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KEEPING OUR GUNS IN OUR PAST

Logan Youngworth-Wright

I. INTRODUCTION

The Second Amendment protects the right of “the people” to keep and bear arms,¹ and it has long been considered “the palladium of [all] liberties”² But for most of America’s history, the scope of the Second Amendment has been hazed in constitutional mystery.³ Since its ratification in 1791, Second Amendment jurisprudence has been deficient at best.⁴ Before 2008, the Supreme Court has only directly addressed the scope of the Second Amendment once⁵ in *United States v. Miller*.⁶ The *Miller* Court held that the Second Amendment protects the right to keep arms that are reasonably related to the preservation of the militia.⁷ But, the *Miller* Court did not rule on whether the Second Amendment protects an individual right or a collective right to keep and bear arms.⁸ More than seventy years after the Supreme Court decided *Miller*, the Supreme Court finally answered the fiercely debated question of whether

¹ U.S. CONST. amend. II. (“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.”)

² St. George Tucker, *View of the Constitution of the United States*, in 1 BLACKSTONE’S COMMENTARIES WITH NOTES OF REFERENCE TO THE CONSTITUTION AND LAWS OF THE FEDERAL GOVERNMENT OF THE UNITED STATES AND OF THE COMMONWEALTH OF VIRGINIA ed. app. at *300 (St. George Tucker ed., Lawbook Exch. 1996) (1803).

³ Andrew R. Gould, Comment, *The Hidden Second Amendment Framework within the District of Columbia v. Heller*, 62 VAND. L. REV. 1535, 1536 (2009) (explaining the Supreme Court’s interpretations of the Second Amendment).

⁴ See generally *United States v. Cruikshank*, 92 U.S. 542 (1876); *Presser v. Illinois*, 116 U.S. 252 (1886); *Miller v. Texas*, 153 U.S. 535 (1894); *Houston v. Moore*, 18 U.S. 1 (1920); *United States v. Miller*, 307 U.S. 174 (1939).

⁵ Gould, *supra* note 3, at 1542.

⁶ *Miller*, 307 U.S. at 178 (holding that the National Firearms Act of 1934 did not infringe on the defendants’ Second Amendment right to bear arms because there was no evidence to suggest that possession of a sawed-off shotgun was reasonably related to the preservation of a well-regulated militia).

⁷ Gould, *supra* note 3, at 1543 (summarizing the Supreme Court’s holding in *Miller*).

⁸ *Id.*

the Second Amendment protects an individual’s right to keep and bear arms in *District of Columbia v. Heller*⁹ and *McDonald v. City of Chicago*.¹⁰

In *Heller* and *McDonald*, the Supreme Court announced that the Second Amendment protects a pre-existing, fundamental¹¹ “right of law-abiding, responsible citizens to use arms in defense of hearth and home.”¹² But, the Court did not purport to define the entire scope of the Second Amendment,¹³ and it did not adopt a standard of review for Second Amendment challenges, although it did reject both an interest-balancing approach and rational basis review as the appropriate standards of review.¹⁴ The Court warned that the right to keep and bear arms is not unlimited,¹⁵ and it left it to future cases to “expound on the historical justifications for the exceptions”¹⁶ to the scope of the Second Amendment. Since *Heller* and *McDonald*, there has been a significant effort to expand the scope of “the people” protected by the Second Amendment to include persons who have not been traditionally included in the definition of “the people.”¹⁷ The lower courts have been grappling with the Court’s holdings in *Heller* and *McDonald* in an attempt to set limit the scope of the Second Amendment.¹⁸ The lower courts have consistently resisted the effort to expand the scope of “the people” to include

⁹ 554 U.S. 570 (2008) (5–4 decision).

¹⁰ 561 U.S. 742 (2010) (5–4 decision).

¹¹ *Id.* at 778.

¹² *Heller*, 554 U.S. at 635.

¹³ *Id.*

¹⁴ *Id.* at 628 n.27; 633.

¹⁵ *Id.* at 626–27.

¹⁶ *Id.* at 635 (“[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 [T]here will be time enough to expound upon the historical justifications for the exceptions we have mentioned if and when those exceptions come before us.”).

¹⁷ See generally James Lockhart, Annotation, *Construction and Application of United States Supreme Court Holding in District of Columbia v. Heller*, 554 U.S. 570, 128 S. Ct. 2783, 171 L. Ed. 2d 637 (2008), *That Second Amendment Confers Individual Right to Keep and Bear Arms to Federal Statutes Regulating Firearms and Other Weapons*, 56 A.L.R. FED. 2d 1, 3 (“Since the *Heller* decision was rendered, a large number of cases have discussed whether and to what extent it affects the validity of various federal laws affecting firearms and other weapons including, but not limited to, provisions of the Gun Control Act of 1968 and the National Firearms Act of 1934, portions of which impose restrictions not specifically referred to in the *Heller* Court’s list of presumptively valid regulation[s].”).

¹⁸ *Id.*

undocumented aliens, but recently the Seventh Circuit forfeited.¹⁹ In August 2015, the Seventh Circuit, in *United States v. Meza-Rodriguez*,²⁰ held that undocumented aliens are part of “the people” protected by the Second Amendment, and the court granted undocumented aliens within the territorial jurisdiction of the Seventh Circuit the right to keep and bear arms. The Seventh Circuit’s holding demeans the Supreme Court’s authority as the supreme interpreter of the Constitution, and it undermines Congress’s plenary power over immigration.

Immigration law is an anomaly to constitutional law—Congress’s plenary power over immigration is not enumerated in the Constitution, however, it is immune from judicial review.²¹ In *Chae Chan Ping v. United States*,²² the Supreme Court established Congress’s plenary power over immigration. The Court explained that Congress derives its plenary power over immigration from Article I, Section 8, Cl. 2 of the Constitution, which empowers it “[t]o establish a uniform Rule of Naturalization ... throughout the United States ...[,]”²³ and from the penumbras of its enumerated powers to “declare war, make treaties, suppress insurrection, repel invasions, regulate foreign commerce, secure republican governments to the States, and admit subjects of other nations to citizenship....”²⁴ Justice Field, writing for a unanimous Court, stated that it is the inherent right of every independent sovereign to exclude foreigners, and Justice Field explained that if a nation could not regulate its borders and exclude foreigners then it would be to that extent at the mercy of foreign powers.²⁵ The

¹⁹ See *supra* text accompanying note 17.

²⁰ 698 F.3d 664 (7th Cir. 2015) (2–1 decision), *cert. denied*, No. 15-7017, 2016 U.S. LEXIS 2690 (Apr. 18, 2016) (per curiam).

²¹ *Matthews v. Davis*, 426 U.S. 67, 81 n.17 (1976).

²² 130 U.S. 581, 603 (1889).

²³ U.S. CONST. art. I § 8 cl. 4 (alterations in original).

²⁴ *Chae Chan Ping v. United States (Chinese Exclusion Case)*, 130 U.S. 581, 604 (1889) (explaining that it is the inherent right of an independent nation to control immigration over its borders).

²⁵ *Id.* at 603.

United States has absolute power to police its borders, and to regulate aliens within its territories.²⁶

The Supreme Court has rendered itself powerless to review Congress’s policy decisions that implicate immigration and naturalization.²⁷ Decisions that directly or indirectly affect immigration can have detrimental effects on the Nation’s economy, national security, and national identity, as well as its diplomatic relationships with foreign states.²⁸ It can also affect the perceptions and expectations of aliens present in or coming to the United States, and perceived mistreatment of foreign-nationals present in the United States could lead to harmful reciprocal treatment of American citizens residing abroad.²⁹

Acting within its naturalization and immigration powers, Congress may lawfully distinguish between United States nationals³⁰ and aliens.³¹ The term “alien” includes all persons who are not citizens or nationals of the United States.³² The Supreme Court has recognized Congress’s power to categorize aliens based on their individual relationships with the United States.³³ Congress may lawfully enact regulations that would be unconstitutional if applied to citizens,³⁴ and it may grant different constitutional protections to aliens based on

²⁶ *Id.*

²⁷ *Harisiades v. Shaughnessy*, 342 U.S. 580, 590–91 (1952) (stating that “nothing in the structure of our Government or the text of our Constitution would warrant judicial review by standards which would require us to equate our political judgment with that of Congress[,]” and that Reform in this field must be entrusted to the branches of the Government in control of our international relations and treaty-making powers.”).

²⁸ *Arizona v. United States*, 132 S.Ct. 2492, 2498 (2012).

²⁹ *Id.*

³⁰ Immigration and Nationality Act (INA) § 101(a)(22), 8 U.S.C. § 1001(a)(22) (2014) (defining “national of the United States”). United States nationals are further divided into citizen-nationals and non-citizen nationals. Non-citizen nationals owe permanent allegiance to the United States, and have the same rights as United States citizens. For the purpose of this comment, I will not differentiate between citizen-nationals and non-citizen nationals because the distinction will not alter or affect the premise of the argument.

³¹ *Matthews v. Davis*, 426 U.S. 67, 80 (1976).

³² 8 U.S.C. § 1001(a)(3).

³³ *Matthews*, 426 U.S. at 80 (1976) (“Congress is explicitly empowered to exercise that type of control over travel across the borders of the United States.”).

³⁴ *Id.*

their immigration statuses.³⁵ But, Congress must treat all individuals with the same immigration status equally.³⁶

Congress has made it unlawful for an immigrant³⁷ to enter the United States without proper admission.³⁸ The Supreme Court has stated that unlawful status is not a constitutional irrelevancy because entry into the class is a crime.³⁹ Congress has granted unlawful aliens less constitutional protections than citizens and aliens lawfully present in the United States, and it has enacted regulations that more stridently regulate the whereabouts of unlawful aliens.⁴⁰ Congress enacted 18 U.S.C. § 922(g)(5), which prohibits unlawful aliens from possessing firearms and/or ammunition.⁴¹ Violation of § 922(g)(5) is an aggravated felony,⁴² and offenders are criminally and civilly liable, and are removable.⁴³

In *United States v. Meza-Rodriguez*,⁴⁴ the Seventh Circuit split from its sister courts, and held that unlawful aliens are part of “the people” to whom the right to keep and bear arms is granted. On November 19, 2015, the government filed a petition for writ of certiorari to the Supreme Court, and on April 18, 2016, the Supreme Court, in a per curiam decision, denied the government’s petition.⁴⁵

³⁵ *Id.*

³⁶ *Id.* Inherent in Congress’s power over immigration is its power to exclude and deport certain classes of aliens based on characteristics Congress deems undesirable, see *U.S. ex rel. Turner v. Williams*, 194 U.S. 279, 291 (1904).

³⁷ 8 U.S.C. § 1101(a)(15) (defining “immigrant”).

³⁸ *Id.* § 1101(a)(13)(A) (defining “admission”).

³⁹ *Plyler v. Doe*, 457 U.S. 202, 220 (1982) (5–4 decision). See also *id.* at 220 n.19 (rejecting undocumented aliens as a suspect class, and reasoning that entry into the class is a crime, and stating that undocumented status is not a constitutional irrelevancy).

⁴⁰ See *id.* at 218–19 (stating that undocumented aliens have been “denied benefits that our society makes available to citizens and lawful residents”).

⁴¹ 18 U.S.C. § 922(g)(5)(a) (2015).

⁴² 8 U.S.C. § 1001(a)(43)(E)(ii) (categorizing 18 U.S.C. § 922(g)(5) as an aggravated felony).

⁴³ *Id.* at § 1227(a)(2)(iii) (stating that aliens convicted of an aggravated felony are removable). See also *id.* at § 1229a(e)(2) (defining “removable”).

⁴⁴ 698 F.3d 664 (7th Cir. 2015) (2–1 decision), *cert. denied*, No. 15-7017, 2016 U.S. LEXIS 2690 (Apr. 18, 2016) (per curiam).

⁴⁵ *Id.*

The Seventh Circuit used an interest-balancing approach to include undocumented aliens in “the people” protected by the Second Amendment, even though the *Heller* Court explicitly rejected an interest-balancing approach as the appropriate method for defining the scope of the Second Amendment.⁴⁶ Since the Supreme Court denied certiorari, undocumented aliens have inconsistent constitutional protections throughout the United States, and their rights are contingent on their whereabouts. In the territorial jurisdiction of the Seventh Circuit, undocumented aliens are part of “the people,” and they have the right to keep and bear arms, but in the rest of the United States, undocumented aliens are not part of “the people,” and are not protected by the Second Amendment.⁴⁷ The Seventh Circuit’s holding could have detrimental effects on immigration law and constitutional law. The court’s holding situates the judiciary as the gatekeeper of undocumented aliens’ constitutional rights in the Seventh Circuit, and as the gatekeeper, the judiciary will eventually usurp Congress’s plenary power over immigration. The Seventh Circuit’s holding and the Supreme Court’s decision to deny certiorari “may well be just the first of ... [an] unknown number of dominos to be knocked off the table.”⁴⁸

⁴⁶ See *District of Columbia v. Heller*, 554 U.S. 570, 663–35 (2008) (5–4 decision) (rejecting a “judge-empowering interest balancing inquiry”); *id.* at 634 (stating that “[t]he very enumeration of the right takes out of the hands of government—even the Third Branch of Government—the power to decide on a case-by-case basis whether the right is *really worth* insisting upon.”). Accord *McDonald v. City of Chicago*, 561 U.S. 742, 787 (2010) (5–4 decision) (“In *Heller*, however, we expressly rejected the argument that the scope of the Second Amendment right should be determined by judicial interest balancing”).

⁴⁷ Compare *United States v. Meza-Rodriguez*, 698 F.3d 664 (7th Cir. 2015) (2–1 decision) (holding undocumented aliens are part of “the people” protected by the Second Amendment), *cert. denied*, No. 15-7017, 2016 U.S. LEXIS 2690 (Apr. 18, 2016) (per curiam), with *United States v. Portillo-Munoz*, 643 F.3d 437 (5th Cir. 2011) (holding undocumented aliens are not part of “the people” protected by the Second Amendment), *cert. denied*, 133 S. Ct. 28 (2012), and *United States v. Carpio-Leon*, 701 F.3d 974 (4th Cir. 2012) (holding undocumented aliens are not part of “the people” protected by the Second Amendment), *cert. denied*, 134 S. Ct. 58 (2013), and *United States v. Flores*, 663 F.3d 1022 (8th Cir. 2011) (per curiam) (holding undocumented aliens are not part of “the people” protected by the Second Amendment), *cert. denied*, 133 S. Ct. 28 (2012), with *United States v. Huitron-Guizar*, 678 F.3d 1164 (10th Cir. 2012) (reserving on whether the undocumented aliens are part of “the people” protected by the Second Amendment), *cert. denied*, 133 S.Ct. 289.

⁴⁸ *Heller*, 554 U.S. at 680 (Stevens, J., dissenting) (alteration in original).

This Comment will argue that undocumented aliens are not part of “the people” protected by the Second Amendment, and therefore do not have the right to keep and bear arms. Part II-A will outline the history of the right to keep and bear arms. Part II-B will explain the Supreme Court’s holdings in *District of Columbia v. Heller* and *McDonald v. City of Chicago*. Part II-C will briefly explain the circuit split on whether undocumented aliens are part of “the people” protected by the Second Amendment, and will analyze the Seventh Circuit’s decision in *United States v. Meza-Rodriguez*. Part III is the legal analysis. Part III-A will argue that the Supreme Court adopted a historical approach to define the scope of the Second Amendment in *District of Columbia v. Heller* and *McDonald v. City of Chicago*, and it will explain the benefits of using a historical approach to define the scope of the Second Amendment. Part III-B will interpret the scope of “the people,” and it will conclude that undocumented aliens are not part of “the people.” Part III-B.1 will expound on the historical definition of the “the people.” Part III-B.2 will analyze the Supreme Court’s attempts to define “the people” in *United States v. Verdugo-Urquidez* and *District of Columbia v. Heller*, and will then argue that the Supreme Court’s decision in *McDonald v. City of Chicago* does not alter the scope of the Second Amendment as it applies to undocumented aliens. Part III-C will show that the history of the right to keep and bear arms in service to the militia, and the history of the common law right to keep and bear arms in self-defense excludes undocumented aliens from claiming a space within the protective scope of the Second Amendment. Part IV is the conclusion.

II. BACKGROUND

A. *The History of the Right to Keep and Bear Arms*

The right to keep and bear arms is deeply rooted in history,⁴⁹ and the right “has always been the distinctive privilege of freemen.”⁵⁰ The idea that an armed populace is the best security for a free state derives from the philosophical texts of Ancient Greece and Ancient Rome.⁵¹ The Founding Fathers relied most heavily on the seventeenth-century English republican ideas, which were deeply influenced by the writings of Aristotle, Cicero, and Niccolò Machiavelli.⁵² The essence of the English republican political thought was that “a citizenry could rule itself without the paternal guiding hand of a monarch.”⁵³ English republicans advocated for an armed populace, and promoted the idea that the power of the government was limited by the consent of the governed.⁵⁴ The Founding Fathers, whether Federalist or Anti-Federalist, all agreed that an armed citizenry and liberty were inextricably connected.⁵⁵

1. The English Duty to Keep and Bear Arms

Before the English Bill of Rights was ratified in 1689, it was an English subject’s duty, not right, to keep and to be trained in arms so that he could assist in keeping the local peace and defending the realm.⁵⁶ England did not have a professional police force until the nineteenth-century, and it did not have a standing army until the late seventeenth-century.⁵⁷ Consequently, all civil and military duties fell into the gentry. An English subject was

⁴⁹ STEPHEN P. HALBROOK, *THAT EVERY MAN BE ARMED: THE EVOLUTION OF A CONSTITUTIONAL RIGHT* loc. 312 (3rd ed. 2013) (ebook).

⁵⁰ JOHN ORDRONAU, *CONSTITUTIONAL LEGISLATION IN THE UNITED STATES* 241 (Philadelphia, T. & J. W. Johnson & Co., 1891), *quoted in* *District of Columbia v. Heller*, 554 U.S. 570, 619 (2008).

⁵¹ HALBROOK, *supra* note 49, at loc. 345.

⁵² *Id.* at loc. 328.

⁵³ David E. Vandercoy, *The History of the Second Amendment*, 28 VAL. U. L. REV. 1007, 1020 (1994) (explaining seventeenth-century English political theories).

⁵⁴ HALBROOK, *supra* note 49, at loc. 335.

⁵⁵ Vandercoy, *supra* note 53, at 1022.

⁵⁶ JOYCE LEE MALCOLM, *TO KEEP AND BEAR ARMS* 1 (photo. reprint 1996) (1994).

⁵⁷ *Id.* at 2.

expected to defend himself, his family, his property, and his neighbors from domestic and foreign attacks; to partake in the local peace keeping tasks, such as the “hue and cry” and the “watch and ward;” to partake in the sheriff’s *posse comitatus*;⁵⁸ and to defend the country when called into service by the King.⁵⁹

The Crown and Parliament reserved the right to enact regulations on the possession and use of certain weapons, and on the possession and use of firearms by certain classes of people.⁶⁰ The first of many game acts was enacted in 1389, and the game acts were intended to prevent popular insurrections by disarming certain groups of people.⁶¹ Since the beginning of the Glorious Reformation, Catholic subjects were suspected subversives, and regulations were enacted to restrict their ability keep and use weapons,⁶² or to completely disarm them.⁶³ These laws set a precedent that would permit the government to legally deprive all Catholics of the right to keep and bear arms in the Declaration of Rights.⁶⁴

After the English Civil War, the last Catholic King of England, James II, ascended the throne in 1685.⁶⁵ James II sought to reinstate Roman Catholicism as the state religion.⁶⁶ During his reign, gun control laws were enforced with greater intensity than ever before, the standing army was enlarged, and the militia was completely eliminated through disuse.⁶⁷ James II appointed Catholics to positions at the head of the army,⁶⁸ and ordered all non-

⁵⁸ *Id.* at 2–3.

⁵⁹ *Id.* at 4. The King was the commander-in-chief of the citizen-militia.

⁶⁰ *Id.*

⁶¹ *Id.* at 12.

⁶² *Id.* All Catholics were prohibited from possessing weapons related to militia service, however it was presumed that they kept weapons in their homes for self-defense.

⁶³ Vandercoy, *supra* note 53, at 1015.

⁶⁴ MALCOLM, *supra* note 56, at 12.

⁶⁵ *Id.* at 96.

⁶⁶ *Id.*

⁶⁷ David. B. Kopel, *Courts and Constitution: It Isn't About Duck Hunting*, 93 MICH. L. REV. 1333, 1346–47 (1995) (reviewing JOYCE LEE MALCOLM, *TO KEEP AND BEAR ARMS* (1994)).

⁶⁸ Vandercoy, *supra* note 53, at 1017.

government personnel to be disarmed.⁶⁹ The British-Anglicans, led by William of Orange, resisted James II's efforts to catholicize the state, and William of Orange defeated James II in 1688 at the conclusion of the Glorious Revolution.⁷⁰

2. *The English Right to Keep and Bear Arms*

In 1689, William III and Mary II signed the Declaration of Rights (enacted by Parliament as the English Bill of Rights) as a condition to their appointments as King Queen.⁷¹ The Declaration narrated James II's abuses, limited the Crown's powers, and enumerated the rights of the subjects.⁷² The English Bill of Rights ensured that history would never repeat itself.⁷³

The English Bill of Rights prohibited the Crown from establishing and/or maintaining a standing army without the consent of Parliament.⁷⁴ It also granted the Protestant subjects the right to keep and bear arms as suitable to their conditions, and as allowed by law.⁷⁵ The Declaration of Rights only limited the powers of the Crown—it did not limit the powers of Parliament.⁷⁶ Parliament could lawfully restrict the use of firearms by Protestants, but Parliament could not eliminate their right to keep firearms because possession was protected as a right.⁷⁷ But, the Catholics were barred from claiming the right to keep and bear arms because the Declaration neglected to grant them the right.⁷⁸ Although Catholics were

⁶⁹ Kopel, *supra* note 67, at 1347.

⁷⁰ *Id.* at 1348.

⁷¹ Vandercoy, *supra* note 53, at 1017.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.* at 1018–19

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ MALCOLM, *supra* note 56, at 123.

permitted to keep weapons in their homes for self-defense, contemporaneous legislation imposed severe restrictions on their ability to keep and use firearms.⁷⁹

Parliament intended to grant Protestants an individual right to use arms in self-defense and a political right to keep and bear arms in service to the militia.⁸⁰ The political right was thought to be the more important of the two rights.⁸¹ It was believed that the individual right to keep and bear arms presupposed the political right, and without the individual right, the political right was useless.⁸² The English right to keep and bear arms would be the predecessor to the Second Amendment to the American Constitution.⁸³

3. The American Right to Keep and Bear Arms

The colonists arriving in the seventeenth century were “men and women steeped in English laws, English customs, English prejudices, and English habits of mind.”⁸⁴ The American colonists implemented the entire body of the English common law in the New World, and the colonists inherited “all the rights of natural subjects, as if born and abiding in England[,]”⁸⁵ including the right to keep and bear arms. English history, common law and political ideologies dominated American culture, and continued to do so even after the colonies declared independence.⁸⁶

⁷⁹ Vandercoy, *supra* note 53, at 1019.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ MALCOLM, *supra* note 56, at 164.

⁸⁴ *Id.* at 137.

⁸⁵ *Id.* at 138 (internal quotation marks omitted) (citation omitted). *See also* MALCOLM, *supra* note 56, at 134 (“The right of individuals to be armed had become as the [English] Bill of Rights had claimed it was, an ancient and indubitable right. It was this heritage the Englishmen took with them to the American colonies and this heritage which Americans fought to protect in 1775.”).

⁸⁶ *Id.* at 138.

The Founding Fathers knew that “[n]othing [was] more certain than the indispensable necessity of government”⁸⁷ But, the Founders feared that a central government might become oppressive, and disarm the people, thereby taking away the people’s only defense against an oppressive government. The Founding Fathers all agreed that “dependence on the people, is no doubt, the primary control on the government ...[,]”⁸⁸ and that a citizen-militia was the “only substitute that can be devised for a standing army, and [it was the] best possible security against it”⁸⁹ It was understood across the American political spectrum that if the newly established constitutional order broke down, then the citizen-militia would disarm the federal military forces and re-establish order.⁹⁰ To preserve the citizen-militia, the Founders ratified the Second Amendment to the United States Constitution. The Second Amendment states, “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.”⁹¹

The Founders knew that the citizen-militia needed to be composed of the “right sort of men and [that it must be] used sensibly[,]”⁹² so that it would not transform into a select-militia or a standing army.⁹³ The Founders divided the control over the citizen-militia between the federal government and the State governments. Article I, Section 8, Clause 16 empowers Congress,

To provide for organizing, arming and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress to the States⁹⁴

⁸⁷ THE FEDERALIST No. 2, at 8 (John Jay) (Project Gutenberg EText ed., n.d.) (alterations in original).

⁸⁸ *Id.*

⁸⁹ MALCOLM, *supra* note 56, at 180 (alteration in original).

⁹⁰ *Id.* at 162.

⁹¹ CONST. II, amend. II.

⁹² MALCOLM, *supra* note 56, at 142 (alterations in original).

⁹³ Patrick Charles, *Second Amendment and Individual Militia Rights*, 9 GEO. J.L. & PUB. POL’Y 323, 367 (2011) [hereinafter *Militia Rights*] (describing the difference between a well regulated militia and a select militia).

⁹⁴ U.S. CONST. art. I, § 8, cl. 16.

The states were expected to maintain and train the citizen-militia.⁹⁵ The states enacted militia laws that defined the obligations and qualifications for service.⁹⁶ The militia laws excused and/or excluded certain individuals and classes of people from service.⁹⁷ The militia was compromised of “all males physically capable of acting in concert for the common defense.”⁹⁸ When the citizen-militia was called into service, the militiamen were expected to bring their personal arms, and to join together for the common defense.⁹⁹ The militiamen were “civilians primarily, soldiers on occasion.”¹⁰⁰

B. The Supreme Court Interprets the Second Amendment in District of Columbia v. Heller and McDonald v. City of Chicago

a. District of Columbia v. Heller

Special Police Officer Dick Heller challenged three District of Columbia laws that prohibited and criminalized the possession and registration of handguns kept in the home for self-defense.¹⁰¹ The Supreme Court addressed whether the District’s prohibition on handguns violated Special Police Officer Heller’s Second Amendment right to keep and bear arms.¹⁰² In a 5–4 decision,¹⁰³ the Court held that the Second Amendment protects an individual’s right

⁹⁵ *United States v. Miller*, 307 U.S. 174, 178 (1939).

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.* at 179.

⁹⁹ *Id.* It was believed that a citizen-militia was an adequate defense against domestic and foreign attacks, and that trained soldiers would only be needed on occasion.

¹⁰⁰ *Id.* at 179.

¹⁰¹ *District of Columbia v. Heller*, 554 U.S. 554, 574–76 (2008) (5–4 decision) (explaining the laws challenged by Officer Heller). Special Police Officer Heller challenged three firearm regulations. Although there were minor exceptions to the laws, the laws in effect completely prohibit firearm possession in the home. The exceptions are not pertinent to the issue before the Court.

¹⁰² *Id.* at 573.

¹⁰³ Justice Scalia delivered the opinion of the Court, in which Chief Justice Roberts, Justice Kennedy, Justice Thomas and Justice Alito joined. Justice Stevens filed a dissenting opinion, in which Justice Souter, Justice Ginsburg, and Justice Breyer joined. Justice Breyer also filed a dissenting opinion, in which Justice Stevens, Justice Souter, and Justice Ginsburg joined. I will briefly mention the dissenting opinions, but the dissents’ interpretations of the Second Amendment are not pertinent to the argument.

to keep and bear arms that are not related to service in the militia, and it stated that the Second Amendment protects the right to keep and bear arms for traditionally lawful purposes.¹⁰⁴ Justice Scalia, writing for the majority, identified the core right protected by the Second Amendment to be an individual right to keep and use a handgun in the home for self-defense.¹⁰⁵ The Court was careful to note that the Second Amendment right to keep and bear arms is not unlimited.¹⁰⁶

The Second Amendment naturally divides into two parts—the prefatory clause and the operative clause.¹⁰⁷ The prefatory clause states, “A well regulated militia, being necessary to the security of a free state”¹⁰⁸ The operative clause states, “the right of the people to keep and bear Arms, shall not be infringed.”¹⁰⁹ The Court concluded that the prefatory clause does not limit the operative clause, and that the prefatory clause merely explains why the right to keep and bear arms was codified in the Bill of Rights.¹¹⁰ The operative clause protects an individual’s private right to keep a handgun in the home for self-defense, and an individual’s ability to exercise his Second Amendment right is not limited to, or contingent upon, service in the militia.¹¹¹

The Court identified “the people” protected by the Second Amendment to be the individual members of the political community.¹¹² Justice Scalia¹¹³ quoted the definition of

¹⁰⁴ *Heller*, 554 U.S. at 636.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 595.

¹⁰⁷ *Id.* at 577.

¹⁰⁸ U.S. CONST. amend. II.

¹⁰⁹ U.S. CONST. amend. II.

¹¹⁰ *Heller*, 554 U.S. at 595–600.

¹¹¹ *Id.*

¹¹² *Id.* at 580.

¹¹³ Justice Scalia joined the majority in *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990), which held that the Fourth Amendment does not protect non-citizen, foreign nationals against warrantless searches outside the territorial jurisdiction of the United States.

“the people” devised by Chief Justice Rehnquist in *United States v. Verdugo-Urquidez*.¹¹⁴ In *Verdugo-Urquidez*, Chief Justice Rehnquist stated,

“[T]he people” ... seems to have been a term of art employed in select parts of the Constitution *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*¹¹⁵

Although Justice Scalia quoted the *Verdugo-Urquidez* definition of “the people,” he tapered the scope of “the people” from encompassing the national community to only the political community.¹¹⁶ Justice Scalia continued his analysis under the presumption “that the Second Amendment right [can be] exercised individually[,] and [it] belongs to all Americans.”¹¹⁷

Justice Scalia stated that the Second Amendment, like all constitutional rights, is enshrined with the scope it was understood to have at the time of its ratification.¹¹⁸ Justice Scalia examined the history and meaning of the right to keep and bear arms before and after the Second Amendment was ratified, and concluded that the Second Amendment protects the right to keep and bear arms for military and civilian purposes.¹¹⁹ The Court stated that the Second Amendment protects the American common law right to keep and bear arms in self-defense, which the American colonists originally inherited as from the English common law as English subjects.¹²⁰ The Court concluded that “the very text of the Second Amendment

¹¹⁴ *Heller*, 554 U.S. at 580 (quoting the *Verdugo-Urquidez* definition of “the people”).

¹¹⁵ *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990) (6–3 decision) (alteration in original) (emphasis added), quoted in *Heller*, 554 U.S. at 581.

¹¹⁶ See *Heller*, 554 U.S. at 580–81 (analyzing the term “the people” in the Bill of Rights).

¹¹⁷ *Id.* (alterations in original).

¹¹⁸ *Id.* at 634.

¹¹⁹ See generally *id.* at 592–95 (tracing the history of the right to keep and bear arms from the English duty to keep and bear arms to the right to keep and bear arms as it is today).

¹²⁰ *Id.* at 592–95.

implicitly recognized the *pre-existence* of the right and declared only that it shall not be infringed [T]his is not a right granted by the Constitution.”¹²¹

In dissent, Justice Breyer argued that the history of the right to keep and bear arms is the beginning, not the end, of the constitutional inquiry.¹²² Justice Breyer explained that an individual’s ability to keep a loaded handgun in the home for self-defense is a “subsidiary interest[] that the Second Amendment seeks to serve.”¹²³ Justice Scalia refuted Justice Breyer’s claim, and stated that “self-defense had little do to with the right’s *codification*; it was the *central component* of the right itself.”¹²⁴

The *Heller* Court emphasized that, “[l]ike most rights, the right secured by the Second Amendment is not unlimited.”¹²⁵ 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.”¹²⁶ Justice Scalia emphasized that “nothing in [the Court’s] opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, ... or [on] laws imposing conditions and qualifications on the commercial sale of firearms.”¹²⁷ The majority stated that the long-standing prohibitions on the right to keep and bear arms are constitutional, and that the aforementioned list is merely exemplary, not exhaustive.¹²⁸ The Court failed to explain why the prohibitions are constitutional. Justice Scalia also noted that precedent does not foreclose the *Heller* Court’s interpretation of the

¹²¹ *Id.* at 592 (alteration in original) (emphasis added) (quoting *United States v. Cruikshank*, 92 U.S. 568, 553 (1875) (internal quotations omitted)).

¹²² *Id.* at 687 (Breyer, J., dissenting).

¹²³ *Id.* at 714 (alteration in original) (arguing that Justice Story did not believe the Second Amendment conferred an individual right of self defense to the people).

¹²⁴ *Id.* at 599 (majority opinion).

¹²⁵ *Id.* at 626.

¹²⁶ *Id.* at 635 (emphasis added).

¹²⁷ *Id.* at 627–28 (alterations in original).

¹²⁸ *Id.* at 626 n.26.

Second Amendment.¹²⁹ The Court even stated that its precedent supports its holding because the Court has only ever upheld limitations on the scope of the Second Amendment that have been based in the historical understanding of the right to keep and bear arms.¹³⁰

The Supreme Court did not identify the applicable standard of review for Second Amendment challenges. In dissent, Justice Stevens criticized the majority's failure to establish a standard of review, and he proposed that an interest-balancing inquiry should be applied to Second Amendment challenges.¹³¹ Justice Stevens argued that an interest-balancing approach would better address the concerns relating to firearms, and he stated that "the majority's decision threatens severely to limit the ability of more knowledgeable, democratically elected officials to deal with gun-related problems."¹³² But, the majority rejected Justice Stevens' interest-balancing approach, explaining that it is too "judge empowering."¹³³ Justice Scalia also noted that rational basis review is not the appropriate level of scrutiny to apply to Second Amendment challenges.¹³⁴

The Supreme Court stated that modern technological developments do not alter the scope of an enumerated constitutional rights,¹³⁵ and the Second Amendment extends *prima facie* to all modern technological developments that fall within the historical understanding of the right to keep and bear arms.¹³⁶ Justice Scalia explained that "[c]onstitutional rights are

¹²⁹ *Id.* at 625.

¹³⁰ *Id.* at 627.

¹³¹ *Id.* at 690 (Stevens, J., dissenting).

¹³² *Id.* at 719.

¹³³ *Id.* at 633 (majority opinion).

¹³⁴ *Id.* at 628 n.27 ("If all that was required to overcome the right to keep and bear arms was a rational basis, the Second Amendment would be redundant with the separate constitutional prohibitions on irrational laws, and would have no effect.").

¹³⁵ *Id.* at 628–29. *See also id.* at 627–28 ("[T]he fact that modern developments have limited the degree of fit between the prefatory clause and the protected right cannot change [the Court's] interpretation of the right.").

¹³⁶ *Id.* at 582.

enshrined with the scope they were understood to have when the people adopted them”¹³⁷ The Court did “not undertake an exhaustive historical analysis of the full scope of the Second Amendment,”¹³⁸ and the Supreme Court left it to future cases to “expound on the historical justifications for the exceptions [to the Second Amendment] when those exceptions come before [it].”¹³⁹

b. McDonald v. City of Chicago

In *McDonald v. City of Chicago*,¹⁴⁰ the Supreme Court, in a splintered 5–4 decision,¹⁴¹ incorporated the Second Amendment right that was recognized in *Heller* against the States.¹⁴² Four citizens challenged Chicago’s gun laws that prohibited residents from keeping a handgun in the home for self-defense.¹⁴³ Justice Alito, writing for the plurality, incorporated the Second Amendment against the States through the Due Process Clause of the Fourteenth Amendment.¹⁴⁴ Justice Thomas, the majority’s critical fifth vote, concurred in the judgment, but incorporated the Second Amendment through the Privileges or Immunities Clause of the Fourteenth Amendment.¹⁴⁵ The plurality and Justice Thomas reached their respective

¹³⁷ *Id.* at 634 (alteration in original).

¹³⁸ *Id.* at 635.

¹³⁹ *Id.* (alterations in original).

¹⁴⁰ 561 U.S. 742 (2010) (5–4 decision).

¹⁴¹ Justice Alito delivered the judgment and the opinion of the Court with respect to Parts I, II-A, and III, in which Chief Justice Roberts, Justice Scalia, Justice Kennedy and Justice Thomas joined. Justice Alito, joined by Chief Justice Roberts, Justice Scalia, and Justice Kennedy, concluded in Parts II-C, IV, and V, that the Due Process Clause of the Fourteenth Amendment incorporates the Second Amendment right recognized in *Heller* against the States. Justice Scalia filed a concurring opinion. Justice Thomas filed a separate opinion, concurring in part and concurring in the judgment. Justice Thomas concluded that the Privileges or Immunities Clause of the Fourteenth Amendment incorporates the Second Amendment right recognized in *Heller* against the States. Justice Stevens filed a dissenting opinion. Justice Breyer filed a dissenting opinion, in which Justice Ginsburg and Justice Sotomayor joined.

¹⁴² *McDonald*, 561 U.S. (majority opinion). *See id.* at 791 (plurality opinion) (“In *Heller*, we held that the Second Amendment protects the right to possess a handgun in the home for the purpose of self-defense.”). *See also id.* at 767–68 (stating that the *Heller* Court “concluded, citizens must be permitted to use handguns for the core lawful purpose of self-defense”).

¹⁴³ *Id.* at 750.

¹⁴⁴ *Id.* at 778 (plurality opinion) (reasoning that the Second Amendment is “fundamental right necessary to the our system of ordered liberty ...[and] deeply rooted in the Nation’s history and tradition”).

¹⁴⁵ *Id.* at 806 (Thomas, J., concurring in part and concurring in the judgment).

conclusions by analyzing the history of the right to keep and bear arms.¹⁴⁶ The *McDonald* majority affirmed that the Second Amendment right to keep and bear arms is not unlimited.¹⁴⁷

C. The Circuit Court Split on the Scope of the Second Amendment

After the Supreme Court's rulings in *Heller* and *McDonald*, a considerable effort has been made to expand the scope of the Second Amendment to include undocumented aliens among "the people" entitled to the right to keep and bear arms.¹⁴⁸ But, the lower courts have resisted expanding the scope of "the people," until recently. The Fifth,¹⁴⁹ Fourth,¹⁵⁰ and Eighth¹⁵¹ Circuits have held that undocumented aliens are not part of "the people" protected by the Second Amendment, and the Tenth Circuit reserved on ruling whether undocumented aliens are part of "the people."¹⁵² Each of the courts' respective decisions has been appealed to the Supreme Court, and the Supreme Court has denied each petition for writ of certiorari.¹⁵³

1. United States v. Meza-Rodriguez

In *United States v. Meza-Rodriguez*,¹⁵⁴ the Seventh Circuit, in a 2–1 decision, split from the Fifth, Fourth, Eighth and Tenth Circuits. Chief Judge Wood, writing for the

¹⁴⁶ See generally *id.* (majority opinion); *id.* (Thomas, J., concurring opinion) (incorporating the Second Amendment through the Privileges or Immunities Clause of the Fourteenth Amendment); *id.* (Alito, J., plurality opinion) (incorporating the Second Amendment through the Due Process Clause of the Fourteenth Amendment).

¹⁴⁷ *Id.* at 927 (majority opinion) (quoting *District of Columbia v. Heller*, 554 U.S. 570, 626 (2010) (warning that the right to keep and bear arms for the purpose of self-defense is not unlimited)).

¹⁴⁸ See *supra* text accompanying note 17.

¹⁴⁹ *United States v. Portillo-Munoz*, 643 F.3d 437 (5th Cir. 2011) (2–3 decision).

¹⁵⁰ *United States v. Carpio-Leon*, 701 F.3d 974 (4th Cir. 2012).

¹⁵¹ *United States v. Flores*, 663 F.3d 1022 (8th Cir. 2011) (per curiam).

¹⁵² *United States v. Huitron-Guizar*, 678 F.3d 1164 (10th Cir. 2012), *cert. denied*, 133 S.Ct. 289.

¹⁵³ See *United States v. Portillo-Munoz*, 643 F.3d 437 (5th Cir. 2011), *cert. denied*, 133 S. Ct. 28 (2012); *United States v. Carpio-Leon*, 701 F.3d 974 (4th Cir. 2012), *cert. denied*, 134 S. Ct. 58 (2013); *United States v. Flores*, 663 F.3d 1022 (8th Cir. 2011), *cert. denied*, 133 S. Ct. 28 (2012); *United States v. Huitron-Guizar*, 678 F.3d 1164 (10th Cir. 2012), *cert. denied*, 133 S.Ct. 289.

¹⁵⁴ 698 F.3d 664 (7th Cir. 2015) (2–1 decision), *cert. denied*, No. 15-7017, 2016 U.S. LEXIS 2690 (Apr. 18, 2016) (per curiam).

majority, held that undocumented aliens are part of “the people” protected by the Second Amendment.¹⁵⁵

Just before midnight on August 13, 2013, Milwaukee police officers responded to a report that there was an armed man at a local bar. The responding officers were not able to apprehend the man, but they did identify him as Defendant-Appellant, Mariano Meza-Rodriguez,¹⁵⁶ who is a citizen of Mexico¹⁵⁷ unlawfully present in the United States,¹⁵⁸ and who is a repeat criminal offender.¹⁵⁹ A few hours later, the officers responded to a second report of a fight at a neighboring bar.¹⁶⁰ The officers identified the aggressor at the neighboring bar as Defendant-Appellant.¹⁶¹ After a foot chase, the police officers seized Defendant-Appellant, and found a .22 caliber cartridge on his person.¹⁶² Meza-Rodriguez was charged in violation of 18 U.S.C. § 922(g)(5),¹⁶³ which makes it an aggravated felony for an undocumented alien to be in possession of a firearm and/or ammunition.¹⁶⁴ The Defendant-Appellant plead guilty,¹⁶⁵ and he filed a timely notice of appeal from his conviction, and he preserved for appeal the issue of whether § 922(g)(5) unconstitutionally burdens his Second Amendment right to keep and bear arms.¹⁶⁶

¹⁵⁵ *Id.* at 672. The Seventh Circuit also held that 18 U.S.C. § 922(g)(5)(a) is constitutional under the Second Amendment, see *id.* at 673.

¹⁵⁶ *Id.* at 666.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 667. See also *United States v. Meza*, No. 13–CR–192, 2014 U.S. Dist. LEXIS 50485, at *17, n.3 (E.D. Wis. Feb. 25, 2014) (“Meza’s criminal history also includes several arrests for offenses ranging from criminal damage to property to theft to robbery with use of force, although no dispositions are reported.”).

¹⁶⁰ *Id.* at 666.

¹⁶¹ *Id.* The Defendant-Appellant was brought to the United States when he was four or five years old, and he has remained in the United States since, but he has never regularized his status.

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ 18 U.S.C. § 922(g)(5)(a).

¹⁶⁵ *Meza-Rodriguez*, 698 F.3d at 667.

¹⁶⁶ *Id.* The United States District Court for the Eastern District of Wisconsin sentenced Defendant-Appellant to time served with no supervised release. After Defendant-Appellant served his sentence, he was removed to Mexico. The Defendant-Appellant filed a timely notice of appeal from his conviction. The court ruled that Defendant-Appellant’s removal to Mexico did not render his appeal moot, *id.* at 667–69.

The Seventh Circuit first addressed whether the Second Amendment protects unlawful immigrants.¹⁶⁷ The court held that unlawful immigrants are part of “the people” protected by the Second Amendment.¹⁶⁸ Next, the court addressed whether § 922(g)(5) burdens an undocumented alien’s right to keep and bear arms.¹⁶⁹ The court applied intermediate scrutiny, and held that § 922(g)(5) does not impermissibly restrict an undocumented alien’s right to keep and bear arms.¹⁷⁰

The Seventh Circuit acknowledged that the *Heller* Court frequently links the “Second Amendment rights with the notions of ‘law-abiding citizens’ and ‘members of the political community.’”¹⁷¹ But, the Seventh Circuit stated that it was reluctant to place weight on the language in *Heller* that links the Second Amendment right to law-abiding citizens and members of the political community because the issue of whether aliens are protected by the Second Amendment was not the issue before the Supreme Court in *Heller*.¹⁷² Instead, the Seventh Circuit determined that the *Verdugo-Urquidez* definition of “the people”¹⁷³ was controlling.¹⁷⁴ The court reasoned that the *Heller* Court affirmed the *Verdugo-Urquidez* Court’s assertion that the First, Second, and Fourth Amendments protect to the same group of people,¹⁷⁵ and the court noted that interpreting the Second Amendment under the *Verdugo-Urquidez* definition of “the people” is consistent with idea that “the people” has the same

¹⁶⁷ *Id.* at 669.

¹⁶⁸ *Id.* at 672.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* at 673. I will not discuss the second issue in great depth because the comment addresses whether undocumented aliens are within the scope of the Second Amendment, not whether the 18 U.S.C. § 922(g)(5) is constitutional.

¹⁷¹ *Id.* (quoting *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008)).

¹⁷² *Id.* at 669.

¹⁷³ *Id.* at 670.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

meaning throughout the Bill of Rights.¹⁷⁶ The Seventh Circuit also relied¹⁷⁷ on *Plyler v. Doe*, which held that the Due Process Clause of the Fourteenth Amendment protects all persons within the territorial jurisdiction of the United States.¹⁷⁸ The court concluded that “[i]n the post-*Heller* world, ... it is now clear that the Second Amendment right to bear arms is no second-class entitlement, [and the court saw] no principled way to carve out the Second Amendment and say that unauthorized [aliens] ... are excluded”¹⁷⁹ from its protections.

The Seventh Circuit then subjected the Second Amendment to a case-by-case analysis, and it found that Meza-Rodriguez is protected by the Second Amendment because he is a member of the national community.¹⁸⁰ The court first noted that because Defendant-Appellant is physically present in the territorial jurisdiction of the United States, he is protected by the Due Process Clause of the Fourteenth Amendment, and therefore entitled to some constitutional protections.¹⁸¹ The court then decided that Defendant-Appellant is a member of the national community because he has developed “sufficient connections” to the United States because had continuously resided in the United States for over twenty years before he was removed to Mexico; he had developed close relationships with family members and acquaintances who lived in the United States; he had attended public school in Milwaukee; and he had sporadically worked while he was present in the United States.¹⁸² The court stated that it “does not dispute that [Defendant-Appellant] has fallen down on the job of performing

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* at 671–72 (construing *Plyler v. Doe*, 557 U.S. 202 (1991), to “show[] that even unauthorized aliens enjoy certain constitutional rights, and so unauthorized status (reflected in the lack of documentations) cannot support a *per se* exclusion from the people protected by the Bill of Rights”).

¹⁷⁸ *Plyler v. Doe*, 457 U.S. 202 (1981).

¹⁷⁹ *Meza-Rodriguez*, 798 F.3d. at 672.

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.*

as a responsible member of the community.”¹⁸³ Nonetheless, it ruled that Defendant-Appellant is a member of the national community, in spite of his “unsavory traits, [which] includ[es] multiple breaches with the law, failure to file tax returns, and lack of a steady job[]”¹⁸⁴ The Seventh Circuit subjected the Second Amendment to a case-by-case analysis, and it empowered the judiciary to use its discretion to decide whether or not to grant undocumented aliens the right to keep and bear arms.¹⁸⁵

The court then applied a level of scrutiny akin to intermediate scrutiny to the Defendant-Appellant’s Second Amendment challenge.¹⁸⁶ The court held that § 922(g)(5) is constitutional under the Second Amendment.¹⁸⁷ The court reasoned that Congress has determined that undocumented aliens are presumptively risky individuals, and it concluded that preventing undocumented aliens from possessing firearms and ammunition substantially relates to the government’s important interest in protecting the public against armed violence.¹⁸⁸

Judge Flaum concurred in the majority’s ruling that § 922(g)(5) is constitutional under the Second Amendment, but doubted whether the scope of the Second Amendment is so expansive as to include undocumented aliens.¹⁸⁹ Judge Flaum critiqued the majority’s reliance on the *Verdugo-Urquidez* definition of “the people.”¹⁹⁰ He stated that the *Verdugo-Urquidez* definition of “the people” is “unsettled,” and that “*Heller* provides considerable

¹⁸³ *Id.* at 672 (alteration in original).

¹⁸⁴ *Id.* (alterations in original).

¹⁸⁵ The United States Court of Appeals for the Seventh Circuit has appellate jurisdiction over the courts in the following districts: Central District of Illinois, Northern District of Illinois, Southern District of Illinois, Northern District of Indiana, Southern District of Indiana, Eastern District of Wisconsin, and Western District of Wisconsin.

¹⁸⁶ *Id.* at 672.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.* at 673.

¹⁸⁹ *Id.* at 673 (Flaum, J., concurring in judgment).

¹⁹⁰ *Id.* at 674.

reason to doubt that an undocumented immigrant can enjoy Second Amendment rights at all.”¹⁹¹ Judge Flaum stated that the court should have followed the Tenth Circuit, and reserve on the constitutional question of whether undocumented aliens are part of “the people.”¹⁹²

On November 19, 2015, the government filed a petition for a writ of certiorari to the Supreme Court, and on April 18, 2016, the Supreme Court denied the government’s petition.¹⁹³

III. LEGAL ANALYSIS

A. Shaping the Future with the Past: The Benefits of Using a Historical Approach to Define the Scope of the Second Amendment

The Constitution’s endurance rests in its immutability, and its immutability is what protects the people’s right to define the national identity through the political process.¹⁹⁴ When the judiciary rules on policy issues that concern constitutional rights, the decisions are final, and the judiciary has usurped the power of the people to define society through the political process, and “the people will have ceased, to be their own rulers, having, to that extent, practically resigned their government, into the hands of that eminent tribunal.”¹⁹⁵ To avoid a future where the people are at the mercy of the judiciary, the Constitution must be interpreted in its original meaning so that the people’s right to define the national identity is preserved.

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *United States v. Meza-Rodriguez*, 698 F.3d 664 (7th Cir. 2015) (2–1 decision), *cert. denied*, No. 15-7017, 2016 U.S. LEXIS 2690 (Apr. 18, 2016) (per curiam).

¹⁹⁴ Justice Antonin Scalia, *Judicial Adherence to the Text of Our Basic Law: A Theory of Constitution Interpretation*, Speech at Catholic University of America (Oct. 18 1996) [hereinafter *Judicial Adherence*].

¹⁹⁵ Pres. Abraham Lincoln, *First Inaugural Address*, March 4, 1861 *available at* <http://www.ushistory.org/documents/lincoln1.htm> (“At the same time the candid citizen must confess that if the policy of the Government upon the vital questions affecting the whole people is to be irrevocably fixed by the decisions of the Supreme Court, the instant they are made in ordinary litigation between parties in personal actions, the people will have ceased to be their own rulers, having to that extent practically resigned their Government into the hands of that eminent tribunal.”).

In *District of Columbia v. Heller*,¹⁹⁶ the late Justice Scalia, who is regarded as “the most influential justice of the century” by his fellow Justices,¹⁹⁷ preserved the scope of the Second Amendment in the history of the right to keep and bear arms. Nevertheless, some historians have questioned and critiqued the Supreme Court’s historical accounts of the right to keep and bear arms in *Heller* and *McDonald*.¹⁹⁸ But, it must be noted that historians and judiciaries have conflicting motivations for studying history—historians seek to reveal the truth, whereas judiciaries seek to establish a workable jurisprudence based on definitive answers.¹⁹⁹ Historians look to the past and marvel at the ironies, while judiciaries look to the past to shape the future.²⁰⁰ Justice Scalia stated that “the question is not whether [a] historically focused method is a *perfect means* of restraining aristocratic judicial Constitution writing; but whether it is the *best means available* in an imperfect world.”²⁰¹

The text and history of the Second Amendment will resolve whether unlawful aliens are entitled to the Second Amendment right. Defining the scope of the Second Amendment in the history of the right to keep and bear arms will shield the Second Amendment from “vague ethico-political First Principles [sic] whose combined conclusion can be found to point in any direction [a] judge [may] favor[.]”²⁰²

B. Undocumented Aliens are Not “The People”

1. The History of “The People”

¹⁹⁶ *District of Columbia v. Heller*, 554 U.S. 570 (2010).

¹⁹⁷ Garrett Epps, *Justice Scalia’s Outsized Legacy*, THE ATLANTIC (Feb. 13, 2016), <http://www.theatlantic.com/politics/archive/2016/02/justice-scalias-outsized-legacy/462756/>.

¹⁹⁸ *Id.* at 18.

¹⁹⁹ SAUL CORNELL, A WELL REGULATED MILITIA loc. 3431 (2006) (ebook).

²⁰⁰ *Id.*

²⁰¹ *McDonald v. City of Chicago*, 561 U.S. 742, 804 (2010) (Scalia, J., concurring) (alteration in original).

²⁰² *Id.* (alterations in original).

“The people” is a term of art used in select parts of the Constitution.²⁰³ The Preamble declares that “the people” ordained and established the Constitution “in order to form a more perfect union.”²⁰⁴ “The people” in the Preamble are the same people who declared independence from Great Britain, and signed the Declaration of Independence in 1776.

The Declaration of Independence was rooted in two principals—human equality and consent of the governed.²⁰⁵ According to the principal of equality, all men are created equal, and all men possess unalienable, natural rights to life, liberty, and the pursuit of happiness.²⁰⁶ But, natural rights not secure in the natural state of being, and to preserve these rights, government are established among men, and these government act as the keeper of its people’s natural rights.²⁰⁷ The government only protects the natural rights of its citizens, who are the people who submit to its power, take on civil obligations in return for protection, and who swear allegiance to it.²⁰⁸ The government only owes its citizens its complete loyalty and protection.²⁰⁹

Although the 1787 Constitution did not formally define citizenship,²¹⁰ it did empower Congress “[t]o establish a uniform Rule of Naturalization ... throughout the United States”²¹¹ During the Founding, the goal of naturalization and immigration was to increase the

²⁰³ *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990).

²⁰⁴ U.S. CONST. pmb. (“We the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America.”).

²⁰⁵ THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (“We hold these Truths to be self-evident, that all Men are created equal, that they are endowed, by their Creator, with certain unalienable Rights, that among these are Life, Liberty, and the Pursuit of Happiness.—That to secure these Rights, Governments are instituted among Men, deriving their just Powers from the Consent of the Governed ...”).

²⁰⁶ NOAH PICKUS, *TRUTH FAITH AND ALLEGIANCE* 16 (3d ed. 2007) (2005).

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ *Id.* at 22.

²¹¹ U.S. CONST. art. I § 8 cl. 4 (alterations in original).

wealth and strength of the United States.²¹² Immigrants were welcomed, and even encouraged, to settle in the United States.²¹³ But, the Founders were concerned that an open immigration policy would severely encroach on the development of the United States' national identity, and so it limited naturalization citizenship to persons who would "throw their fortunes into a common lot with ours."²¹⁴ The Naturalization Act of 1790 the first law to define citizenship, and restrict access to naturalization citizenship.²¹⁵ The Act of 1790 required, amongst other things, that a naturalizing alien swear an oath of allegiance to the Constitution and the United States.²¹⁶ A naturalizing alien was also required to appreciate and understand the principals of self-governance.²¹⁷ Naturalized citizens were granted all the constitutional rights and protections that were afforded to natural born citizens.

"The Constitution's protections against governmental abrogation of rights were reserved for the citizenry; they did not extend to aliens."²¹⁸ The Federalist and Republican debates illustrate the dispute as to whether non-citizens were entitled to constitutional rights. The Federalists wanted to limit the constitutional protections afforded to non-citizens, and they argued that only citizens were entitled to constitutional rights because only citizens submitted to the power of the government.²¹⁹ The Jeffersonian-Republicans argued that the Constitution protected all persons who observed the laws of the land.²²⁰ Eventually, the

²¹² 2 ANNALS OF CONG. 562 (1790) (remarks of Rep. James Madison from Virginia).

²¹³ P.A. Madison, *What "Subject to the Jurisdiction Thereof" Really Means*, FEDERALIST BLOG (Sept. 22, 2007), http://www.federalistblog.us/2007/09/revisiting_subject_to_the_jurisdiction/.

²¹⁴ ANNALS OF CONG. 562 remarks of Rep. James Madison from Virginia).

²¹⁵ An Act to Establish an Uniform Rule of Naturalization, ch. 3, 1 Stat. 103 (1790).

²¹⁶ *Id.*

²¹⁷ PICKUS, *supra* note 205, at 32.

²¹⁸ *Id.* at 39. *See also id.* at 18 n.1; n.3 (stating that in 1790, all new naturalizing citizens were required to swear an oath of true faith and allegiance to the United States and to the Constitution, and that only the citizens were entitled to the full protections of the Constitution).

²¹⁹ *Id.* at 34.

²²⁰ *Id.*

Federalist's prevailed. In the late eighteenth-century, the Federalists dominated the 5th Congress, and it passed the Alien and Seditions Acts, which allowed Congress and the Executive to stringently regulate immigration and naturalization, and to curtail the constitutional protections afforded to aliens.²²¹

The modern idea of American Citizenship did not develop until the Reconstruction, when the 39th Congress ratified the Fourteenth Amendment to the Constitution of the United States.²²² The Fourteenth Amendment²²³ overruled *Dred Scott v. Sandford*,²²⁴ which held that African Americans were not citizens, and codified the Civil Rights Act of 1866.²²⁵ The Civil Rights Act of 1866 defined citizenship to include “all persons born in the United States and *not subject to any foreign power* ... [and declared that] such citizens, of every race and color ... shall have the same right[s]” The Fourteenth Amendment required all citizens, and persons similarly situated, to be treated equally.²²⁶ The Reconstruction Congress did not intend for, nor did the public believe that, the Fourteenth Amendment required all persons of all legal statuses to be

²²¹ Geoffrey Heeren, *Persons Who are Not the People: The Changing Rights of Immigrants in the United States*, 44 COLUM. HUMAN RIGHTS L. REV. 367, 377 (2013) (explaining the history of immigrants' rights in the United States).

²²² Janel Thamkul, *The Plenary Power-Shaped Hole in the Core Constitutional Law Curriculum: Exclusion, Unequal Protection, and American National Identity*, 96 CALIF. L. REV. 553, 557 (2008) (explaining how citizenship shapes the national identity).

²²³ CORNELL, *supra* note 199, at loc. 2532

The problem [Republican Senator John Bingham of Ohio, who drafted the Amendment,] and abolitionists of a legalistic cast of mind encountered was that the original understanding of federalism placed state violations of individual rights in the purview of state constitutional law, not federal law. In practice this meant blacks and abolitionists had no real remedy in southern courts or legislatures prior to the Civil War. The structure of federalism had created a refuge for opponents of liberty and equality. Even if one believed that state violations of the federal Bill of Rights were unconstitutional, the Constitution provided no basis for appeals to the federal courts, and Congress lacked any direct authority to alleviate these injustices. Indeed, Bingham had argued that the abolitionist-inspired Civil Rights Act enacted by Congress was unconstitutional precisely because the Constitution had not bestowed this type of sweeping authority on Congress or the courts. The Fourteenth Amendment solved this problem by giving Congress the legal mandate to deal with state deprivations of basic rights.

²²⁴ 60 U.S. 393 (1858).

²²⁵ See *supra* text accompanying note 223.

²²⁶ See *supra* text accompanying note 223.

treated equally.²²⁷ In NOTES ON THE CONSTITUTION OF THE UNITED STATES, William A. Sutherland summarized the prevailing view of the legal commentators during the Reconstruction, which was that “the Fourteenth Amendment was not designed to interfere in the least with the exercise of [the police] power that the states ...[,]”²²⁸ and it was not designed to tamper with the original scopes of the enumerated constitutional rights.²²⁹

2. *Sometimes They’re In; Sometimes They’re Out: Excluding Undocumented Immigrants from the “The People”*

a. *The First Attempt to Define “The People:” The Verdugo-Urquidez Definition of “The People”*

Before *District of Columbia v. Heller*, the Supreme Court had only attempted to define “the people” once before in *United States v. Verdugo-Urquidez*.²³⁰ The *Verdugo-Urquidez* Court held that the Fourth Amendment did not apply to the search of a residence located in Mexico, and owned by a Mexican national who had no voluntary connections to the United States.²³¹ In its analysis of the scope of the Fourth Amendment, the Court proposed 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 community²³²

²²⁷ See e.g., THE LOYAL GEORGIAN, Feb. 3, 1866, at 3, col. 4 (“We answer certainly you have the same right to own and carry arms that other citizens have. You are not only free but citizens of the United States and as such entitled to the same privileges granted to other citizens by the constitution”); *The Arms Seizure*, NEW ORLEANS PICAYUNE, Sept. 10, 1874, at 1, col. 4 (“The right of an American citizen to possess and bear arms is guaranteed to him by the constitution. The right of a merchant to sell and of an individual to buy arms, is beyond all question.”).

²²⁸ WILLIAM A. SUTHERLAND, NOTES ON THE CONSTITUTION OF THE UNITED STATES, 698 (1904). See also, CORNELL, *supra* note 199, at loc. 3055 (explaining that legal commentators during the Reconstruction did not believe that the Fourteenth Amendment altered the scope of the Second Amendment).

²²⁹ CORNELL, *supra* note 199, at loc. 3105.

²³⁰ 494 U.S. 259 (1990).

²³¹ *Id.* at 274–75.

²³² *Id.* at 265.

But, as Justice Brennan noted in dissent, the Court left the “precise contours of its sufficient connections test unclear[,]”²³³ and the Court did not clearly define what constitutes a “substantial connection.” It merely suggested that voluntary presence in the United States and/or acceptance of some societal obligations might constitute a “substantial connection.”²³⁴ But, the Court “tempered [its] seemingly alien-friendly approach with the caveat that constitutional [rights] apply differently to citizens and aliens.”²³⁵

The *Verdugo-Urquidez* Court also endorsed a uniform reading of “the people” throughout the Constitution, however a uniform reading of “the people” in the First, Second, and Fourth Amendments does not necessarily warrant including undocumented aliens in the definition of “the people.” The *Verdugo-Urquidez* holding is often wrongly cited as granting undocumented aliens Fourth Amendment rights, even though the *Verdugo-Urquidez* Court explicitly stated that it has never ruled on whether undocumented aliens are protected by the Fourth Amendment.²³⁶ The Court inferred that the Fourth Amendment does not protect undocumented aliens present in the United States.²³⁷

²³³ *Id.* 244 (Brennan, J., dissenting) (alteration in original) (internal quotation marks omitted).

²³⁴ *See generally id.* (majority opinion). *See also id.* at 232 (Brennan, J., dissenting) (“The Court admits that the people extends beyond the citizenry, but leaves the precise contours of its sufficient connection test unclear.”).

²³⁵ 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, 649 (2013) (explaining the Supreme Court’s holding in *Verdugo-Urquidez*).

²³⁶ *See Verdugo-Urquidez*, 494 U.S. at 272.

The Court of Appeals found some support for its holding in our decision in *INS v. Lopez-Mendoza*, 468 U.S. 1032, 104 S.Ct. 3479, 82 L.Ed.2d 778 (1984), where a majority of Justices assumed that the Fourth Amendment applied to illegal aliens in the United States. We cannot fault the Court of Appeals for placing some reliance on the case, but our decision did not expressly address the proposition gleaned by the court below. The question presented for decision in *Lopez-Mendoza* was limited to whether the Fourth Amendment’s exclusionary rule should be extended to civil deportation proceedings; it did not encompass whether the protections of the Fourth Amendment extend to illegal aliens in this country. The Court often grants certiorari to decide particular legal issues while assuming without deciding the validity of antecedent propositions Our statements in *Lopez-Mendoza* are therefore not dispositive of how the Court would rule on a Fourth Amendment claim by illegal aliens in the United States if such a claim was squarely before us.

²³⁷ *Id.* at 283 n.6 (Brennan, J., dissenting).

Undocumented aliens rights under the First Amendment are just as tenuous as their rights under the Fourth Amendment. Although the Supreme Court has recognized that “freedom of speech and press is accorded to aliens residing in this country[.]”²³⁸ and that “the assurance of First Amendment rights is everyone’s concern[.]”²³⁹ the Court has recently restricted undocumented aliens’ First Amendment rights. In *Reno v. American-Arab Anti-Discrimination Committee*, the Supreme Court rejected the argument that undocumented aliens are entitled to raise selective enforcement defenses under the First Amendment during removal proceedings.²⁴⁰ The Court reasoned that “when an alien’s continuing presence in this country is in violation of the immigration laws, the Government does not offend the Constitution by deporting him for the additional reason that it believes him to be a member of an organization that supports terrorist activity.”²⁴¹ By depriving undocumented aliens the constitutional defense, the Court restricted undocumented aliens’ rights under the First Amendment, and inferred that unlawful aliens do not enjoy the full protections of the First Amendment.²⁴² The First and Fourth Amendment jurisprudences do not mandate that undocumented aliens be included in the definition of “the people,” and it would not be inconsistent with precedent to exclude them from “the people.” It may even be more consistent with precedent to exclude undocumented aliens from “the people.”

b. A Slight of Hand: Narrowing the Scope of “The People” to Exclude Undocumented Aliens

The *Heller* Court relied on the *Verdugo-Urquidez* definition of “the people,” but in a slight of hand, Justice Scalia restricted the scope of “the people” to include only members of

²³⁸ *Bridges v. Wixon*, 326 U.S. 135, 148 (1945) (alteration in original).

²³⁹ *Salnikova*, *supra* note 235, at 649 (quoting *Bridges v. California*, 314 U.S. 252, 282 (1945)).

²⁴⁰ *Reno v. American-Arab Anti-Discrimination Committee*, 525 U.S. 471 (1999).

²⁴¹ *Id.* at 491–92.

²⁴² *Salnikova*, *supra* note 235, at 650 (quoting Maryam Kamali Miyamoto, *The First Amendment After Reno v. American-Arab Anti-Discrimination Committee: A Different Bill of Rights for Aliens?*, 35 HARV. C.R.-C.L. L. REV. 183, 186 (2000)).

the political community.²⁴³ The *Heller* definition is controlling because the legitimacy of the *Verdugo-Urquidez* definition of “the people” is questionable, and *Heller* provides considerable reason to doubt the validity of the *Verdugo-Urquidez* definition of “the people.”

In *Verdugo-Urquidez*, four justices adopted the substantial connections test, and five justices out rightly rejected it.²⁴⁴ Justice Stevens filed an opinion concurring in the judgment, and Justice Kennedy joined the majority but filed a concurring opinion that rejected Chief Justice Rehnquist’s interpretation of the scope of the Fourth Amendment. Justice Stevens rejected the substantial connections test,²⁴⁵ and stated that Court’s opinion was overly broad, and that it was not sensible since the issue before the Court was quite narrow.²⁴⁶ In concurrence, Justice Kennedy doubted the Court’s definition of “the people.”²⁴⁷ Justice Kennedy explained that he “cannot place any weight on the reference to the people in the Fourth Amendment as a source of restricting its protections ”²⁴⁸ The substantial connections test survived by only four Justices, and its legality is questionable.²⁴⁹

In *Heller*, Justice Scalia defined “the people” to include only the members of the political community.²⁵⁰ In *United States v. Cruikshank*,²⁵¹ Chief Justice Waite explained that

Citizens are the members of the political community to which they belong. They are the people who compose the community, and who, in their associated capacity, have established or submitted themselves to the domain of the government, the people may confer upon it such powers as they choose.

²⁴³ Pratheepan Gulasekaram, “*The People*” of the Second Amendment: Citizenship and the Right to Bear Arms, 85 N.Y.U. L. REV. 1521, 1536 (2010).

²⁴⁴ Chief Justice Rehnquist delivered the opinion of the Court, in which Justice White, Justice O’Connor, Justice Scalia, and Justice Kennedy joined. Justice Kennedy filed a concurring opinion. Justice Stevens filed an opinion concurring in the judgment. Justice Brennan filed a dissenting opinion, in which Justice Marshall joined; and Justice Blackmun filed a dissenting opinion.

²⁴⁵ *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990) (Stevens, J., concurring in judgment).

²⁴⁶ *Id.* at 279.

²⁴⁷ *Id.* (Kennedy, J., concurring in judgment).

²⁴⁸ *Id.* at 287 (internal quotation marks omitted).

²⁴⁹ *Id.* (Rehnquist, C.J., majority opinion).

²⁵⁰ *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008) (5–4 decision) (Scalia, J., majority opinion).

²⁵¹ 92 U.S. 524, 548 (1875).

Professor Pratheepan Gulasekaram stated that Justice Scalia, who joined in the *Verdugo-Urquidez* definition of “the people,” was undoubtedly aware that the *Verdugo-Urquidez* definition left open the possibility that undocumented immigrants may be included in “the people.”²⁵² Justice Scalia certainly knew that *Heller* was the opportune moment to exclude undocumented aliens from “the people.” The shift may appear to be an insignificant tweak, or, as one commentator criticized, Justice Scalia’s usual rhetoric,²⁵³ but the constraint placed on “the people” could have rippling affects on immigration law and constitutional law, and a Supreme Court Justice would not act so hastily without so intending.

The *Heller* Court’s definition of “the people” accentuates the narrowness of the Court’s holding. In dissent, Justice Stevens acknowledged, while criticizing, the Court’s holding that re-defined “the people” as the members of the political community.²⁵⁴ Justice Stevens stated that “when the [majority] finally drills down on the substantive meaning of the Second Amendment, the Court limits the protected class to law-abiding, responsible citizens,”²⁵⁵ which, as Justice Stevens argued, contradicts the Court’s affirmation that “the people” protected by the Second Amendment are the same people protected by the First and Fourth Amendments.²⁵⁶ In *Six Amendments: How and Why We Should Change the Constitution*, Justice Stevens explains that Justice Scalia went to great lengths to emphasize the restriction of the *Heller* holding. Justice Stevens explains that Justice Scalia included the exemplary list of constitutional prohibitions on firearm possession to the exaggerate the

²⁵² Gulasekaram, *supra* note 243, at 1536 (explaining the importance of the *Verdugo-Urquidez* Court’s definition of “the people” to understanding Justice Scalia’s definition of “the people” in *Heller*).

²⁵³ Matthew Blair, Comment, *Constitutional Cheap Shots: Targeting Undocumented Residents with the Second Amendment*, 9 SETON HALL CIR. REV. 159, 168 (2012) (“A survey of numerous other majority opinions authored by Justice Scalia reveals a pattern of similar rhetoric, in which ‘citizen’ does not denote anything other than a simple inhabitant of the United States.”).

²⁵⁴ *Heller*, 554 U.S. at 644 (Stevens, J., dissenting).

²⁵⁵ *Id.* (internal quotation marks omitted).

²⁵⁶ *Id.*

shallowness of the Court’s holding, and to make it apparent that the scope of the Second Amendment is limited to the scope in which it was enshrined.²⁵⁷ It is obvious that Justice Scalia, the chief wordsmith of the Court,²⁵⁸ intentionally limited the definition of “the people.” To ignore the *Heller* definition of “the people,” like the Seventh Circuit did in *Meza-Rodriguez*,²⁵⁹ demeans the Court’s authority as the supreme interpreter of the Constitution, and it imputes sloppiness into the Supreme Court’s pronouncement of a fundamental right.²⁶⁰

c. Keeping It the Way It Was and the Way it Is: The Fifth and Fourteenth Amendments Do Not Expand the Scope of the Second Amendment

All governments must govern impartially and justly, and “the concept of equal justice under [the] law is served by the Fifth Amendment’s guarantee of due process, and [] the Fourteenth Amendment.”²⁶¹ The Due Process Clause of the Fifth Amendment prevents the federal government from denying “any person ... life, liberty, or property, without due process of law ”²⁶² The Fourteenth Amendment requires state and local governments to treat all

²⁵⁷ John Paul Stevens, J., *Six Amendments: Why and How We Should Change the Constitution* (2014) (excerpt available at https://www.washingtonpost.com/opinions/the-five-extra-words-that-can-fix-the-second-amendment/2014/04/11/f8a19578-b8fa-11e3-96ae-f2c36d2b1245_story.html).

²⁵⁸ Taylor Kate Brown, *Meet the Supremes: Who are the US Supreme Court Justices?*, <http://www.bbc.com/news/magazine-33103973> (last visited Nov. 11, 2015).

²⁵⁹ *United States v. Meza-Rodriguez*, 698 F.3d 664 (7th Cir. 2015) (2–1 decision), (“While some of *Heller*’s language does link Second Amendment rights with notions of ‘law-abiding citizens’ and ‘members of the political community,’ those passages do not reflect an attempt to define the term ‘people.’ We are reluctant to place more weight on these passing references than the Court itself did.”), *cert. denied*, No. 15-7017, 2016 U.S. LEXIS 2690 (Apr. 18, 2016) (per curiam) See also Blair, *supra* note 253, at 169–171 (arguing that Justice Scalia’s opinions reveal a pattern of rhetoric, in which the use of “citizen” does not mean anything more than an inhabitant within the territorial jurisdiction of the United States).

²⁶⁰ Gulasekaram, *supra* note 243, at 1532 (“The lack of attention by litigants and academics to the ‘citizens’ specified by the *Heller* majority makes sense if the reference was inadvertent or was a colloquial allusion to a general class of persons to whom all civil rights inure. Such a reading, however, imputes a significant degree of sloppiness and imprecision into a profound pronouncement on the scope of a fundamental right. In a doctrinal world where citizenship as a legal status often matters, casual usage of the term ‘citizen’ to describe rights beneficiaries is problematic.”).

²⁶¹ *Hampton v. Mow Sun Wong*, 426 U.S. 228, 100 (1976) (alteration in original).

²⁶² U.S. CONST. amend. V (“[N]or shall any person ... be deprived of life, liberty, or property, without due process of law....”).

persons similarly situated equally.²⁶³ The concept of equal protection is rooted in the American ideal of justice.²⁶⁴

i. The Fifth Amendment

The Bill of Rights applies directly to the Federal Government, and Fifth Amendment protects certain rights of all aliens in the territorial jurisdiction of the United States, whether lawfully or unlawfully present, from abuses by the federal government.²⁶⁵ In *Graham v. Connor*, the Supreme Court declared that if a constitutional provision guarantees a right, then an individual cannot claim additional protections of that right under the Due Process Clause of the Fifth Amendment.²⁶⁶ When deciding whether undocumented aliens are part of “the people” protected by the Second Amendment, the Fifth Circuit in *United States v. Portillo-Munoz*, noted that undocumented immigrants cannot look to the Fifth Amendment “as an additional source of protection for [the] right to keep and bear arms.”²⁶⁷ Challenges brought under the Second Amendment must be analyzed under the Second Amendment framework—not the framework of the Fifth Amendment because the Second Amendment applies directly to the federal government. The Due Process Clause of the Fifth Amendment does not expand the scope of “the people” protected by the Second Amendment, and therefore, it does not

²⁶³ U.S. CONST. amend. XIV.

²⁶⁴ *Wong Wing v. United States*, 163 U.S. 288, 242 (1896) (applying the rule of the Equal Protection Clause to the Fifth and Sixth Amendments, and stating that the provisions are universal in their applications, and that the Amendments apply to all persons in the territorial jurisdiction). *See also Mathews v. Diaz*, 426 U.S. 67, 77 (1976) (“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”).

²⁶⁵ *See Plyler v. Doe*, 457 U.S. 202, 202 (1982); *Wong Wing*, 163 U.S. 288 (1896).

²⁶⁶ 490 U.S. 386, 396 (1898) (“Because the Fourth Amendment provides an explicit textual source of constitutional protection against this sort of physically intrusive governmental conduct, that Amendment, not the more generalized notion of ‘substantive due process,’ must be the guide for analyzing these claims.”).

²⁶⁷ 634 F.3d 437, 442 n.4 (5th Cir. 2011) (alteration in original). The Fifth Circuit did not reach the merits of the Defendant-Appellant’s claim that 18 U.S.C. § 922(g)(5) violated his substantive due process guarantees under the Fifth and Fourteenth Amendments because the court found that he did not properly preserve the claim for appeal. *See also id.* at 442.

entitle all persons within the territorial jurisdiction of the United States the right to keep and bear arms.

ii. The Fourteenth Amendment

The Second Amendment is a distinctive privilege of freedom,²⁶⁸ is fundamentally necessary for the American system of ordered liberty,²⁶⁹ and is incorporated against the States through the Fourteenth Amendment.²⁷⁰ The Due Process Clause of the Fourteenth Amendment protects all persons within the territorial jurisdiction of the United States. In accordance with the modern incorporation doctrine, the Second Amendment should have been incorporated through the Due Process Clause of the Fourteenth Amendment, and should *theoretically* entitle all persons within the territorial jurisdiction of the United States the right to keep and bear arms.²⁷¹ But, in *McDonald v. City of Chicago*, the Supreme Court did not reach a majority ruling on the method of incorporation.²⁷² Even though the Second Amendment is incorporated against the States, the Due Process Clause is not necessarily the channel for its incorporation.

Justice Alito, writing for the plurality, relied on *stare deices*, and incorporated the Second Amendment through the Due Process Clause of the Fourteenth Amendment.²⁷³ Whereas, Justice Thomas, the critical fifth vote, concurred in the judgment, and incorporated the Second Amendment through the Privileges or Immunities Clause of the Fourteenth Amendment, which protects the privileges and immunities of citizens.²⁷⁴ The four dissenting

²⁶⁸ *McDonald v. City of Chicago*, 561 U.S. 561 (2010) (Alito, J., majority opinion).

²⁶⁹ *Id.* at 778.

²⁷⁰ *Id.*

²⁷¹ *Id.*

²⁷² *See generally id.* (Alito, J., plurality opinion); *id.* at 806 (Thomas, J., concurring in part).

²⁷³ *Id.* at 758 (Alito, J., plurality opinion).

²⁷⁴ *Id.* at 806 (Thomas, J., concurring in part).

Justices argued that the Second Amendment should not be incorporated against the States.²⁷⁵ Since neither the plurality opinion nor the concurring opinion is controlling, and because they are logically opposed, neither the Due Process Clause nor the Privileges or Immunities Clause are the declared method of incorporation.²⁷⁶

Since neither clause is the declared method of incorporation, the *McDonald* holding does not mandate that the Second Amendment protect all persons within the territorial jurisdiction of the United States. Although it could be argued that Justice Alito's method of incorporation is controlling because it is narrower since it adheres to stare decisis, it could also be argued that Justice Thomas's method of incorporation is controlling since it only requires that the Second Amendment protect citizens and not all the persons within the territorial jurisdiction of the United States.²⁷⁷ Justice Thomas's method does not expand the scope of the Second Amendment, whereas the plurality's method expands the Second Amendment past its original scope. The failure to reach a majority on the method of incorporation did not affect the ruling in *McDonald* because the four challengers were citizens, and thus entitled to the protections of the Second Amendment regardless of the method of incorporation. But, the ruling only applies to citizens,²⁷⁸ and therefore, the issue of whether undocumented aliens are protected by the Second Amendment is not affected by the Supreme Court's ruling in *McDonald v. City of Chicago*.

C. An Exclusive History: The History of the Right to Keep and Bear Arms Excludes Undocumented Aliens from the Protective Scope of the Second Amendment

²⁷⁵ See generally *id.* (Stevens, J., dissenting opinion) (arguing that neither that the Privileges or Immunities Clause nor the Due Process Clause should incorporate the Second Amendment); *id.* (Breyer, J., dissenting) (arguing that the neither Privileges or Immunities Clause nor the Due Process Clause should incorporate the Second Amendment, and advising that the Court's holding that removes firearm regulation from the political branches of the government, and arguing that courts are not as capable or as equipped as the political branches to answer empirical questions).

²⁷⁶ David S. Cohen, *The Paradox of McDonald v. City of Chicago*, 79 GEO. WASH. L. REV. 823, 11 (2010).

²⁷⁷ *Id.* at 11 n.58.

²⁷⁸ *Id.* at 11.

In the early seventeenth-century, the American colonies flourished under the guiding hand of its mother country, Great Britain. The colonists implemented the entire body of the English common law in the New World,²⁷⁹ and they inherited all the natural rights of British subjects as if they were born and residing in England, including the right to keep and bear arms.²⁸⁰ The English rights and common law were altered to accommodate life in the New World,²⁸¹ but, as Alexis De Tocqueville explained, there was “not an opinion, custom, or law ... which the point of departure [was] not easily explain[ed].”²⁸² In America, the English right to keep and bear arms expanded past its original scope, and the Founders codified the expanded right in the Second Amendment to the United States Constitution.²⁸³

In 1768, the British army intended to foist an oppressive martial law upon the colonies, and the British army tried to disarm the colonists in an effort to impose the martial system.²⁸⁴ The colonists refused to comply with the British army’s demands, and they revolted.²⁸⁵ After defeating the British soldiers in the American Revolution, the colonies declared independence in 1776. During the war, the citizen-militia was the public fortitude, and the American victory reinforced the colonists’ confidence and pride in the citizen-militia,²⁸⁶ and intensified their reservations about standing armies.²⁸⁷

²⁷⁹ MALCOLM, *supra* note 56, at 138.

²⁸⁰ *Id.*

²⁸¹ *Id.*

²⁸² ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 48 (Eduardo Nolla, ed., James T. Schleifer, trans., Liberty Fund, 2010) (1835) (alterations in original).

²⁸³ MALCOLM, *supra* note 56, at 138.

²⁸⁴ CORNELL, *supra* note 199, at loc. 375.

²⁸⁵ *Id.* at 363.

²⁸⁶ See e.g., Nichols Collin, *A Foreign Spectator XXV*, *INDEPENDENT GAZETTEER*, Sept. 21, 1787 (stating that “even the power of a veteran army could not subdue a patriotic militia ten times its number”).

²⁸⁷ CORNELL, *supra* note 199, at loc. 336.

The Founding Fathers drafted the Second Amendment in response to the widespread fear towards standing armies.²⁸⁸ It was believed that if the constitutional checks on the newly established federal government failed, then the citizen-militia would restore order.²⁸⁹ The Second Amendment was ratified to prevent the disarmament of the citizen-militia, and it implicitly protected the ancient common law right to use arms in self-defense because, as Alexander Hamilton stated, “the original right of self defense ... is paramount to all positive forms of government.”²⁹⁰ The early Americans did not sharply distinguish between personal safety and political safety, and therefore, the right to keep and bear arms in service to the militia and the right to keep and bear arms in self-defense were inextricably linked, but the two rights were legally distinct.²⁹¹ The common law right was not contingent upon service in the militia, but if one was disqualified or excluded from militia service, then he could be prohibited from exercising his common law right to bear arms in self-defense, and vice versa.

To properly define the scope of the Second Amendment, and to specifically determine whether undocumented aliens are entitled to the Second Amendment right to keep and bear arms, the history of the militia right and common law right to keep and bear arms must be analyzed. Neither the militia right nor the common law right was absolute. Militia laws defined the scope of the right to keep and bear arms in service to the militia,²⁹² and the common law defined the scope of the right to keep and bear arms in self-defense.²⁹³ Because “[t]he Second Amendment codified a pre-existing right, [] it codified a pre-existing understanding

²⁸⁸ *Id.* at loc. 210.

²⁸⁹ *Id.*

²⁹⁰ THE FEDERALIST No. 28, at 334 (Alexander Hamilton) (Project Gutenberg EText ed., n.d.).

²⁹¹ *Id.*

²⁹² Saul Cornell & Nathan DeDino, *A Well Regulated Right: The Early American Origins of Gun Control*, 33 FORDHAM L. REV. 487, 506–09 (2004) (explaining the Militia laws in the Early Republic).

²⁹³ *Id.* at 501–02 (explaining the restriction placed on firearm possession by the common law).

of that right[.]”²⁹⁴ and the pre-ratification understanding of the right will illuminate the scope of the Second Amendment, as will post-ratification firearm legislation. The history of the right to keep and bear arms excludes undocumented aliens from claiming a space within the protective scope of the Second Amendment.

1. Arming Aliens: Excluding Aliens from the Citizen-Militia

a. The Body Politic

During the early Republic, service in the militia was limited to the body politic.²⁹⁵ The early American military organization consisted exclusively of citizen-militias that were maintained by the States, and which were modeled after the English militia system.²⁹⁶ Each colony instituted a militia that composed of white males, between the ages of eighteen and sixty,²⁹⁷ and who were usually employed as farmers, gentry, tradesman, and yeomen.²⁹⁸ Control over the militia was localized.²⁹⁹ Each city, town, or district had its own organization and hierarchy, and the militiamen elected the officers.³⁰⁰ The colonial militias served as the first defense against internal and external threats, and served as the watch and ward in the communities.³⁰¹ The militiamen were required to keep and maintain arms at their own expense,³⁰² and were expected to bring their personal arms and ammunition when called into service.³⁰³ In response to the dangers inherent in the New World, some colonial governments

²⁹⁴ Patrick J. Charles, *The Second Amendment Standard of Review After McDonald: Historical Guideposts and the Missing Arguments in McDonald v. City of Chicago*, 2 AKRON L. REV. 7, 11 (2010).

²⁹⁵ Lawrence Delbert Cress, *An Armed Community: The Origins and Meaning of the Right to Bear Arms*, 71 J. AM. HIST. 1, 29 (1984) (explaining membership in the militia during the Revolutionary War).

²⁹⁶ Keith E. Ehrman & Dennis A. Henigan, *The Second Amendment in the Twentieth Century: Have You Seen Your Militia Lately?*, 15 U. DAYTON L. REV. 5, 34 (1989) (explaining the history of the militia).

²⁹⁷ Malcolm, *supra* note 56, at 139.

²⁹⁸ James Biser Whisker, *The Citizen-Soldier Under Federal and State Law*, 94 W. VA. L. REV. 947, 954–54 (1992) (explaining the organization of the colonial militias).

²⁹⁹ *Id.* at 955.

³⁰⁰ *Id.*

³⁰¹ MALCOLM, *supra* note 56, at 139.

³⁰² Whisker, *supra* note 298, at 955.

³⁰³ Ehrman & Henigan, *supra* note 296, at 34.

required all households to keep arms.³⁰⁴ But, pursuant to public safety, the colonial governments prohibited certain individuals and groups of people from keeping and using arms. Indians, African American slaves, and non-naturalized aliens, all of whom were not citizens, were prohibited from owning arms.³⁰⁵ Indians, slaves, and non-citizen immigrants were, like the Catholics in England, a threat to the established order.³⁰⁶ Some colonies even disarmed colonists who did not take loyalty oaths, or who did not swear undivided allegiance to the colonial governments.³⁰⁷

During the American Revolutionary War, all persons, including white male citizens, were required to pledge their allegiance to the Republic. If a person did not, then he was stripped of his citizenship and disarmed as to prevent him from fighting against the Americans, and he could not reclaim his citizenship or weapons until after the State lifted the banishment. Almost every state by July 4, 1776, enacted Test Acts, which required all male white citizens to swear allegiance to the commonwealths, to renounce his allegiance to the British monarchy, and to swear to not act in any way as to injure the independence of his state.³⁰⁸ The Test Acts were enacted pursuant to the principal that “in every free state, allegiance and protection [were] reciprocal.”³⁰⁹ By the late eighteenth-century, a “zone of immunity” was created, and the right to keep and bear arms became a “birthright” for persons who willingly pledged their allegiance to the United States.³¹⁰

³⁰⁴ MALCOLM, *supra* note 56, at 139.

³⁰⁵ *Id.* at 113.

³⁰⁶ MALCOLM, *supra* note 56, at 140.

³⁰⁷ *E.g.*, Act of Mar. 14, 1776, ch. VII, 1775-1776 Mass. Acts 31 (requiring the disarming of persons who were “disaffected to the Cause of America”); Act of Apr. 1, 1778, ch. LXI, §§ 2, 5, 1777-1778 Pa. Laws 123, 126 (mandating that white males over the age of eighteen take an oath of loyalty or be disarmed).

³⁰⁸ Robert H. Churchill, *Gun Regulation, The Police Power and the Right to Keep Arms in Early America: The Legal Context of the Second Amendment*, 25 LAW & HIST. REV. 139, 160 (2007).

³⁰⁹ *Id.* (citation omitted) (alteration in original).

³¹⁰ *Id.* at 161.

Undocumented aliens would undoubtedly be excluded from the Founding era's citizen-militia. Undocumented immigrants do not swear allegiance to the United States as to entitle them to all the privileges and immunities of citizenship, including to the right to keep and bear arms in defense of the Nation. The United States offers all immigrants coming to the United States the opportunity to naturalize, but undocumented aliens willfully forego the opportunity to avail themselves to the full rights and protections of the Constitution. Undocumented aliens choose to remain loyal to their homeland, and as a result they are protected under international laws, the laws of the United States, and the laws of their home countries. The Supreme Court has explained,

Each has been offered naturalization, with all of the rights and privileges of citizenship, conditioned only upon open and honest assumption of undivided allegiance to our Government He may claim protection against our Government unavailable to the citizens [Undocumented] aliens retain[] immunities from burden[s] which the citizen[s] must shoulder. *By withholding his allegiance from the United States he leaves outstanding a foreign call on his loyalties which international law not only permit[s] our Government to recognize [but] ... commands [it] to respect ...* They cannot, consistent[] with our international commitments, be compelled to take part in the operations of war directed against their own country. In addition to such general immunities they may enjoy particular treaty privileges³¹¹

Undocumented aliens, unlike citizens, have no urgency to respond to the call of the government. The United States cannot compel undocumented aliens to respond to its demands, and it cannot legally enforce consequences that are consistent with its international commitments.³¹²

³¹¹ *Harisiades v. Shaughnessy*, 342 U.S. 580, 586–87 (1952) (emphasis added) (alterations in original). The original quote refers to all immigrants, but the term immigrants encompasses undocumented aliens, and the quote is apt.

³¹² Deportation is not a criminal proceeding. Deportation is a civil proceeding.

The Second Amendment was designed to “promote liberty through localism ”³¹³ Militiamen served alongside family, friends, neighbors, and fellow churchgoers,³¹⁴ but their first loyalty and duty was to the Nation. Although undocumented aliens may have personal attachments to people and places within in the country, select personal attachments do not automatically translate to national fidelity. The Supreme Court explained that undocumented aliens,

May be personally loyal to the United States, [but] if his nation becomes our enemy his allegiance prevails over personal preference and makes him also our enemy So long as the alien elects to continue the ambiguity of his allegiance his domain here is held [in] precarious tenure³¹⁵

By virtue of their immigration status, undocumented aliens would be excluded from the Founding’s citizen-militia.

b. Republican Virtue

The citizen-militia was inherently virtuous because it identified with the citizenry.³¹⁶ The idea was that because the citizen-militia comprised of the entire gentry, it reflected the common good and integrity of the populace.³¹⁷ As the police force, the militia was expected to instill civic virtue in society. The citizen-militia internalized the “everyday mindset of

³¹³ Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L. REV. 1193, 1171 (1993) (explaining the intimate relationships between the militiamen).

³¹⁴ *Id.* at 1170.

³¹⁵ *Harisiades*, 342 U.S. 587 (alterations in original). The original quote refers to all immigrants, but the term immigrants encompasses undocumented aliens, and the quote is apt.

³¹⁶ David C. Williams, *Civic Republicanism and the Citizen Militia: The Terrifying Second Amendment*, 100 YALE L.J. 551, 557 (1991).

³¹⁷ *Id.* at 557, 579.

each militiaman,”³¹⁸ and it was a “local institution, bringing together representative Citizens [sic] to preserve popular values of their society.”³¹⁹ Alexander Hamilton explained that the militiamen were bonded by their loyalty to the Nation and to each other,

Where in the name of common-sense, are our fears to end if we may not trust our sons, our brothers, our neighbors, our fellow-citizens? What shadow of danger can there be from men who daily mingling with the rest of the countrymen and who participate in the same feeling sentiments, habits and interests?³²⁰

The citizen-militia was central to American life before and after the Revolution.

The ideal militiaman was a man of republican virtue who was “shaped by his myriad ties to his community, [which was] the most important for this purpose [of] being [a militiaman].”³²¹ Militia service was synonymous with integrity, as it was the duty of the militiamen to “stand apart from the state and correct it when it began to fall into corruption.”³²² Militiamen were required to suppress any self-interest, and refuse all perverted demands.³²³ Militia service required cooperation among citizens, and participation in self-government.³²⁴ The citizen-militia idealized freedom by self-government through the use of public arms, and it condemned the promotion of individualized self-interest through the use of private arms.³²⁵ Persons deemed “un-virtuous” were stripped of their right to keep and bear arms³²⁶ because they were a threat to the established order. Laws were enacted to ensure that they remained permanently disarmed.³²⁷

³¹⁸ Amar, *supra* note 313, at 1171.

³¹⁹ *Id.*

³²⁰ THE FEDERALIST No. 3 (Alexander Hamilton) (Project Gutenberg EText ed., n.d.).

³²¹ David Yassky, *The Second Amendment: Structure, History, and Constitutional Change*, 99 MICH. L. REV. 588, 626–27 (2000) (alteration in original).

³²² Williams, *supra* note 316, at 580 (explaining the virtue inherent in militia service).

³²³ *Id.*

³²⁴ *Id.* at 580, 583.

³²⁵ *Id.*

³²⁶ Yassky, *supra* note 316, at 626–27.

³²⁷ *Id.*

Undocumented immigrants, by reason of their unlawful immigration status, are not “virtuous” citizens, or law-abiding responsible citizens. Although a generalization, Congress has made an empirical decision that undocumented aliens pose a threat to society and to the established order. The Second Circuit crafted an appropriate metaphor,

Illegal aliens are aliens who have already violated a law of this country. They are subject to deportation. Moreover, illegal aliens are those who ... [are] likely to maintain no permanent address in this country, elude detection through an assumed identity, and—already living outside the law—resort to illegal activities to maintain a livelihood [O]ne seeking to arrange an assassination would be especially eager to hire someone who had little commitment to this nation’s political institutions and who could disappear afterwards without a trace³²⁸

Although not all undocumented aliens pose a danger to society and not all are unworthy of society’s trust, undocumented aliens are already in violation of federal law, and therefore their unlawful status is not constitutionally irrelevant.³²⁹ Patrick Charles, the recipient of the 2008 Judge John R. Brown Award for his Second Amendment research, stated, “the founders would have publicly accepted the disarming of [even] recidivist violent misdemeanants who repeatedly show a disregard for the laws of the community.”³³⁰ In light of the historical conception of the citizen-militia, unlawful aliens should be excluded from the scope of the Second Amendment.

2. Shooting Bullets at a Natural Right: The Common Law has limited the Scope of the Natural Right to Self-Defense

Self-defense is a natural right, and it is common to all persons everywhere. The First Congress relied heavily on the work of William Blackstone, whose work is still today the

³²⁸ *United States v. Toner*, 728 F.2d 115, 128–29 (2d Cir. 1984) (internal quotations omitted) (alterations in original).

³²⁹ *Plyler v. Doe*, 457 U.S. 202 (1981).

³³⁰ Charles, *supra* note 294, at 30 (alteration in original).

preeminent legal authority.³³¹ Blackstone wrote that there were three primary rights, and five auxiliary rights.³³² The three primary rights are the natural rights to personal security, personal liberty, and private property.³³³ The five auxiliary rights are barriers that protect the primary rights.³³⁴ Blackstone categorized the right to keep and bear arms as the fifth auxiliary right.³³⁵

Blackstone accepted the Lockean social contract theory.³³⁶ The social contract theory requires every person to give up some part of his natural liberty when he enters into a structured society. Each person must forfeit his “power [to] act[] as [he] thinks fit ... in consideration of receiving the advantages of mutual commerce[,]”³³⁷ and he must “conform to those laws, which the community has thought properly to establish.”³³⁸ Once a person conforms, he becomes a member of the political community and he is granted full governmental protection. Blackstone thought that men reserved some rights against the political community,³³⁹ and he believed that constitutional rights were absolute.³⁴⁰ But, Blackstone rejected the notion that if the political community violated an individual’s primary

³³¹ *District of Columbia v. Heller*, 554 U.S. 570, 593–94 (2008) (“Blackstone, whose work, we have said, constituted the preeminent authority on English law for the founding generation.”).

³³² Michael Steven Green, *The Paradox of Auxiliary Rights: The Privilege Against Self-Incrimination and the Right To Bear Arms*, 52 DUKE L.J. 113, 116 (2002) (explaining why the right to keep and bear arms is an auxiliary right).

³³³ Robert J. Cottrol & Raymond T. Diamond, *The Fifth Auxiliary Right*, 104 YALE L.J. 995, 1011 (1994) (reviewing JOYCE LEE MALCOLM, *TO KEEP AND BEAR ARMS: THE ORIGINS OF AN ANGLO-AMERICAN RIGHT* (1994)) (stating that the government allowing the citizens to bear arms so that the citizens did not become overly dependent on the government for survival).

³³⁴ *Id.*

³³⁵ *Id.* at 1011. Blackstone believed that there were five auxiliary rights that preserved the inherent rights of individuals. The Five Auxiliary rights were, the constitution, powers and privileges of parliament; the limitation on the king’s prerogative; right to access the courts for redress of injury; right to petition the king or parliament for redress; and the right to keep and bear arms.

³³⁶ Green, *supra* note 332, at 128 (explaining Blackstone’s theory on auxiliary rights).

³³⁷ 1 WILLIAM BLACKSTONE, *COMMENTARIES* *121 (alterations in original).

³³⁸ *Id.*

³³⁹ Cottrol & Raymond, *supra* note 333, at 129.

³⁴⁰ BLACKSTONE, *supra* note 337, at *91.

rights, then the individual had the absolute right to oppose the community.³⁴¹ Blackstone reasoned that if the political community lacked the authority to judge whether an individual's rights had been violated, then civil society would cease to exist, and it would revert to the state of nature.³⁴² Blackstone believed that "civil disobedience is only valid when the public voice proclaims such resistance as necessary."³⁴³

Blackstone taught that society must entrust one branch of government as the supreme sovereign power that "acknowledges no superior [power] upon earth."³⁴⁴ Since the people acted through the legislature, Blackstone declared the legislature as the supreme sovereign power. The judiciary was the guardian of the people's rights, which required it to be "subversive of all government."³⁴⁵ But, the people's rights were at the will of the legislature, and the legislature could lawfully set qualifications and conditions on an individual's, or class's, ability to exercise the rights.³⁴⁶ Blackstone advised that persons should "have[] arms for their defense suitable to their condition and degree, and such as allowed by law "³⁴⁷ To Blackstone the right to keep and bear arms was "a public allowance under due restrictions "³⁴⁸ A man renounced his untrammelled right to self-defense once he left the state of nature and entered into civil society.³⁴⁹ Thus, it is the right of a state to regulate the use and

³⁴¹ Cottrol & Raymond, *supra* note 333, at 129.

³⁴² Green, *supra* note 332, at 130.

³⁴³ BLACKSTONE, *supra* note 337, at *224.

³⁴⁴ *Id.* at *91 (alteration in original).

³⁴⁵ *Id.*

³⁴⁶ Cottrol & Raymond, *supra* note 333, at 131 (referencing GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 261 (1969) ("For Blackstone ... every act of Parliament was in a sense a part of the Constitution, and all law, customary and statutory, was thus Constitutional.")).

³⁴⁷ 4 WILLIAM BLACKSTONE, COMMENTARIES *143–44 (alteration in original).

³⁴⁸ *Id.*

³⁴⁹ Cornell & DeDino, *supra* note 284, at 493.

possession of firearms even if such legislation infringes on a person's natural right to self-defense.³⁵⁰

Henry St. George Tucker, the leading commentator during the Founding,³⁵¹ described the Second Amendment as the “true palladium of liberty.”³⁵² Tucker identified an individual's right to keep and bear arms in self-defense in the common law, rather than in the Constitution.³⁵³ Tucker thought that the right to use arms in self-defense could be lawfully regulated by legislation and the common law,³⁵⁴ and since the common law had developed differently in each state, the scope of the right to keep and bear arms varied from state to state.³⁵⁵ According to Tucker, there was a legal distinction between weapons kept for militia service and weapons kept for self-defense, and only militia service weapons enjoyed full constitutional protections.³⁵⁶ Weapons kept primarily for individual self-defense were not constitutionally protected. But, they did enjoy some protections under the common law, but possession and use of weapons in self-defense were subject to state regulations,³⁵⁷ and often completely prohibited.³⁵⁸

³⁵⁰ *Id.* at 515.

³⁵¹ Saul Cornell, *St. George Tucker and the Second Amendment: Original Understandings and Modern Misunderstandings*, 47 WM. & MARY L. REV. 1123, 1124 (2006) [hereinafter *Original Understandings*] (explaining the importance of St. George Tucker's writings during the Founding Era). *See also id.* at 1135 (“Tucker's *Commentaries* are best understood as providing one important gloss on the meaning of American constitutionalism at the end of the Federalist Era.”).

³⁵² Tucker, *supra* note 2, at *300.

³⁵³ *Original Understandings*, *supra* note 351, at 1126–27.

³⁵⁴ *Id.* at 1144.

³⁵⁵ *Id.* at 1145.

³⁵⁶ *Id.* at 1148.

³⁵⁷ *Id.* at 1149.

³⁵⁸ *Id.* at 1152.

The Founders believed that to maximize freedom, liberty should be regulated.³⁵⁹ The concept of well-regulated liberty is analogous to the modern concept of “ordered liberty.”³⁶⁰ “Outside a well regulated society governed by the rule of law, liberty was[, and is,] nothing more than licentiousness and anarchy.”³⁶¹ Inherent in the police powers of the states was the power to regulate the use of firearms in self-defense.³⁶² The colonies, and then eventually the states, had the power to define the scope of the common law right to keep and bear arms in self-defense.³⁶³ The Second Amendment was intended to restrain arbitrary powers—it was not intended to create arbitrary power by entitling all persons with the right to keep and use a deadly weapon. Although the States could not completely eliminate the right to use arms in self-defense, the States could severely limit the right pursuant to public safety.³⁶⁴ The common law right to self-defense required “that a person who kills another in his own defense, should have retreated as far as he conveniently or safely can, to avoid the violence of the assault, before he turns upon his assailant.”³⁶⁵

“Self-defense presupposes some means of effectuating that defense.”³⁶⁶ The right to keep and bear arms is only one method to preserve the natural right to life, liberty, and property. The natural right to self-defense does not protect the right to use any method available for self-defense, and it does not protect the right to use arms in self-defense if certain qualifications are not met.³⁶⁷ Some critics argue that reserving the Second Amendment right

³⁵⁹ Cornell & DeDino, *supra* note 292, at 493 (citing JOHN J. ZUBLY, THE LAW OF LIBERTY 26 (Philadelphia 1775)).

³⁶⁰ *McDonald v. City of Chicago*, 561 U.S. 742, 778 (2010) (holding that the right to keep and bear arms is a “fundamental right necessary to the our system of ordered liberty”).

³⁶¹ *Id.* (alteration in original).

³⁶² *Id.* at 502.

³⁶³ Cornell & DeDino, *supra* note 284, at 500.

³⁶⁴ *Id.*

³⁶⁵ 4 BLACKSTONE, *supra* note 347, at *184–85.

³⁶⁶ Tucker, *supra* note 2, at *629.

³⁶⁷ *Id.*

to only citizens is illogical, claiming that non-citizens require more self-defense than citizens.³⁶⁸ But, the right to use arms in self-defense and the natural right to self-defense are two distinct rights, and should not be confused. Undocumented immigrants are not deprived of their natural right to self-defense if they are excluded from the scope of the Second Amendment. There are other means available to defend oneself, and aliens can rely on the United States government for protection against immediate threats against their persons. The natural right to self-defense should not be confused with the right to choose a means to effectuate self-defense.³⁶⁹ Furthermore, undocumented aliens are not completely prohibited from using firearms in self-defense. Through the political process, the people, if they so choose, can grant undocumented aliens a statutory right to keep handguns in their home for self-defense. But, the Seventh Circuit's holding prevents the people from choosing whether undocumented aliens should be granted a statutory right to use firearms in self-defense, and it ultimately deprives the people of their right to define the national identity of the United States.

IV: CONCLUSION

Justice Scalia stated that the Founding Fathers knew “that societies not only evolve, they also rot.”³⁷⁰ If we keep fixing the Constitution to our society's ideas of fairness and equality, the Constitution will eventually snap, and it will become nothing more than an old piece of paper. Inherent in the Constitution is the distinction between citizens and non-citizens, and only citizens are entitled to all the rights and protections of the Constitution. If courts, like the Seventh Circuit, keep minimizing the difference between citizens and aliens, then eventually American citizenship will have no value, and the United States will crumble.

³⁶⁸ Gulasekaram, *supra* note 243, at 1575.

³⁶⁹ Kenneth A. Klukowski, *Citizen's Gun Rights: Incorporating the Second Amendment Through the Privileges and Immunities Clause*, 39 N.M. L. REV. 195, 242 (2009).

³⁷⁰ *Judicial Adherence*, *supra* note 194.