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NOTES

THE RIGHT OF NON-CITIZENS TO BEAR ARMS: UNDERSTANDING “THE PEOPLE” OF THE SECOND AMENDMENT

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INTRODUCTION

On July 1, 2015, thirty-one-year-old Kate Steinle was walking on a pier in San Francisco with her father when she was struck with a bullet.¹ Juan Francisco Lopez-Sanchez, an undocumented immigrant and a repeat felon who had been deported five times, was accused of firing the fatal shot.² This seemingly random killing sparked debate over the controversial topic of immigration, given Lopez-Sanchez’s immigration status and deportation history.³ This story, however, also captures another issue: the rights of non-citizens to possess firearms. Although the Second Amendment provides that “[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,”⁴ the right to bear arms is not without its limits.⁵ Congress, through 18 U.S.C. § 922(g)(5), has limited this right. Section 922(g)(5) provides that it is

unlawful for any person . . . who, being an alien—is illegally or unlawfully in the United States; or . . . has been admitted to the United States under a nonimmigrant visa . . . to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or

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1. Steve Almasy et al., *Suspect in Killing of San Francisco Woman Had Been Deported Five Times*, CNN (July 4, 2015, 12:21 PM), <http://www.cnn.com/2015/07/03/us/san-francisco-killing-suspect-immigrant-deported/> [<http://perma.cc/Y2RV-9T36>].

2. *Id.*

3. Michael Pearson, *Suspect Tells TV Station He Killed San Francisco Woman*, CNN (July 7, 2015, 10:09 PM), <http://www.cnn.com/2015/07/06/us/san-francisco-killing/> [<http://perma.cc/5KE9-PEQT>].

4. U.S. CONST. amend. II.

5. *See* District of Columbia v. Heller, 554 U.S. 570, 595 (2008).

ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.⁶

The constitutionality of this statute depends on whether non-citizens are part of “the people” upon whom the Second Amendment confers a right to bear arms.⁷

The Fifth Circuit, in 2011, was the first federal court of appeals to address whether non-citizens are part of “the people” upon whom the Second Amendment confers a right to bear arms.⁸ The court in *United States v. Portillo-Munoz* upheld § 922(g)(5) and held the phrase “the people” in the Second Amendment did not include aliens illegally in the United States.⁹ The issue then presented itself again, a few months later, in the Eighth Circuit.¹⁰ Without any analysis, the Eighth Circuit agreed with the Fifth Circuit in holding the rights guaranteed by the Second Amendment did not extend to illegal aliens.¹¹ Given the opportunity, the Tenth Circuit then dodged the question by declining to make the broader determination of whether illegal aliens are entitled to Second Amendment rights and instead upheld § 922(g)(5) under intermediate scrutiny.¹² Shortly thereafter, the Fourth Circuit was presented with its opportunity to continue limiting the interpretation of the Second Amendment’s “the people” or to find a differing interpretation that included non-citizens.¹³ Like the Fifth and Eighth Circuits, the Fourth Circuit held the Second Amendment right to bear arms did not extend to illegal aliens.¹⁴

On August 20, 2015, the Seventh Circuit, in *United States v. Meza-Rodriguez*, decided to part ways with the Fourth, Fifth, and Eighth Circuits.¹⁵ The court created a circuit split by holding non-citizens are among “the people” to whom the Second Amendment bestows an individual right.¹⁶ The court did, however, limit the meaning of “the people” to those non-citizens who have

6. 18 U.S.C. § 922 (2012).

7. *See United States v. Carpio-Leon*, 701 F.3d 974, 982 (4th Cir. 2012) (explaining because the Second Amendment does not extend to illegal aliens, § 922(g)(5) does not violate the Second Amendment, and it was unnecessary for the court to go through an analysis of applying the appropriate means of scrutiny).

8. *See generally United States v. Portillo-Munoz*, 643 F.3d 437 (5th Cir. 2011) (examining whether illegal aliens receive Second Amendment coverage).

9. *Id.* at 442.

10. *See generally United States v. Flores*, 663 F.3d 1022 (8th Cir. 2011) (looking at the relationship between illegal aliens and the Second Amendment).

11. *Id.* at 1023.

12. *United States v. Huitron-Guizar*, 678 F.3d 1164, 1170 (10th Cir. 2012).

13. *See generally United States v. Carpio-Leon*, 701 F.3d 974 (4th Cir. 2012) (determining whether there is Second Amendment coverage for illegal aliens).

14. *Id.* at 982.

15. *See generally 798 F.3d 664* (7th Cir. 2015) (describing the applicability of the Second Amendment to illegal aliens), *cert. denied*, 136 S. Ct. 1655 (2016).

16. *Id.* at 671-72.

“developed substantial connections as a resident in this country.”¹⁷ After finding the defendant satisfied this criteria,¹⁸ the court nevertheless upheld § 922(g)(5), finding Congress had a strong enough interest in “prohibiting persons who are difficult to track and who have an interest in eluding law enforcement” to restrict Second Amendment rights in such a manner.¹⁹

This Note argues that the phrase “the people” contained within the Second Amendment includes all non-citizens within the United States, even those who have not “developed substantial connections as a resident in this country.”²⁰ This Note further argues that by upholding § 922(g)(5), the Seventh Circuit missed an important opportunity, and it should have struck down the statute as an impermissible restriction on the right to bear arms. Part I of this Note explains the various meanings of “the people” throughout the Constitution and explains how the Supreme Court has generally interpreted the Second Amendment. Part II then examines the different approaches taken across circuits in determining whether the Second Amendment extends protection to non-citizens. Part III argues that the conflict should be resolved by an extension of the Seventh Circuit’s preliminary conclusion that the Second Amendment right to bear arms extends to otherwise qualified non-citizens. Courts should hold, like the Seventh Circuit, that non-citizens have a right to bear arms. However, unlike the Seventh Circuit, courts should not limit this right to non-citizens who have “developed substantial connections with this country.”²¹ Finally, this Part argues that the Seventh Circuit should have struck down § 922(g)(5) because it fails under intermediate scrutiny.

I. THE MEANINGS OF “THE PEOPLE” AND THE SECOND AMENDMENT

A. “The People” of the Constitution

The phrase “the people” appears within six constitutional amendments, five of which are in the Bill of Rights.²² The First Amendment provides that “Congress shall make no law . . . abridging . . . the right of *the people* peaceably to assemble”²³ The Second Amendment protects “the right of *the people* to keep and bear Arms.”²⁴ The Fourth Amendment protects “[t]he right of *the people* to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.”²⁵ The Ninth Amendment reads: “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others

17. *Id.* at 671.

18. *Id.* at 672.

19. *Id.* at 673.

20. *See id.* at 671.

21. *See id.* at 672 (utilizing the language of the court).

22. *The Meaning(s) of “The People” in the Constitution*, 126 HARV. L. REV. 1078, 1078 (2013) (citing U.S. CONST. amends. I, II, IV, IX, X, XVII).

23. U.S. CONST. amend. I (emphasis added).

24. U.S. CONST. amend. II (emphasis added).

25. U.S. CONST. amend. IV (emphasis added).

retained by *the people*.”²⁶ Finally, the Tenth Amendment provides: “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*.”²⁷ Although these amendments confer and protect important rights, the courts have rarely considered the meaning of this phrase, and its application to non-citizens.²⁸

1. *The First Amendment*.—The Supreme Court has recognized that the First Amendment applies to non-citizens.²⁹ In *Bridges v. Wixon*, deportation proceedings were instituted against Harry Bridges, an alien, on the ground that he, at one time, had been a member of and was affiliated with the Communist Party.³⁰ The Attorney General sustained findings that Bridges was affiliated with and had been a member of the Communist Party and ordered Bridges to be deported.³¹ Among the findings sustained by the Attorney General was that Bridges sponsored and was responsible for the publication of the *Waterfront Worker*, a paper found to be an instrument of the Communist Party.³² However, the Supreme Court deemed the findings devoid of any evidence that the *Waterfront Worker* advocated overthrow of the government.³³ According to the Court, the *Waterfront Worker* was a militant trade union journal, which aired grievances and discussed national affairs that affected workingmen.³⁴ In holding that Bridges’ deportation was unlawfully ordered,³⁵ the Court reasoned:

But we cannot believe that Congress intended to cast so wide a net as to reach those whose ideas and program, though coinciding with the legitimate aims of such groups, nevertheless fell far short of overthrowing the government by force and violence. *Freedom of speech and of press is accorded aliens residing in this country*. So far as this record shows the literature published by Harry Bridges, the utterances made by him were entitled to that protection. They revealed a militant advocacy of the cause of trade-unionism. But they did not teach or advocate or advise the subversive conduct condemned by the statute.³⁶

2. *The Fourth Amendment*.—In addition to the First Amendment, the Supreme Court has implicitly, and in one case more explicitly, considered the

26. U.S. CONST. amend. IX (emphasis added).

27. U.S. CONST. amend. X (emphasis added).

28. See *The Meaning(s) of “The People” in the Constitution*, *supra* note 22.

29. Olesya A. Salnikova, “*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, 649 (2013).

30. 326 U.S. 135, 139 (1945).

31. *Id.* at 140.

32. *Id.* at 145.

33. *Id.* at 146.

34. *Id.*

35. *Id.* at 156.

36. *Id.* at 147-48 (emphasis added).

applicability of the Fourth Amendment to non-citizens.³⁷ In *Almeida-Sanchez v. United States*, the Court held the government violated the Fourth Amendment when it executed a warrantless search and seizure on the automobile of the defendant, who was a Mexican national.³⁸ Although the Court did not consider the non-citizenship status of the defendant in its analysis, by holding that a Fourth Amendment violation had occurred, the Court implicitly endorsed the proposition that non-citizens enjoy Fourth Amendment rights.³⁹

In *United States v. Verdugo-Urquidez*, the Court more explicitly considered the meaning of the term “the people” within the Fourth Amendment.⁴⁰ In *Verdugo-Urquidez*, agents from the Drug Enforcement Agency along with the Mexican Federal Judicial Police searched Verdugo-Urquidez’s residences in Mexico without first obtaining a warrant.⁴¹ Verdugo-Urquidez was a citizen and resident of Mexico.⁴² Therefore, the case involved the application of the Fourth Amendment’s protection from warrantless search and seizure to a non-citizen in a foreign country.⁴³ The Court held the Fourth Amendment did not apply to search and seizures by United States agents on property owned by a non-citizen, which was located in a foreign country.⁴⁴ The Court reasoned that history of the drafting of the Fourth Amendment and the understanding of the Framers “never suggested that the provision was intended to restrain the actions of the Federal Government against aliens outside of the United States territory.”⁴⁵ The Court also maintained that the cases that Verdugo-Urquidez relied on did not support his position that he should be extended Fourth Amendment rights because the cases “establish[ed] only that aliens receive constitutional protections when they have come within the territory of the United States and developed substantial connections with the country.”⁴⁶ Although *Verdugo-Urquidez* demonstrates that Fourth Amendment rights are not without limits, the Court did not exclude all non-citizens from the protections of the Fourth Amendment: only those outside the borders of the United States who lack sufficient connections with the country to be considered part of that community.⁴⁷ As the Court stated: “At the time of the

37. See generally *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990) (examining the applicability of the Fourth Amendment to illegal aliens); see generally *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973) (describing coverage of the Fourth Amendment to illegal aliens).

38. 413 U.S. 266, 273 (1973).

39. The Honorable Karen Nelson Moore, *Aliens and the Constitution*, 88 N.Y.U. L. REV. 801, 835 (2013).

40. See 494 U.S. at 265.

41. *Id.* at 262.

42. *Id.*

43. *Id.* at 261.

44. *Id.*

45. *Id.* at 266.

46. *Id.* at 271.

47. See *id.* at 274-75 (1990); see also Jennifer Daskal, *The Un-Territoriality of Data*, 125 YALE L.J. 326, 340-41 (2015) (“*Verdugo-Urquidez* thus established a two-step decision tree. First, where does the search or seizure take place? If in the United States, the Fourth Amendment applies.

search, [Verdugo-Urquidez] was a citizen and resident of Mexico with *no voluntary attachment to the United States*, and the place searched was *located in Mexico*. Under *these* circumstances, the Fourth Amendment has no application.”⁴⁸

B. Interpreting the Second Amendment

Like the phrase, “the people,” the meaning of the Second Amendment itself is a source of significant controversy.⁴⁹ Previously, the primary source of contention centered on whether the Second Amendment only protects gun rights related to militia service or whether an individual’s right to use firearms for purposes of self-defense is also protected under the Second Amendment.⁵⁰ The Court, in 2008, was able to resolve this issue in *District of Columbia v. Heller*.⁵¹ *Heller* involved a challenge to a District of Columbia handgun law, which generally prohibited the possession of handguns and required residents to keep their other lawfully-owned firearms unloaded and disassembled while in the home.⁵² The Court struck down the prohibition and held the Second Amendment protects an individual’s right to bear arms.⁵³ In reaching its decision, the Court delved into an extensive discussion on the meaning of the Second Amendment by parsing through the various phrases contained within the amendment.⁵⁴ The Court also looked to the history of the Second Amendment, including arms-bearing rights in state constitutions that preceded and immediately followed the adoption of the Second Amendment.⁵⁵ Moreover, the Court considered interpretations of the Second Amendment in the century after its enactment by founding-era legal scholars,⁵⁶ case law,⁵⁷ and legislators,⁵⁸ concluding that the precedent supported the proposition that the Second Amendment protects an individual’s right.⁵⁹

The Court, however, did declare that the Second Amendment right to bear

If outside the United States, then turn to the question of identity: Is the target of the search or seizure a U.S. citizen or an alien with substantial voluntary connections to the United States? If yes, then the Fourth Amendment applies, and the test is one of reasonableness. If, on the other hand, the target is a noncitizen lacking substantial connections to the United States, the Fourth Amendment does not apply . . .”).

48. *Verdugo-Urquidez*, 494 U.S. at 274-75 (emphasis added).

49. See generally Michael C. Dorf, *What Does the Second Amendment Mean Today?*, 76 CHI.-KENT L. REV. 291 (2000) (describing the debate over the meaning of the Second Amendment).

50. See *District of Columbia v. Heller*, 554 U.S. 570, 577 (2008).

51. See generally *id.*

52. *Id.* at 574.

53. *Id.* at 634.

54. See *id.* at 579-600.

55. *Id.* at 601-02.

56. *Id.* at 605.

57. *Id.* at 610.

58. *Id.* at 614.

59. *Id.* at 625.

arms is not unlimited.⁶⁰ The Court insisted that its holding was not to be “taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.”⁶¹ The District of Columbia’s prohibition though, went beyond these permissible prohibitions,⁶² as it prohibited individuals from exercising “the inherent right of self-defense [which] has been central to the Second Amendment right.”⁶³

Two years later, in *McDonald v. City of Chicago*, the Court had an opportunity to extend its holding in *Heller* to the states.⁶⁴ *McDonald* involved a challenge to a Chicago handgun prohibition; similar to that of the District of Columbia’s in *Heller*.⁶⁵ By a 5-4 margin, the Court held the Second Amendment was incorporated against the states through the Fourteenth Amendment.⁶⁶ There was no consensus, however, on exactly which clause of the Fourteenth Amendment incorporated the Second Amendment right against the states.⁶⁷ Justice Alito along with three other Justices held the Second Amendment right is “fundamental to our scheme of ordered liberty,” meaning the Second Amendment right is “deeply rooted in this Nation’s history and tradition,”⁶⁸ and it is incorporated through the Due Process Clause of the Fourteenth Amendment.⁶⁹ Justice Thomas agreed as to the fundamental status of the right to keep and bear arms but disagreed that the right is enforceable against the States through the Due Process Clause.⁷⁰ Instead, Thomas argued that “the right to keep and bear arms is a privilege of American citizenship that applies to the States through the Fourteenth Amendment’s Privileges or Immunities Clause.”⁷¹

Because the Due Process Clause and the Privileges or Immunities Clause have textual differences, the lack of consensus as to which clause incorporates the Second Amendment right against the states matters for non-citizens.⁷²

60. *Id.* at 626.

61. *Id.* at 626-27.

62. *Id.* at 635.

63. *Id.* at 628.

64. *See* 561 U.S. 742, 749 (2010).

65. *Id.* at 750.

66. *Id.* at 791 (noting five justices held the Second Amendment was incorporated through the Fourteenth Amendment, four of whom held the Due Process Clause incorporated the Second Amendment right, and one justice held the Second Amendment was incorporated through the Privileges or Immunities Clause).

67. *See generally* David S. Cohen, *A Second Amendment Quartet: Heller and McDonald in the Lower Courts: McDonald’s Paradoxical Legacy: State Restrictions of Non-Citizens’ Gun Rights*, 71 MD. L. REV. 1219, 1220 (2012).

68. *McDonald*, 561 U.S. at 767.

69. *Id.* at 791.

70. *Id.* at 806 (Thomas, J., concurring).

71. *Id.*

72. Cohen, *supra* note 67, at 1222.

Specifically, the Due Process Clause provides that no state shall “deprive *any person* of life, liberty, or property, without due process of law,”⁷³ while the Privileges or Immunities Clause states that “no State shall make or enforce any law which shall abridge the privileges or immunities of *citizens of the United States*.”⁷⁴ Longstanding precedent demonstrates that non-citizens are protected under the Due Process Clause, whereas most scholars contend that because the Privileges or Immunities Clause refers to “citizens of the United States,” this clause does not apply to non-citizens.⁷⁵ Therefore, *McDonald*, standing alone without a majority decision regarding the appropriate clause to use for incorporation, does not make it clear whether the Second Amendment applies to non-citizens.⁷⁶

Although *Heller* was a landmark decision that resolved the controversy concerning whether the Second Amendment is an individual right or a collective one, and *McDonald* is an important decision that extended *Heller*’s interpretation of the Second Amendment to the states, the Court left many questions unanswered. These questions remain unanswered, as the Supreme Court has rejected more than sixty Second Amendment cases in the last seven years.⁷⁷ Among the questions unanswered includes which individuals have the right to possess and carry weapons.⁷⁸

II. INCONSISTENCY IN THE FEDERAL CIRCUITS

A. Circuits Holding Non-Citizens Do Not Have Second Amendment Rights

In 2011, the Fifth Circuit was faced with the task of determining the constitutionality of 18 U.S.C. § 922(g)(5)’s federal ban on firearm possession by undocumented immigrants, a matter of first impression in the federal circuit courts.⁷⁹ The Fifth Circuit upheld § 922(g)(5), finding illegal aliens are not among “the people” in the Second Amendment, and thus do not have Second Amendment rights.⁸⁰ This case, *United States v. Portillo-Munoz*, involved the arrest of defendant, Armando Portillo-Munoz, who was a native and citizen of Mexico and was illegally present in the United States.⁸¹ After the sheriff’s

73. U.S. CONST. amend. XIV, § 1 (emphasis added).

74. *Id.* (emphasis added).

75. Cohen, *supra* note 67, at 1224-25.

76. *See generally id.*

77. *Protecting Strong Gun Laws: The Supreme Court Leaves Lower Court Victories Untouched*, L. CTR. TO PREVENT GUN VIOLENCE (Aug. 26, 2015), <http://smartgunlaws.org/protecting-strong-gun-laws-the-supreme-court-leaves-lower-court-victories-untouched/> [<http://perma.cc/8H2S-4YF5>].

78. *United States v. Meza-Rodriguez*, 798 F.3d 664, 674 (7th Cir. 2015) (Flaum, J., concurring), *cert. denied*, 136 S. Ct. 1655 (2016).

79. *United States v. Portillo-Munoz*, 643 F.3d 437, 439 (5th Cir. 2011).

80. *Id.* at 442.

81. *Id.* at 438-39.

department received a complaint that an individual was “spinning around” on a motorcycle, a police officer approached Portillo-Munoz and discovered a .22 caliber handgun in his vehicle.⁸² Portillo-Munoz, who worked on a ranch, claimed the firearm was to protect the chickens at the ranch from coyotes, and he also admitted to being illegally present in the United States.⁸³ Portillo-Munoz was arrested and indicted for unlawfully carrying a weapon in violation of § 922(g)(5).⁸⁴

On appeal, Portillo-Munoz argued that his conviction under § 922(g)(5) violated the Second Amendment.⁸⁵ In holding that Portillo-Munoz, an illegal alien, was not afforded Second Amendment rights, the court heavily relied on the Supreme Court’s language in *District of Columbia v. Heller*.⁸⁶ Specifically, the Fifth Circuit focused on the Supreme Court’s pronouncement that the Second Amendment “surely elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home.”⁸⁷ The Fifth Circuit also looked to the Court’s statements that “in all six other provisions of the Constitution that mention ‘the people,’ the term unambiguously refers to all members of the political community,”⁸⁸ and “[w]e start therefore with a strong presumption that the Second Amendment right is exercised individually and belongs to all Americans.”⁸⁹ Therefore, the Fifth Circuit equated the Second Amendment’s reference to “the people” with the Court’s references in *Heller* to “law-abiding responsible citizens,” “members of the political community,” and “Americans.”⁹⁰

The court additionally rejected Portillo-Munoz’s argument that the Supreme Court’s decision in *United States v. Verdugo-Urquidez* entitled him to Second Amendment rights because of his sufficient connections with the United States to be included in “the people.”⁹¹ The court refused to accept that “the people” of the Fourth Amendment, which *Verdugo-Urquidez* involved, and “the people” of the Second Amendment involve the same groups of people.⁹² The court declared that the Second Amendment involves an affirmative right to keep and bear arms, while the Fourth Amendment is a protective right against abuses by the government, and it is “reasonable that an affirmative right would be extended to fewer groups than would a protective right.”⁹³

Sixth months later, the Eighth Circuit also held the protections of the Second

82. *Id.* at 438.

83. *Id.*

84. *Id.* at 439.

85. *Id.*

86. *Id.* at 440.

87. *Id.* (quoting *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008)).

88. *Id.* (quoting *Heller*, 554 U.S. at 580).

89. *Id.* (quoting *Heller*, 554 U.S. at 581).

90. *Id.*

91. *Id.* at 440-41.

92. *Id.* at 440.

93. *Id.* at 441.

Amendment do not extend to illegal aliens.⁹⁴ In *United States v. Flores*, defendant, Joaquin Bravo Flores, was charged with being an illegal alien in possession of a firearm in violation of 18 U.S.C. § 922(g)(5).⁹⁵ The court's one page opinion offered no analysis and simply agreed with the Fifth Circuit's conclusion that illegal aliens are not entitled to Second Amendment rights.⁹⁶

Like the Fifth and Eighth Circuits, the Fourth Circuit has held Second Amendment rights do not extend to illegal aliens.⁹⁷ In *United States v. Carpio-Leon*, defendant, Nicolas Carpio-Leon, who was in the United States illegally, was indicted under 18 U.S.C. § 922(g)(5).⁹⁸ Carpio-Leon had been living in the United States illegally for thirteen years, had a wife and three children, and had no prior criminal record.⁹⁹ During a search of Carpio-Leon's home, Immigration and Customs Enforcement Agents discovered a .22 caliber rifle, a 9 millimeter pistol, and ammunition.¹⁰⁰ Carpio-Leon admitted to being illegally in the United States, resulting in his arrest and indictment.¹⁰¹

On appeal, Carpio-Leon, like Portillo-Munoz, contended that possession of firearms for self-defense was protected under the Second Amendment and that this protection also extended to illegal aliens.¹⁰² In reaching its conclusion that illegal aliens are not protected by the Second Amendment, the court first focused on the Supreme Court's precedent set forth in *District of Columbia v. Heller* and *United States v. Verdugo-Urquidez* and concluded "[t]he Supreme Court's precedent is . . . not clear on whether 'the people' includes illegal aliens."¹⁰³ The court, therefore, relied on the historical analysis of the Second Amendment employed by the Court in *Heller*.¹⁰⁴ According to the court, the historical evidence supported the notion that the government has historically been capable of disarming individuals who were not "law-abiding members of the political community."¹⁰⁵ The court additionally referred to the Supreme Court's emphasis in *Heller*, declaring that the Second Amendment right is not unlimited,¹⁰⁶ and finally noted the special deference owed to Congress in the area of law regarding immigration and illegal aliens.¹⁰⁷

Although the Tenth Circuit has also been presented with the issue of determining the scope of the Second Amendment's "people," the court avoided

94. See *United States v. Flores*, 663 F.3d 1022, 1023 (8th Cir. 2011).

95. *Id.*

96. *Id.*

97. See *United States v. Carpio-Leon*, 701 F.3d 974, 982 (4th Cir. 2012).

98. *Id.* at 975.

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.* at 978, 981.

104. *Id.* at 979-80.

105. *Id.*

106. *Id.* at 977.

107. *Id.* at 982.

the constitutional question in *United States v. Huitron-Guizar* and instead upheld 18 U.S.C. § 922(g)(5) under intermediate scrutiny.¹⁰⁸ *Huitron-Guizar* involved the arrest of Emmanuel Huitron-Guizar, a Mexican-born, illegal immigrant, after officers discovered three firearms in his home.¹⁰⁹ After the district court denied Huitron-Guizar's motion to dismiss his indictment, he appealed, claiming that § 922(g)(5) infringed on his Second Amendment right to bear arms.¹¹⁰

The court noted that interpretation of "the people" was a large and complicated question,¹¹¹ and ultimately unnecessary.¹¹² The court therefore assumed, without deciding, that Second Amendment rights extend to illegal aliens and upheld § 922(g)(5) as a permissible restriction on the assumed right.¹¹³ Applying intermediate scrutiny, the court first held crime control and public safety are important governmental interests.¹¹⁴ Then, discussing the relationship between these interests and limiting the access of firearms to illegal aliens, the court noted that Congress may have concluded illegal aliens should not receive Second Amendment rights because (1) they have already violated the law by being in the United States illegally, (2) they have demonstrated a willingness to defy law, or finally, (3) they are harder to trace, and therefore should not be entitled to possess firearms.¹¹⁵ The court therefore held that § 922(g)(5) withstood Huitron-Guizar's constitutional challenge.¹¹⁶

B. The Seventh Circuit's Departure

On August 20, 2015, the Seventh Circuit created a circuit split with the Fourth, Fifth, and Eighth Circuits by holding the Second Amendment protects non-citizens' rights to keep and bear arms.¹¹⁷ In *United States v. Meza-Rodriguez*, defendant, Meza-Rodriguez, a Mexican national, was brought to America when he was four or five years old and had remained in the country ever since.¹¹⁸ On August 24, 2013, Milwaukee police officers responded to a report of a fight at a local bar.¹¹⁹ The officers broke up the fight and recognized Meza-Rodriguez from a surveillance video that the officers had obtained from an earlier call regarding

108. 678 F.3d 1164, 1169-70 (10th Cir. 2012).

109. *Id.* at 1165.

110. *Id.*

111. *Id.* at 1169.

112. *See id.* (noting even if the Second Amendment right extended to some illegal aliens, § 922(g)(5) could still be found constitutional).

113. *Id.* at 1169-70.

114. *Id.* at 1170.

115. *Id.*

116. *Id.*

117. *United States v. Meza-Rodriguez*, 798 F.3d 664, 672 (7th Cir. 2015), *cert. denied*, 136 S. Ct. 1655 (2016).

118. *Id.* at 666.

119. *Id.*

an armed man in a bar.¹²⁰ Meza-Rodriguez was apprehended after a chase, and the police discovered he was carrying a .22 caliber cartridge in his pocket.¹²¹ Meza-Rodriguez was indicted for violating 18 U.S.C. § 922(g)(5).¹²² He moved to dismiss the indictment, alleging that § 922(g)(5) unconstitutionally violated his Second Amendment right to bear arms.¹²³ The district court denied his motion and sentenced him to time served with no supervised release.¹²⁴ Meza-Rodriguez was later removed to Mexico, and filed a timely notice of appeal.¹²⁵

The court first held Meza-Rodriguez's removal to Mexico did not render his appeal moot.¹²⁶ The court then addressed the issue of whether the Second Amendment protects unauthorized non-citizens.¹²⁷ Acknowledging the circuits that had decided the issue relied on the Court's language in *District of Columbia v. Heller*, the court declared that it was reluctant to place great weight on the language of *Heller* given that the question before the Court in *Heller* did not require the Court to determine the scope of "the people" as it pertains to non-citizens.¹²⁸ Rather, in *Heller*, the Court was merely determining whether the Second Amendment right to bear arms was an individual or collective one.¹²⁹ The Seventh Circuit also pointed out that *Heller* supports multiple interpretations of "the people"; a reading of *Heller* could support either exclusion or inclusion of non-citizens as part of "the people."¹³⁰ After noting *Heller's* lack of clarity as to the issue at hand, the court went on to analyze the Court's decision in *United States v. Verdugo-Urquidez*.¹³¹

In *Verdugo-Urquidez*, the Court stated:

"[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.¹³²

The Court in *Verdugo-Urquidez* also stated, "[A]liens receive constitutional protections when they have come within the territory of the United States and developed substantial connections with this country."¹³³ Given these statements,

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.* at 667.

124. *Id.*

125. *Id.*

126. *Id.* at 668.

127. *Id.* at 669.

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.* at 670.

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

133. *Id.* (quoting *Verdugo-Urquidez*, 494 U.S. at 271).

the Seventh Circuit concluded that “*Verdugo-Urquidez* governs the applicability of the Fourth Amendment to noncitizens.”¹³⁴ Because the term “the people,” as it appears throughout the Bill of Rights, should be read consistently to carry the same meaning,¹³⁵ the court held, as with the Fourth Amendment, that under the Second Amendment, an illegal alien is considered part of “the people” where the alien has developed substantial connections as a resident of the United States.¹³⁶

The court then rejected the government’s contentions that “unauthorized noncitizens categorically have not accepted the basic obligations of membership in U.S. society and thus cannot be considered as part of ‘the people,’”¹³⁷ and that Meza-Rodriguez’s previous unlawful behavior, failure to file tax returns, and lack of a steady job demonstrated that he had not accepted the obligations of living in America.¹³⁸ The court maintained that previous unlawful behavior itself is not a relevant consideration in determining whether a non-citizen has developed substantial connections as a resident in the country.¹³⁹ To do so would allow non-citizens to lose constitutionally-protected rights that were previously possessed, and “[t]he Second Amendment is not limited to such on-again, off-again protection.”¹⁴⁰

Given Meza-Rodriguez’s connections with the United States, including his near life-long residence, the court held Meza-Rodriguez met the standard set forth in *Verdugo-Urquidez*.¹⁴¹ Although Meza-Rodriguez was able to invoke the protections of the Second Amendment, the right to bear arms is not unlimited, so the court considered whether 18 U.S.C. § 922(g)(5) was a permissible restriction.¹⁴² The court acknowledged that the Supreme Court has not prescribed a particular level of scrutiny in such a situation,¹⁴³ and concluded that “‘some form of strong showing,’ akin to intermediate scrutiny, is the right approach.”¹⁴⁴ The government argued that the ban on firearms possessed by illegal aliens was substantially related to the statute’s objectives of “keep[ing] guns out of the hands of presumptively risky people” and “suppress[ing] armed violence”¹⁴⁵ because illegal aliens have the ability to evade detection by law enforcement.¹⁴⁶ Although the court agreed with the government’s position that illegal aliens are more

134. *Id.*

135. *Id.*

136. *See id.* at 671 (declaring the only question in determining the scope of the Second Amendment is “whether the alien has developed substantial connections as a resident in this country” and that Meza-Rodriguez had met this criterion).

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.* at 672.

142. *Id.*

143. *Id.*

144. *Id.* (quoting *United States v. Skoien*, 614 F.3d 638, 641 (7th Cir. 2010)).

145. *Id.* at 673 (quoting *United States v. Yancey*, 621 F.3d 681, 683-84 (7th Cir. 2010)).

146. *Id.*

difficult to track,¹⁴⁷ the court declined to accept the government's additional position that illegal aliens are more likely than the general population to commit future gun-related crimes.¹⁴⁸ Even declining to accept the government's second argument, the court upheld 18 U.S.C. § 922(g)(5) stating:

[T]he government has [a] strong interest in preventing people who already have disrespected the law (including, in addition to aliens unlawfully in the country, felons, § 922(g)(1), fugitives, § 922(g)(2), and those convicted of misdemeanor crimes of domestic violence, § 922(g)(9)) from possessing guns. 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.¹⁴⁹

Judge Flaum concurred in the judgment.¹⁵⁰ Flaum argued that the Tenth Circuit's approach in *United States v. Huitron-Guizar* was the appropriate one.¹⁵¹ Flaum further averred that the court did not need to reach the question of whether the Second Amendment grants rights to undocumented immigrants, because "regardless of the answer 18 U.S.C. § 922(g)(5) satisfies intermediate scrutiny and thus passes constitutional muster."¹⁵²

III. RESOLVING THE SPLIT

A. Non-Citizens Are "The People"

"The phrase 'the people' is not defined in the Constitution, nor is its meaning clear on its face."¹⁵³ Therefore, courts are required to employ constitutional interpretation. Many sources are used in interpreting constitutional provisions.¹⁵⁴ In general, courts start with the text of the particular provision, and if the text is unclear, courts then turn to sources such as intratextualism, origins, precedent, and the purpose behind the particular provision.¹⁵⁵

Beginning with the text of the Second Amendment, it is observed that the text itself "provides no basis for limiting arms bearing to citizens."¹⁵⁶ Although the Constitution refers to multiple categories of individuals, including referring to

147. *Id.*

148. *Id.*

149. *Id.*

150. *See id.* (Flaum, J., concurring).

151. *See id.* at 674.

152. *See id.*

153. *The Meaning(s) of "The People" in the Constitution*, *supra* note 22, at 1088.

154. *Id.*

155. *Id.*

156. Pratheepan Gulasekaram, "The People" of the Second Amendment: Citizenship and the Right to Bear Arms, 85 N.Y.U. L. REV. 1521, 1524, 1532-33 (2010).

“citizen” or “citizens” in some provisions, nowhere in the Bill of Rights is citizen mentioned.¹⁵⁷ For example, Article III Section 2 refers to “citizens” several times in discussing federal court jurisdiction;¹⁵⁸ Article I Section 2 requires a person to have “been seven years a citizen of the United States” as one requirement to becoming a Representative;¹⁵⁹ Article I Section 3 requires a person to have “been nine years a citizen of the United States” as a requirement for becoming a U.S. Senator;¹⁶⁰ and Article II Section 1 provides that “No person except a natural born citizen, or a citizen of the United States . . . shall be eligible to the office of President.”¹⁶¹ Given the drafters’ use of the term “citizen” in other constitutional provisions, use of the phrase “the people” rather than “citizen” demonstrates the conscious and clear intention that the phrase “the people” includes more than just those individuals with citizen status.¹⁶²

Additionally, there is a lack of definitive historical authority that treats “the people” as synonymous with requiring citizenship.¹⁶³ The exact meaning of “the people” during the creation of the Constitution and during its early infancy is not entirely clear.¹⁶⁴ However, the current stigma that surrounds undocumented immigrants was generally lacking during the founding era.¹⁶⁵ As a matter of fact, “the general attitude . . . towards continued immigration—was one of tolerance and even encouragement.”¹⁶⁶ Including non-citizens as members of “the people” entitled to Second Amendment rights is also consistent with historical views on the importance of the Bill of Rights. In 1800, James Madison wrote:

It does not follow, because aliens are not parties to the Constitution, as citizens are parties to it, that whilst they actually conform to it, they have no right to its protection. Aliens are not more parties to the laws than

157. Moore, *supra* note 39, at 806-07.

158. U.S. CONST. art. III, § 2.

159. U.S. CONST. art. I, § 2.

160. U.S. CONST. art. I, § 3.

161. U.S. CONST. art. II, § 1.

162. Moore, *supra* note 39, at 807.

163. Gulasekaram, *supra* note 156, at 1534. Gulasekaram does note that the Court in *Dred Scott v. Sandford* equated “the people” with white “citizens.” *Id.* However, *Dred Scott* was overruled by the Fourteenth Amendment. *Id.*

164. *Id.* at 1533.

165. See Peter J. Duignan, *Making and Remaking America: Immigration into the United States* (Sept. 15, 2003), <http://www.hoover.org/research/making-and-remaking-america-immigration-united-states> [https://perma.cc/F827-PTYK]. Duignan explains that “[i]mmigrants were generally welcomed in the late 1700s and early 1800s,” and “[d]uring its first hundred years, the United States had a laissez-faire or open borders policy that allowed immigrants into the United States without restriction.” *Id.* Moreover, the Naturalization Act of 1790, in effect during the ratification of the Bill of Rights, “established the principle that an immigrant could acquire citizenship relatively easy.” *Id.*

166. Gillian Stevens, *U.S. Immigration Policy and the Language Characteristics of Immigrants*, 23 IN DEFENSE OF THE ALIEN 177, 179 (2000).

they are parties to the Constitution; yet it will not be disputed, that as they owe, on one hand, a temporary obedience, they are entitled, in return, to their protection and advantage.¹⁶⁷

Moreover, precedential authority lends support to the proposition that undocumented immigrants are among “the people” entitled to Second Amendment rights. As discussed in Part I, the Court in *United States v. Verdugo-Urquidez* analyzed the meaning of the phrase “the people,” albeit in the context of the Fourth Amendment.¹⁶⁸ Because *Verdugo-Urquidez* involved the Fourth Amendment and not the Second Amendment, it has been suggested that *Verdugo-Urquidez* lacks applicability to the meaning of the phrase “the people” in the Second Amendment.¹⁶⁹ In interpreting the Fourth Amendment, however, the Court in *Verdugo-Urquidez* implicated its applicability to the Second Amendment when it expressly suggested the uniformity of the phrase “the people” in the First, Second, Fourth, Ninth, and Tenth Amendments.¹⁷⁰ The Court in *Heller* also made this connection when it stated: “[I]t has always been widely understood that the Second Amendment, like the First and Fourth Amendments codified a pre-existing right.”¹⁷¹ Therefore, the Court’s holding in *Verdugo-Urquidez* is applicable in determining the meaning of “the people” contained within the Second Amendment because “absent any other textual distinction, ‘the people’ in one amendment surely [has the same meaning as] ‘the people’” in another amendment.¹⁷²

Using the same rationale, cases interpreting the First Amendment’s applicability to non-citizens are also relevant in helping to determine the Second Amendment’s meaning of “the people.” Therefore, the Court’s holding in *Bridges v. Wixon*, declaring aliens residing within the United States are accorded freedom of speech and of press,¹⁷³ also lends support to the proposition that non-citizens are among “the people” of the Second Amendment.

Unlike those cases interpreting the phrase “the people” contained within the First and Fourth Amendments, the Court’s analysis in *District of Columbia v. Heller* is not applicable in determining the Second Amendment’s meaning of this phrase. This is because *Heller* did not involve the application of the Second

167. Moore, *supra* note 39, at 807.

168. See generally 494 U.S. 259 (1990).

169. See *United States v. Portillo-Munoz*, 643 F.3d 437, 440 (5th Cir. 2011).

170. See 494 U.S. at 265 (“While this textual exegesis is by no means conclusive, it suggests 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.”).

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

172. Matthew Blair, *Constitutional Cheap Shots: Targeting Undocumented Residents with the Second Amendment*, 9 SETON HALL CIRCUIT REV. 159, 175 (2012) (citing *Verdugo-Urquidez*, 494 U.S. at 265).

173. 326 U.S. 135, 148 (1945).

Amendment to non-citizens.¹⁷⁴ Nevertheless, commentators have suggested that the Court's analysis did provide guidance on whether non-citizens are included in the meaning of "the people."¹⁷⁵ Those who suggest that the language of *Heller* lends support to excluding non-citizens from "the people" under the Second Amendment point to the following language in the Court's opinion: "[T]he people' includes persons who are part of a 'political community' and who are 'law-abiding' citizens.;" "[T]he right to bear arms belongs to 'all members of the political community.;" "[T]he Second Amendment 'elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home.'"¹⁷⁶ In fact, the Fifth Circuit in *United States v. Portillo-Munoz* and the Fourth Circuit in *United States v. Carpio-Leon* both relied on this specific language in *Heller* in concluding that non-citizens were not entitled to Second Amendment rights.¹⁷⁷ However, the question before the Court in *Heller* was not which individuals have Second Amendment rights; rather, the question was whether the right to bear arms is a collective one or an individual one.¹⁷⁸ As such, resolving the precise meaning of "the people" was not necessary, nor did the Court's holding definitely resolve this issue.¹⁷⁹ As provided by the Seventh Circuit in *United States v. Meza-Rodriguez*, *Heller* is open to multiple interpretations on this issue.¹⁸⁰ "*Heller* used several, somewhat different nouns to describe potential rightsholders under the Second Amendment (for example, 'individuals,' 'citizens,' and 'Americans')—terms that have different implications."¹⁸¹ Additionally, the Court in *Heller* adopted an expansive view of the Second Amendment by holding the Second Amendment confers an individual right to possess firearms for self-defense rather than protecting only the right in connection with militia service.¹⁸² It is highly unlikely that such an expansive decision would also curtail the same right for undocumented immigrants.¹⁸³

Finally, the purported purpose behind the Second Amendment supports including non-citizens among "the people" of the Second Amendment. The Court in *Heller* regarded self-defense to be the core purpose of the Second Amendment right to bear arms.¹⁸⁴ Such a right is thus premised on self-preservation unlike particular rights that only extend to citizens that serve public-oriented purposes.¹⁸⁵ Possessing and having the ability to use firearms for self-defense arguably has

174. See 554 U.S. at 574-76.

175. See, e.g., Salnikova, *supra* note 29, at 641.

176. *Id.* at 643 (quoting *Heller*, 554 U.S. at 579-81, 635).

177. *United States v. Carpio-Leon*, 701 F.3d 974, 979 (4th Cir. 2012); *United States v. Portillo-Munoz*, 643 F.3d 437, 440 (5th Cir. 2011).

178. *The Meaning(s) of "The People" in the Constitution*, *supra* note 22, at 1086.

179. *Id.*

180. 798 F.3d 664, 669 (7th Cir. 2015), *cert. denied*, 136 S. Ct. 1655 (2016).

181. *The Meaning(s) of "The People" in the Constitution*, *supra* note 22, at 1086-87.

182. Blair, *supra* note 172, at 166.

183. *Id.*

184. *The Meaning(s) of "The People" in the Constitution*, *supra* note 22, at 1098.

185. See Gulasekaram, *supra* note 156, at 1573.

even greater significance for non-citizens, who frequently encounter hostility because of their citizenship status.¹⁸⁶ Moreover, non-citizens are likely to live in areas with high levels of concentrated poverty,¹⁸⁷ resulting in a greater exposure to criminal behavior.¹⁸⁸ Therefore, limiting Second Amendment rights to only citizens would undermine the Second Amendment's purpose,¹⁸⁹ because to condition Second Amendment rights on citizenship status suggests that the Amendment's purpose is instead about public-oriented state-defense rather than self-defense as declared by the Court.¹⁹⁰

B. The Right of All Non-Citizens

Constitutional interpretation demonstrates that the phrase "the people" should not be limited to citizens of the United States. Although the Seventh Circuit took this position, the court nonetheless limited the Second Amendment right to those non-citizens who have "developed substantial connections as a resident in this country."¹⁹¹ Problematically, in limiting Second Amendment rights to particular non-citizens, the Seventh Circuit relied solely on dicta in *Verdugo-Urquidez* and ignored the complexity of the splintered decision.¹⁹² The Seventh Circuit interpreted the Court's holding in *Verdugo-Urquidez* to require that aliens always show that they have "substantial connections" with the United States before acquiring protection under the Fourth Amendment.¹⁹³ However, the question in *Verdugo-Urquidez* was limited to whether the Fourth Amendment was applicable to an alien where the place searched was located outside of the United States.¹⁹⁴ In holding that the Fourth Amendment did not apply to the particular defendant in *Verdugo-Urquidez*, the Court relied heavily on the fact that the search in question took place outside of the United States.¹⁹⁵ For example, when interpreting the Fourth Amendment, the Court stressed several times that it was

186. *Id.* at 1575.

187. See generally Paul A. Jargowsky, *Immigrants and Neighborhoods of Concentrated Poverty: Assimilation or Stagnation?*, 35 J. ETHNIC & MIGRATION STUD. 1129 (2009).

188. Steven J. Knox, *Reconstructing an End to Concentrated Poverty*, 16 J.L. SOC'Y 223, 228 (2014) ("When poor families are concentrated in neighborhoods with other poor adults, those neighborhoods are dangerous and feature less access to information about jobs.").

189. Gulasekaram, *supra* note 156, at 1575.

190. *Id.* at 1538.

191. *United States v. Meza-Rodriguez*, 798 F.3d 664, 671 (7th Cir. 2015), *cert. denied*, 136 S. Ct. 1655 (2016).

192. Daskal, *supra* note 47, at 340 n.40 (explaining courts that "have relied on Chief Justice Rehnquist's language in *Verdugo-Urquidez* to suggest that even within the United States, only U.S. citizens and aliens with substantial voluntary connections are entitled to Fourth Amendment protections," are in the minority and are inconsistent with the essential holding in *Verdugo-Urquidez*).

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

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

195. See *id.*

considering the geographical location of the particular search in its analysis, maintaining “it was never suggested that the [Fourth Amendment] was intended to restrain the actions of the Federal Government against aliens *outside* of the United States territory,”¹⁹⁶ and stating there is “no indication that the Fourth Amendment was understood by contemporaries of the Framers to apply to activities of the United States directed against aliens *in foreign territory or in international waters*.”¹⁹⁷ Therefore, any reference by the Court to the application of the Fourth Amendment to aliens within the United States was “not binding in future cases that directly raise[d] th[is] question[.]”¹⁹⁸

Given the narrow facts of *Verdugo-Urquidez*, commentators have suggested that the Court’s reference to “substantial connections” is only applicable where a search or seizure takes place outside of the United States.¹⁹⁹ If the search takes place within the United States, then the Fourth Amendment applies regardless of whether a non-citizen has substantial voluntary connections with the United States; but if the search takes place outside of the United States, then only citizens and those aliens with substantial connections are entitled to Fourth Amendment protections.²⁰⁰ Such an interpretation is supported by the Court’s language. Concluding in *Verdugo-Urquidez*, the Court declared: “At the time of the search, [defendant] was a citizen and resident of Mexico with no voluntary attachment to the United States, and the place searched was located in Mexico. Under these circumstances, the Fourth Amendment has no application.”²⁰¹ Thus, such a narrow holding suggests that if the defendant would have had a voluntary attachment to the United States, a different result may have followed, even though the search took place outside of the United States.²⁰² A different outcome may have also followed if the search had taken place within the United States, regardless of the defendant’s connections with this country.²⁰³

Moreover, although five Justices in *Verdugo-Urquidez* held the Fourth Amendment was not violated given the particular facts of the case, Justice Kennedy, who cast the fifth vote, specifically confirmed in his concurring opinion that a different outcome would have resulted had the search taken place within

196. *Id.* at 266 (emphasis added).

197. *Id.* at 267 (emphasis added).

198. *Id.* at 272 (explaining the lower court was incorrect in relying on *INS v. Lopez-Mendoza*, because the Court did not address the particular issue for which the lower court espoused a particular holding).

199. Daskal, *supra* note 47, at 340-41.

200. *Id.*

201. 494 U.S. at 274-75.

202. Joseph Ricchezza, *Are Undocumented Aliens “People” Persons Within the Context of the Fourth Amendment?*, 5 GEO. IMMIGR. L.J. 475, 499 (1991) (“In the plurality opinion the Court suggested *Verdugo-Urquidez* would be protected by the strictures of the Fourth Amendment if his presence in the United States was ‘voluntary,’ and if he accepted some ‘societal obligations’ or had a ‘substantial connection’ with the United States.”).

203. *Id.* (“The Court also implied that *Verdugo-Urquidez* would have been protected by the Fourth Amendment if the search had taken place in the United States.”).

the United States.²⁰⁴ He stated: “If the search had occurred in a residence within the United States, I have little doubt that the full protections of the Fourth Amendment would apply.”²⁰⁵ There were also four votes declaring that Verdugo-Urquidez was entitled to Fourth Amendment protections.²⁰⁶ By analyzing these votes, it is reasonable to conclude that had the search taken place within the United States, the Court would have been willing to grant Fourth Amendment rights to Verdugo-Urquidez regardless of the extent of his connections with the United States.²⁰⁷

Therefore, the Seventh Circuit properly acknowledged *Verdugo-Urquidez*’s applicability in determining the meaning of the phrase “the people” in the Second Amendment, but misinterpreted and infused dicta into the Court’s essential holding. Although the Court’s language in *Verdugo-Urquidez* lends much support to the conclusion that “the people” in the First, Second, Fourth, Ninth, and Tenth Amendments includes a greater class of individuals than just United States citizens,²⁰⁸ concluding that that Court limited the scope of people entitled to protections and rights conferred within the Bill of Right to those non-citizens who have developed “substantial connections” with the United States is unsound given the precise issue involved and the splintered decision.²⁰⁹

Aside from the fact that the Seventh Circuit’s sufficient connection test stems from a misguided interpretation of Supreme Court precedent, such a test also leads to practical problems. First, as Justice Brennan pointed out in his dissent in *Verdugo-Urquidez*, the test is not entirely clear.²¹⁰ The test is ambiguous when it comes to the determination of a non-citizen’s substantial connection with the United States; does an alien need to reside within the United States for a few days, weeks, months, or years?²¹¹ Additionally, what actions if any does an

204. See 494 U.S. at 278 (Kennedy, J., concurring).

205. *Id.*

206. See *id.* Justice Brennan filed a dissenting opinion in which Justice Marshall joined. See *id.* at 279 (Marshall, J., dissenting). Justice Blackmun also filed a dissenting opinion. See *id.* at 297 (Blackmun, J., dissenting). Justice Stevens concurred in judgment finding Verdugo-Urquidez was among “the people” entitled to Fourth Amendment protections, but that the search was not “unreasonable.” See *id.* at 279 (Stevens, J., concurring).

207. Richezza, *supra* note 202.

208. 494 U.S. at 282 (Brennan, J., dissenting) (“The Court admits that ‘the people’ extends beyond the citizenry . . .”).

209. See Mathilda McGee-Tubb, *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-SUPPLEMENT 75, 79-80 (2012) (claiming *Verdugo-Urquidez* holds ambiguous precedential value because the Court did not command a majority regarding its substantial connections test).

210. See Blair, *supra* note 172, at 179 (quoting *Verdugo-Urquidez*, 494 U.S. at 282 (Brennan, J., dissenting)).

211. Victor C. Romero, *Whatever Happened to the Fourth Amendment?: Undocumented Immigrants’ Rights After INS v. Lopez-Mendoza and United States v. Verdugo-Urquidez*, 65 S. CAL. L. REV. 999, 1015 (1992).

undocumented immigrant need to perform to establish a substantial connection? Such a test leaves non-citizens uncertain of whether they possess a Second Amendment right to bear arms.²¹² Law enforcement officers and governmental agents are also left in doubt as to “what course of action they can pursue when confronted with a suspect of ambiguous citizenship.”²¹³ Moreover, this test is unworkable for lower courts, leading to inconsistent results,²¹⁴ and the possibility of Second Amendment rights being improperly denied to non-citizens.²¹⁵

Due, in part, to these concerns, Justice Brennan, who dissented in *United States v. Verdugo-Urquidez*, argued that constitutional protections should extend to everyone in the United States and those subject to its laws.²¹⁶ However, the thrust of Brennan’s dissent illustrated another problem with limiting “the people” to include only those non-citizens with sufficient connections, and that is the problem that such a limitation conflicts with the notion of fundamental fairness. As he stated:

By concluding that respondent is not one of “the people” protected by the Fourth Amendment, the majority disregards basic notions of mutuality. If we expect aliens to obey our laws, aliens should be able to expect that we will obey our Constitution when we investigate, prosecute, and punish them. . . . Mutuality is essential to ensure the fundamental fairness that underlies our Bill of Rights.²¹⁷

Principles of mutuality and fundamental fairness “are central to our Nation’s constitutional conscience,”²¹⁸ and it is inequitable to enforce our laws against all non-citizens while at the same time excluding some non-citizens from the protections and rights that are conferred to others.²¹⁹ Thus the “substantial connections” test runs contrary to the notion of fundamental fairness because it requires the establishment of a substantial connection to be considered entitled to particular rights while at the same time requiring that those who lack substantial connections still be subject to the laws of the United States.

Therefore, contrary to the Seventh Circuit’s imposed limitation, “the people” contained within the Second Amendment should be interpreted to include all non-citizens within the United States.

212. See Blair, *supra* note 172, at 179.

213. See *id.*

214. See Douglas I. Koff, *Post-Verdugo-Urquidez: The Sufficient Connection Test—Substantially Ambiguous, Substantially Unworkable*, 25 COLUM. HUM. RTS. L. REV. 435, 471 (1994).

215. See *id.* at 485 (making the same argument with regard to aliens deserving of Fourth Amendment protections).

216. *The Meaning(s) of “The People” in the Constitution*, *supra* note 22, at 1088-89.

217. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 284 (1990) (Brennan, J., dissenting).

218. *Id.* at 286.

219. *Id.* at 284.

C. The Constitutionality of 18 U.S.C. § 922(g)(5)

Concluding that “the people” includes all non-citizens within the United States, even those who have an absence of “substantial connections,” does not mean that it is lawful for a non-citizen to be in possession of a firearm. As the Court in *Heller* pronounced: “Like most rights, the right secured by the Second Amendment is not unlimited.”²²⁰ Congress, thus, has the ability to limit constitutional rights through permissible restrictions.²²¹ The Seventh Circuit in *United States v. Meza-Rodriguez* held 18 U.S.C. § 922(g)(5) was such a permissible restriction.²²² Making the determination of whether 18 U.S.C. § 922(g)(5) impermissibly infringes a non-citizen’s Second Amendment rights, first requires applying the appropriate standard of review.

The Supreme Court has not addressed the appropriate standard of review for Second Amendment regulations,²²³ and inferior courts have been inconsistent in their approaches.²²⁴ Some courts have employed the intermediate scrutiny approach while others have employed an approach known as a two-step inquiry.²²⁵ Additionally, Justice Breyer, dissenting in *Heller*, advanced an interest-balancing approach.²²⁶ Under the intermediate scrutiny approach, laws will be upheld “if they ‘serve important governmental objectives and . . . [are] substantially related to achievement of those objectives.’”²²⁷ Courts using the two-step inquiry approach first ask “whether the challenged law imposes a burden on conduct falling within the scope of the Second Amendment’s guarantee.”²²⁸ “If it does . . . the court moves to the second step of applying an appropriate form of means-end scrutiny.”²²⁹ In the second step, the court will either apply intermediate or strict scrutiny. The level of scrutiny applied then determines whether the law is constitutionally permissible based on the proper level of scrutiny.²³⁰ Where the regulation threatens a core Second Amendment right, strict scrutiny is used, whereas intermediate scrutiny is used where the regulation is less severe.²³¹ In contrast to these approaches, Breyer’s interest-balancing approach asks “whether the statute burdens a protected interest in a way or to an extent that

220. *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008).

221. *See id.* at 626-27 (explaining the Second Amendment right is not unlimited and that the majority opinion should not cast doubt on longstanding prohibitions on the possession of firearms).

222. 798 F.3d 664, 673 (7th Cir. 2015), *cert. denied*, 136 S. Ct. 1655 (2016).

223. Anjali Motgi, *Of Arms and Aliens*, 66 STAN. L. REV. ONLINE 1, 7 (2013).

224. Don B. Kates & Alice Marie Beard, *Gun Control Policy and the Second Amendment: Response: Murder, Self-Defense, and the Right to Arms*, 45 CONN. L. REV. 1685, 1699 (2013).

225. *Id.* at 1700.

226. Jason T. Anderson, *Second Amendment Standard of Review: What the Supreme Court Left Unanswered in District of Columbia v. Heller*, 82 S. CAL. L. REV. 547, 572 (2009).

227. *Id.* at 560 (quoting *Craig v. Boren*, 429 U.S. 190, 197 (1976)) (alteration in original).

228. Kates & Beard, *supra* note 224, at 1700-01.

229. *Id.* at 1701.

230. *Id.*

231. *Id.* at 1702.

is out of proportion to the statute's salutary effects upon other important governmental interests."²³²

Although the lower courts have not settled on an appropriate standard of review, applying intermediate scrutiny appears to be the emerging trend.²³³ The courts that have applied intermediate scrutiny for Second Amendment challenges generally argue that some form of heightened scrutiny is appropriate given the constitutional right at issue.²³⁴ However, these courts point to the list of presumptively lawful firearm regulations provided for in *Heller* in arguing that strict scrutiny would not be appropriate given the apparent inconsistency that would arise if strict scrutiny were applied, thus forcing the courts to hold such regulations unconstitutional.²³⁵ The Seventh Circuit is among the majority of courts following this trend; concluding in *Meza-Rodriguez* that the appropriate standard to apply was "akin to intermediate scrutiny."²³⁶ Thus, the court required the government to show that 18 U.S.C. § 922(g)(5) was substantially related to the statute's objective of "'keep[ing] guns out of the hands of presumptively risky people' and to 'suppress[] armed violence.'"²³⁷ Rather than arguing that the Seventh Circuit applied the incorrect standard of review, this Note accepts and assumes that the application of intermediate scrutiny was appropriate but argues that under this standard, the court incorrectly concluded that 18 U.S.C. § 922(g)(5) is substantially related to Congress's objective in passing this statute.

The justification for § 922(g)(5) has no basis in reality, and thus fails under intermediate scrutiny.²³⁸ Although the government contended in *Meza-Rodriguez* that the objective of § 922(g)(5) was to keep guns out of the hands of presumptively risky people and to suppress armed violence, illegal aliens are no more likely to commit violent crimes than people who are legally in the United States.²³⁹ Studies also show that American citizens are significantly more likely to be imprisoned than people migrating to the country illegally.²⁴⁰ Although

232. Anderson, *supra* note 226, at 573 (quoting *District of Columbia v. Heller*, 1285 S. Ct. 2783, 2852 (2008)).

233. Stephen Kiehl, *In Search of a Standard: Gun Regulations After Heller and McDonald*, 70 MD. L. REV. 1131, 1141 (2011).

234. *Id.* at 1145.

235. *Id.*

236. *United States v. Meza-Rodriguez*, 798 F.3d 664, 672 (7th Cir. 2015), *cert. denied*, 136 S. Ct. 1655 (2016).

237. *Id.* at 673 (quoting *United States v. Yancey*, 621 F.3d 681, 683-84 (7th Cir. 2010)).

238. See Blair, *supra* note 172, at 188-89 (claiming courts using intermediate scrutiny to analyze laws that restrict Second Amendment rights for non-citizens must determine whether the underlying reasons for the passage of such gun laws "have any basis in reality").

239. See generally RUBEN G. RUMBAUT & WALTER A. EWING, THE MYTH OF IMMIGRANT CRIMINALITY AND THE PARADOX OF ASSIMILATION: INCARCERATION RATES AMONG NATIVE AND FOREIGN-BORN MEN, AM. IMMIGR. COUNCIL (Feb. 21, 2007), <https://www.americanimmigrationcouncil.org/sites/default/files/research/Imm%20Criminality%20%28IPC%29.pdf> [<https://perma.cc/F4DF-ZKMC>].

240. Blair, *supra* note 172, at 189.

intermediate scrutiny does not require that a particular regulation be the most narrowly tailored means to achieve the government's purported objective, the government must still demonstrate "that the regulation does not excessively restrict the right it implicates."²⁴¹ A blanket exclusion on all aliens "illegally or unlawfully in the United States" is excessive given the lack of connection between this group of people and an increased propensity to commit unlawful acts. In the absence of a demonstrated nexus between non-citizens and the danger they supposedly create, § 922(g)(5) fails to pass constitutional muster.

CONCLUSION

In *United States v. Meza-Rodriguez*, the Seventh Circuit became the first circuit to hold non-citizens are entitled to the rights granted to "the people" under the Second Amendment.²⁴² By so holding, the Seventh Circuit created a circuit split²⁴³ in need of a resolution.²⁴⁴ Given that the phrase "the people" is present throughout the Bill of Rights, a decision regarding which individuals are included in "the people" could have a great impact on a wide array of non-citizen's rights. For this reason, courts faced with the issue of whether non-citizens are entitled to Second Amendment rights should hold that all non-citizens situated within the United States are members of "the people" of the Second Amendment. This conclusion is supported by the contrast in text of the Second Amendment with different phrases used throughout the Constitution, a historical perspective of the rights of non-citizens, precedent, and the ultimate purpose of the Second Amendment as declared in *District of Columbia v. Heller*. Furthermore, a test that limits Second Amendment rights to only those non-citizens who have developed "substantial connections" with the United States emanates from an oversimplified and misguided interpretation of Supreme Court precedent; this test leads to inconsistent results for non-citizens in similar situations; and the test conflicts with our nation's notion of fundamental fairness.

In addition to holding that all non-citizens situated within the United States are members of "the people," courts should further hold 18 U.S.C. § 922(g)(5) is an unconstitutional restriction on this right, given that when intermediate scrutiny is applied, § 922(g)(5) fails to pass constitutional muster because there is no substantial relationship between limiting non-citizens' firearm rights and crime prevention.

241. Michael Rogers, *Guns on Campus: Continuing Controversy*, 38 J.C. & U.L. 663, 697 (2012).

242. See 798 F.3d 664, 671 (7th Cir. 2015), *cert. denied*, 136 S. Ct. 1655 (2016).

243. See *id.* at 672 n.1 (recognizing the holding created a circuit split with the Fourth, Fifth, and Eighth Circuits).

244. The Supreme Court denied certiorari on April 18, 2016. *Meza-Rodriguez v. United States*, 136 S. Ct. 1655 (2016). However, the issue of whether non-citizens are entitled to Second Amendment rights and the constitutionality of 18 U.S.C. § 922(g)(5) continues to be debated in the district courts. See *generally* *United States v. Cordoba*, No. 3:15-CR-067, 2015 WL 6680890 (S.D. Ohio Oct. 30, 2015).

In sum, the Seventh Circuit was correct in deviating from previous circuits that have excluded non-citizens as members of the Second Amendment's "the people." The Seventh Circuit should not have, however, imposed a restriction to include only those non-citizens who have "developed substantial connections as a resident in this country."²⁴⁵ Ultimately, the court's decision to grant non-citizens the right reserved under the Second Amendment was undercut by its upholding of § 922(g)(5).

245. *Meza-Rodriguez*, 798 F.3d at 671.