza-Rodriguez's twenty years of voluntary residence in the United States clearly satisfied the requirements outlined in *Verdugo-Urquidez*.<sup>251</sup>

Under a substantial connections analysis, Nicolas Carpio-Leon should have also qualified as part of "the people" protected by the Second Amendment. Nicolas voluntarily lived in Orangeburg, South Carolina, for more than thirteen years, held a steady job, and fathered three children in the U.S.<sup>252</sup> Unfortunately, the Fourth Circuit did not apply the substantial

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248. See *United States v. Meza-Rodriguez*, 798 F.3d 664, 670 (7th Cir. 2015) (reasoning that it makes sense to apply the *Verdugo-Urquidez* standard to the facts of this case to determine whether the scope of "the people" covers Meza-Rodriguez).

249. See *id.* at 672 (concluding that Meza-Rodriguez satisfies the necessary criteria).

250. See *id.* at 671 (insisting that Meza-Rodriguez's criminal record does render his substantial connections meaningless for purposes of the *Verdugo-Urquidez* analysis).

251. See *id.* (noting that Meza-Rodriguez's connections are "much more than the connections our sister circuits have found to be adequate").

252. See *United States v. Carpio-Leon*, 701 F.3d 974, 976 (4th Cir. 2012) (listing Nicolas's connections to the United States).

connections analysis to Nicolas, concluding instead that undocumented immigrants categorically do not qualify as part of “the people.”<sup>253</sup> Reviewing courts should reject the approach in *Carpio-Leon* and affirm the approach in *Meza-Rodriguez*.

Importantly, consistent interpretation of “the people” does not mean ultimately that undocumented persons will automatically receive the full panoply of rights received by citizens. Rather, in the same way as noncitizens must prove “substantial connections” to the United States as a precondition for Fourth Amendment rights, the undocumented will receive less protection than citizens—undeniably part of “the people”—because the undocumented who do not solidify themselves as part of the community will not be included in “the people.”<sup>254</sup>

## VI. Conclusion

This Note proposes that courts interpret “the people” of the Second and Fourth Amendment in the same manner. Such an approach would confer Second Amendment protection on undocumented immigrants who voluntarily live in the United States and have developed substantial connections to our nation. A thorough approach to addressing threshold challenges to § 922(g)(5) must articulate a comprehensive paradigm to determine inclusion in “the people” of the Second Amendment. To that end, this Note recommends that courts apply Fourth Amendment jurisprudence to determine when a specific undocumented-immigrant defendant has sufficient connections for purposes of the Second Amendment.

The trend to exclude categorically undocumented persons from “the people” of the Second Amendment underscores the “latent and mostly unvoiced-societal struggle” with non-citizen

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253. See *id.* at 981 (explaining that, regardless of their connections to the nation, undocumented immigrants, due to their illegal entry into the nation, do not qualify as part of “the people”).

254. See Magliocca, *supra* note 36

It may be that illegal aliens should get no protection from the Bill of Rights or less than what those who are lawfully here get, but I don't see any support for the proposition that illegal aliens would, for example, get Fourth Amendment rights but no First or Second Amendment rights.

participation in the American polity.<sup>255</sup> This troubling and unsubstantiated trend, if left unchecked, threatens to leave undocumented persons outside the scope of the First, Second, Fourth, Ninth, and Tenth Amendments.<sup>256</sup> A consistent interpretation of “the people” would safeguard the rights and protections bestowed on undocumented persons who—as part of “the people”—have developed sufficient connections to the national community, clarify the meaning of the phrase throughout the Bill of Rights, and dispel the dissonance in the constitutional jurisprudence governing guns and alienage. The inclusive approach to undocumented persons, taken by the Seventh Circuit, represents the correct approach. Through a proper interpretation of the Second Amendment’s scope, the judiciary will safeguard liberty for the entire gamut of “the people.”<sup>257</sup>

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255. Gulasekaram, *supra* note 42, at 651–52.

256. *See id.* at 652 (“[B]oth this judicial ipse dixit and state statutory frameworks that employ alienage distinctions in gun laws appear to represent a troubling and undertheorized trend towards leaving immigrants outside the protection of our Constitution’s liberties and increasing the chasm between citizens and noncitizens without justification.”).

257. *See* St. George Tucker, *View of the Constitution of the United States*, in 1 BLACKSTONE’S COMMENTARIES app. D at 300 (1803)

This may be considered as the true palladium of liberty . . . . The right of self defence is the first law of nature: in most governments it has been the study of rulers to confine this right within the narrowest limits possible. Wherever standing armies are kept up, and the right of the people to keep and bear arms is, under any colour or pretext whatsoever, prohibited, liberty, if not already annihilated, is on the brink of destruction.