

# Constitutional Cheap Shots: Targeting Undocumented Residents with the Second Amendment

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<sup>1</sup> J.D., 2013, Seton Hall University School of Law; B.A., 2007, College of William and Mary. I would like to thank every single member of the *Seton Hall Circuit Review* for working so hard to make a silk purse out of a sow’s ear. This Comment is dedicated to the victims of the August 2012 massacre in Oak Creek, Wisconsin, as well as the other 31,000 Americans who were killed by guns last year.

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## I. INTRODUCTION

*[I]llegal 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 . . . one 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 trace.<sup>2</sup>*

In June 2011, evidently influenced by a fear of stealthy alien assassins, the Fifth Circuit Court of Appeals ruled that undocumented residents lack Second Amendment rights under the Constitution.<sup>3</sup> In upholding the 1986 amendments to the federal Omnibus Crime Control Act, which denied undocumented residents the right to bear arms,<sup>4</sup> the Fifth Circuit’s ruling broke new ground in the circuit courts based on how it came to that decision. Judge Garwood’s majority opinion upheld the constitutionality of 18 U.S.C. § 922(g)(5), declaring that undocumented residents are not “people” under the Second Amendment.<sup>5</sup> This Comment proposes that the decision in *United States v. Portillo-Munoz* misinterpreted the recent guidance of the United States Supreme Court regarding gun rights, and that this misreading creates uncertainty regarding the constitutional rights of undocumented persons in the United States.

This Comment emphasizes the need for a resolution that fairly balances constitutional rights with necessary limitations. Part II introduces the reader to *Portillo-Munoz*, the first decision made by the federal appellate courts on the issue of whether the Second Amendment applies to undocumented immigrants. The section then discusses the

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<sup>2</sup> *United States v. Portillo-Munoz*, 643 F.3d 437, 441 (5th Cir. 2011), *as revised* (June 29, 2011) (citing *United States v. Toner*, 728 F.2d 115, 128–29 (2d Cir. 1984)).

<sup>3</sup> *Id.* at 442.

<sup>4</sup> See 18 U.S.C.A. § 922 (as amended 1986); *Scarborough v. United States*, 431 U.S. 563 (1977); see also Scott Jacobs, *Toward A More Reasonable Approach to Gun Control: Canada As A Model*, 15 N.Y.L. SCH. J. INT’L & COMP. L. 315, 328–29 (1995) (“The 1986 amendments expanded the classes of persons prohibited from selling, shipping, or receiving firearms to include illegal aliens, veterans who had received a dishonorable discharge, and persons who had renounced their U.S. citizenship.”).

<sup>5</sup> *Portillo-Munoz*, 643 F.3d at 442.

second federal appellate court analysis of this same issue<sup>6</sup> by the Tenth Circuit in *United States v. Huitron-Guizar*,<sup>7</sup> which firmly grounds its reasoning in Supreme Court precedent.<sup>8</sup> Part III analyzes several errors of *Portillo-Munoz* court's interpretation of Supreme Court precedent, and considers other possible formulations of constitutional rights. This Comment concludes that the Tenth Circuit's analysis in *Huitron-Guizar* is more appropriate than the Fifth Circuit's analysis in *Portillo-Munoz*.

## II. BACKGROUND

### A. *United States v. Portillo-Munoz*

On July 10, 2010, Armando Portillo-Munoz, a ranch hand, was "spinning around" on his motorcycle in Dimmit, Texas, when he was approached by the police.<sup>9</sup> The police officers found a .22 caliber handgun in his vehicle, and a dollar bill with a white powdery substance inside the folds.<sup>10</sup> Portillo-Munoz admitted to being a citizen of Mexico who was illegally present in the United States.<sup>11</sup> He was arrested and charged with unlawfully carrying a weapon and possession of a controlled substance.<sup>12</sup> Prior to this arrest, Portillo-Munoz had obtained the gun to protect the chickens on the ranch from coyotes.<sup>13</sup> He was sentenced to ten months imprisonment, followed by three years of supervised release.<sup>14</sup>

On appeal, Portillo-Munoz argued that his conviction under 18 U.S.C. § 922(g)(5), a federal gun law, violated his right to bear arms under the Second Amendment,<sup>15</sup> which provides: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."<sup>16</sup> The provision under which he was convicted states that it is "unlawful for any person . . . who, being an alien . . . illegally or unlawfully in the United States . . . to . . . possess in or affecting commerce, any firearm or ammunition; or

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<sup>6</sup> The Eighth Circuit also affirmed a conviction of an undocumented immigrant under the federal law in *United States v. Flores*, 663 F.3d 1022 (8th Cir. 2011); however, it merely affirmed the decision of the Fifth Circuit.

<sup>7</sup> 678 F.3d 1164, 1165 (10th Cir. 2012).

<sup>8</sup> *United States v. Verdugo-Urquidez*, 494 U.S. 259, 275 (1990).

<sup>9</sup> *Portillo-Munoz*, 643 F.3d at 438.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at 439.

<sup>12</sup> *Id.*

<sup>13</sup> *United States v. Portillo-Munoz*, 643 F.3d 437, 439 (5th Cir. 2011).

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> U.S. CONST. amend. II.

to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.”<sup>17</sup> Portillo-Munoz argued that, despite his illegal status, he should be included in the definition of “the people” who are entitled by the Second Amendment to keep and bear arms.<sup>18</sup> He argued that, in the past, the Supreme Court interpreted the concept of “people” to include more than just the nation’s citizenry,<sup>19</sup> and that the Fifth Circuit itself had previously employed a broader test to determine which “people” were due the Fourth Amendment’s similarly-worded protection against unreasonable searches and seizures.<sup>20</sup>

As a matter of first impression in the federal circuits, the Fifth Circuit Court of Appeals upheld the constitutionality of Section 922(g)(5), upholding the federal ban on gun possession by undocumented immigrants in the United States.<sup>21</sup> The court based its holding primarily on the recent Supreme Court case *District of Columbia v. Heller*, which held that the Second Amendment conferred an individual right to bear arms independent from a person’s involvement in a militia.<sup>22</sup> Justice Scalia, writing for the *Heller* majority, stated that “whatever else [the Second Amendment] leaves to future evaluation, it surely elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home.”<sup>23</sup> Yet while the *Heller* decision effectively overruled certain gun restrictions in the District of Columbia, the Court took care to confine the scope of its decision to individuals denied firearms prior to its holding.<sup>24</sup> The Court stated that “nothing in [its] opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.”<sup>25</sup> In a footnote to this statement, the Court added that those served “only as examples” and that the “list does not purport to be exhaustive.”<sup>26</sup>

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<sup>17</sup> 18 U.S.C. § 922(g)(5).

<sup>18</sup> Brief for Petitioner at 10, *United States v. Portillo-Munoz*, 643 F.3d 437, 439 (5th Cir. 2011) (No. 11-10086).

<sup>19</sup> *Id.* at 12.

<sup>20</sup> *Id.*

<sup>21</sup> *Portillo-Munoz*, 643 F.3d at 442.

<sup>22</sup> *District of Columbia v. Heller*, 554 U.S. 570, 595 (2008).

<sup>23</sup> *Id.* at 635.

<sup>24</sup> *See id.* (“In sum, we hold that the District’s ban on handgun possession in the home violates the Second Amendment. . . . Assuming that *Heller* is not disqualified from the exercise of Second Amendment rights, the District must permit him to register his handgun and must issue him a license to carry it in the home.”).

<sup>25</sup> *Id.* at 626–27.

<sup>26</sup> *Id.* at 627 n. 26.

The Fifth Circuit held that, based on the *Heller* decision, any Second Amendment rights available to U.S. citizens should remain foreclosed to undocumented residents like Portillo-Munoz.<sup>27</sup> The court specifically stated that the “language in *Heller* invalidates Portillo’s attempt to extend the protections of the Second Amendment to undocumented residents,” as “[u]ndocumented residents are not ‘law-abiding, responsible citizens’ or ‘members of the political community.’”<sup>28</sup> The Fifth Circuit held that the *Heller* decision, in addition to affirming the Second Amendment as an individual right, also reinterpreted the meaning of the phrase “the people,” at least for purposes of the Second Amendment.<sup>29</sup> The Fifth Circuit acknowledged that the Supreme Court’s prior interpretation of the word “people,” in the context of the Fourth Amendment,<sup>30</sup> “indicated that the same analysis would extend to the text of the Second Amendment.”<sup>31</sup> Nevertheless, the court declined to analogize the identical wording of the two amendments, instead declaring, “[t]he Second Amendment grants an affirmative right to keep and bear arms, while the Fourth Amendment is at its core a protective right against abuses by the government.”<sup>32</sup> Based on this perceived distinction between the two amendments, as well as its citizen-focused interpretation of *Heller*, the Fifth Circuit refused to apply the broader definition of “the people” embraced by Supreme Court precedent.<sup>33</sup>

#### B. *United States v. Huitron-Guizar*

Nearly one year later, the Tenth Circuit Court of Appeals reached the same conclusion as the Fifth Circuit regarding the Second Amendment, but did so using a less categorical approach. In March 2011, pursuant to a warrant, law enforcement officials searched the home of Emmanuel Huitron-Guizar, a Mexican citizen who had lived in the United States since age three. The search turned up three firearms.<sup>34</sup> The police also discovered that Huitron-Guizar was undocumented, and he was charged with violating § 922(g)(5).<sup>35</sup>

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<sup>27</sup> See *Portillo-Munoz*, 643 F.3d at 440.

<sup>28</sup> *Id.* at 440 (citing *Heller*, 554 U.S. at 644).

<sup>29</sup> *Id.* at 440.

<sup>30</sup> Compare U.S. CONST. amend. IV (“The right of the people . . . against unreasonable searches and seizures, shall not be violated . . .”) with U.S. CONST. amend. II (“ . . . the right of the people to keep and bear Arms, shall not be infringed.”).

<sup>31</sup> *Portillo-Munoz*, 643 F.3d at 440.

<sup>32</sup> *Id.* at 441.

<sup>33</sup> See *supra* note 27.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

The Tenth Circuit upheld his conviction, while avoiding a determination of whether the Second Amendment excludes Huitron-Guizar as an undocumented resident.<sup>36</sup> The court specifically refuted the Fifth Circuit's interpretation of *Heller*, noting that "aliens were not part of [*Heller*'s] calculus."<sup>37</sup> The court also stated that an "even greater reason not to read an unwritten holding into *Heller* is that the question seems large and complicated."<sup>38</sup> Noting that the history of gun ownership and citizenship requirements of the colonial era were not discussed by either party, the court declined to answer a "question of such far-reaching dimensions without a full record and adversarial argument."<sup>39</sup> Instead, the court upheld § 922(g)(5) by employing an intermediate scrutiny analysis, finding that the firearm ban was "substantially related to an important" government ends of crime control and public safety.<sup>40</sup>

C. *United States v. Verdugo-Urquidez*

In *Verdugo-Urquidez*, the Supreme Court held that the Fourth Amendment's protection against unreasonable searches and seizures is not implicated by a search that targets a noncitizen that occurs outside the nation's borders.<sup>41</sup> In this case, the Drug Enforcement Administration arrested a Mexican citizen who was believed to be a leader of a large and violent narcotrafficking operation.<sup>42</sup> Verdugo-Urquidez was arrested in Mexico by local police officers and transported to California, where United States Marshal Service arrested him and held him for trial.<sup>43</sup> American and Mexican police officers searched his house in Mexico without a warrant, and Verdugo-Urquidez sought to have the incriminating documents suppressed from his trial in the United States.<sup>44</sup>

The Supreme Court ruled that Verdugo-Urquidez did not qualify as one of "the people" protected by the "Fourth Amendment [or] the First and Second Amendments."<sup>45</sup> The plurality of the Court, however, did not make that determination based solely on the defendant's lack of United States citizenship, and instead used a "sufficient connections" test, finding that Verdugo-Urquidez could not be considered one of "the

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<sup>36</sup> *Id.* at 1170.

<sup>37</sup> *Id.* at 1168.

<sup>38</sup> *Id.* at 1169.

<sup>39</sup> *Huitron-Guizar*, 678 F.3d at 1169.

<sup>40</sup> *Id.*

<sup>41</sup> *United States v. Verdugo-Urquidez*, 494 U.S. 259, 275 (1990).

<sup>42</sup> *Id.* at 262.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at 262–63.

<sup>45</sup> *Id.* at 265.

people” because he was not a member of the “class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community.”<sup>46</sup>

Justice Kennedy concurred with the majority, but expressed dissatisfaction that the majority focused on the defendant’s status, and not the government’s conduct.<sup>47</sup> The majority, however, did not seem eager to apply the “sufficient connections” test to noncitizens who reside in the country illegally, and in fact, seemed to back away from prior case law, which assumed that illegally-residing aliens have Fourth Amendment rights.<sup>48</sup> Having just propounded a test based on sufficient connections, the Court refused to carve out a special exception for individuals residing in the United States illegally, who in many cases may have been able to show sufficient connections to the country. In the end, the Court neither affirmatively granted Fourth Amendment protection to undocumented residents, nor categorically barred them from protection under the constitutional provision.<sup>49</sup>

#### D. *Post-Verdugo-Urquidez*

Twenty-one years later, the Fifth Circuit, in *Portillo-Munoz*, interpreted the *Heller* decision as clarifying the *Verdugo-Urquidez* standard of “sufficient connection” in regard to undocumented residents.<sup>50</sup> Prior to *Heller*, a court may have inquired into the connections of an alien – resident or otherwise – to determine if he was sufficiently connected to the United States to be part of the national community.<sup>51</sup> The *Portillo-Munoz* court, however, interpreted *Heller* as

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<sup>46</sup> *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990).

<sup>47</sup> *See id.* at 276 (Kennedy, J., concurring) (“Given the history of our Nation’s concern over warrantless and unreasonable searches, explicit recognition of ‘the right of the people’ to Fourth Amendment protection may be interpreted to underscore the importance of the right, rather than to restrict the category of persons who may assert it.”).

<sup>48</sup> *Id.* at 272 (“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 were squarely before us.”).

<sup>49</sup> *Id.* at 272–73 (“Even assuming such aliens would be entitled to Fourth Amendment protections, their situation is different from respondent’s. The illegal aliens in *Lopez-Mendoza* were in the United States voluntarily and presumably had accepted some societal obligations; but respondent had no voluntary connection with this country that might place him among ‘the people’ of the United States.”)

<sup>50</sup> *Portillo-Munoz*, 643 F.3d at 440.

<sup>51</sup> *See, e.g., Doe v. United States*, 2010 WL 4852390 (Fed. Cl. Nov. 10, 2010); *Veiga v. World Meteorological Org.*, 568 F. Supp. 2d 367, 374 (S.D.N.Y. 2008) *aff’d sub nom. Veiga v. World Meteorological Organization*, 368 F. App’x 189 (2d Cir. 2010); *United States v. Esparza-Mendoza*, 265 F. Supp. 2d 1254, 1265 (D. Utah 2003) *aff’d*, 386 F.3d 953 (10th Cir. 2004).

closing the door to any claims brought by undocumented United States residents.<sup>52</sup>

Though *Heller* quotes the *Verdugo-Urquidez* standard of the “class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community,”<sup>53</sup> Justice Scalia paraphrased the quote when he restated that “the people,” as a term of art, “unambiguously refers to all members of the political community, not an unspecified subset.”<sup>54</sup> Based on this pronouncement, the *Portillo-Munoz* court stated that the sufficient connections test of the Fourth Amendment would not be applicable to an alien illegally present in the United States.<sup>55</sup> This limitation on the sufficient connections test, coupled with the Supreme Court’s reference in *Heller* to citizens,<sup>56</sup> foreclosed any possibility that Mr. Portillo-Munoz is a member of “the people” under either the Second or Fourth Amendment.

### III. ANALYSIS

Although the Fifth Circuit based its holding that undocumented residents lack Second Amendment rights on the *Heller* decision, a close reading of *Heller* does not support that proposition. Banning individuals residing in the United States illegally from owning firearms may seem reasonable, but any such prohibition should result from a careful weighing of the relevant governmental and societal interests at stake. It cannot simply be the result of a blanket policy of excluding all rights and privileges to those who lack documentation. Certainly, mere constitutional semantics should not control the outcome when several fundamental rights are at stake. The *Heller* decision, which expanded the Second Amendment as an individual right to self-defense, cannot also be plausibly used to curtail that same right for undocumented residents.

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<sup>52</sup> *Portillo-Munoz*, 643 F.3d at 442.

<sup>53</sup> *Heller*, 554 U.S. at 580 (quoting *Verdugo-Urquidez*, 494 U.S. at 265).

<sup>54</sup> *Id.* at 580.

<sup>55</sup> *See Portillo-Munoz*, 643 F.3d at 440 (“ . . . neither this court nor the Supreme Court has held that the Fourth Amendment extends to a native and citizen of another nation who entered and remained in the United States illegally.”).

<sup>56</sup> *See id.* at 440 (quoting *Heller*, 554 U.S. at 635) (“The Court held 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.’”).



A. *The Text of Heller Does Not Support a Narrower Reading of “The People”*

To support its holding, the Fifth Circuit pointed to two examples in the *Heller* decision in which the language employed would exclude undocumented residents.<sup>57</sup> Specifically, the court pointed to *Heller*’s use of the phrases “law-abiding, responsible citizens”<sup>58</sup> and “members of the political community”<sup>59</sup> to establish the proposition that a person cannot be a member of “the people” unless he is also a citizen. The Fifth Circuit reinforced this idea by concluding that “[a]liens who enter or remain in this country illegally and without authorization are not Americans as that word is commonly understood.”<sup>60</sup>

The *Portillo-Munoz* majority offers no further guidelines on who is “commonly understood” to be an American. Nor does the court offer any textual support for this declaration, leaving the skeptical reader with a suspicion that the common understanding is common only to three circuit judges. One could presume that by “American,” the judges are referring to those who have United States citizenship. The phrases from *Heller* that the Fifth Circuit majority cites, however, do not state that the person who qualifies as a member of “the people” must simply be a citizen. Instead, the citizen must also be “law-abiding” and “responsible,” and should also be a “member of the political community[.]” Although “law-abiding” certainly corresponds to the current law that prohibits felons from gun ownership,<sup>61</sup> it is difficult to translate the other two characteristics into workable tests for who should be allowed to own a gun. “Responsible” is a highly subjective characteristic that is not necessarily correlated with gun ownership at all.<sup>62</sup> Similarly, no one contends that being a member of a political community (e.g., having voting rights) should be one of the determinants

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<sup>57</sup> *Portillo-Munoz*, 643 F.3d at 440.

<sup>58</sup> See *Heller*, 554 U.S. at 635 (“The Court held 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.’”).

<sup>59</sup> See *id.* at 580 (“What is more, in all six other provisions of the Constitution that mention ‘the people,’ the term unambiguously refers to all members of the political community, not an unspecified subset.”).

<sup>60</sup> *Portillo-Munoz*, 643 F.3d at 440.

<sup>61</sup> 18 U.S.C. § 922(g)(5).

<sup>62</sup> Garen J. Wintemute. *Association between firearm ownership, firearm-related risk and risk reduction behaviours and alcohol-related risk behaviours*. INJURY PREVENTION-BRITISH MEDICAL JOURNALS (Jun. 13, 2011). <http://injuryprevention.bmj.com/content/early/2011/06/13/ip.2010.031443.abstract>. (finding that gun owners are twice as likely to participate in binge drinking, chronic heavy drinking, and drinking and driving than are non-gun owners).

for gun access. So, then, why are courts so quick to conflate citizenship with Second Amendment rights?

Another concern with basing a new constitutional rule on only a few words of dicta is that words are often ambiguous. The Oxford English Dictionary, for example, defines “citizen” in its first, three-part definition as “an inhabitant of a city or (often) of a town; [especially] one possessing civic rights and privileges, a burgess or freeman of a city[.]” as “a townsman, as opposed to a countryman[.]” and finally, a “civilian as distinguished from a soldier; in earlier times also distinguished from a member of the landed nobility or gentry.”<sup>63</sup> Only then does the dictionary, in its second definition, discuss what the *Portillo-Munoz* majority views as the correct interpretation: “A member of a state, an enfranchised inhabitant of a country, as opposed to an alien . . . .”<sup>64</sup> The distinction between “citizen” meaning “person who possesses United States citizenship” and “citizen” meaning “everyday person” should not come as a surprise to anyone accustomed to reading bombastic Supreme Court decisions,<sup>65</sup> especially those written by Justice Scalia.<sup>66</sup> The word “citizen” may resonate with more grandiosity than its simpler, yet more accurate, counterpart “person.” That, however, does not necessarily mean that the Court was intending to equate the two concepts.

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. In *Lucas v. S. Carolina Coastal Council*,<sup>67</sup> for example, Justice Scalia stated, “[t]his accords, we think, with our ‘takings’ jurisprudence, which has traditionally been guided by the understandings of our *citizens* regarding the content of, and the State’s power over, the ‘bundle of rights’ that they acquire when they obtain title to property.”<sup>68</sup> One who performs even a cursory survey of Justice Scalia’s majority opinions is sure to find that this overbroad use of “citizen” is not uncommon.<sup>69</sup>

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<sup>63</sup> OXFORD ENGLISH DICTIONARY 249 (2d ed. 1989).

<sup>64</sup> OXFORD ENGLISH DICTIONARY 250 (2d ed. 1989).

<sup>65</sup> See, e.g., *F.C.C. v. Pacifica Found.*, 438 U.S. 726, 748 (1978) (“Patently offensive, indecent material presented over the airwaves confronts the *citizen*, not only in public, but also in the privacy of the home, where the individual’s right to be left alone plainly outweighs the First Amendment rights of an intruder.”) (emphasis added).

<sup>66</sup> See Linda Greenhouse, *Justice Scalia Objects*, N.Y. TIMES (Mar. 9, 2011, 8:40 PM), <http://opinionator.blogs.nytimes.com/2011/03/09/justice-scalia-objects/>.

<sup>67</sup> 505 U.S. 1003 (1992).

<sup>68</sup> *Id.* at 1027 (emphasis added).

<sup>69</sup> See, e.g., *Brown v. Entm’t Merchants Ass’n*, 131 S. Ct. 2729, 2755 (2011) (“The Republic would require virtuous *citizens*, which necessitated proper training from childhood.”) (emphasis added); *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2086 (2011) (“For example, a law-abiding *citizen* might observe a crime during the days or weeks before a

Patriotically spirited as the word “citizen” may be, it should not be read literally as a constitutional test.

To find support for the idea that the word “citizen” cannot always be taken at face value, one merely needs to examine other uses of the word “citizen” in the *Heller* decision to see if the word is interchangeable with the phrase “person with United States citizenship.” For example, the opinion states: “The District [of Columbia] law, by contrast, far from imposing a minor fine, threatens citizens with a year in prison (five years for a second violation) for even obtaining a gun in the first place.”<sup>70</sup> If one uses the strict reading of “citizen” that the Fifth Circuit requires, then the statement becomes: “The District law . . . threatens persons with United States citizenship with a year in prison . . . .” Since the District of Columbia statute does not in fact threaten only bona fide citizens with such a punishment (the actual language uses the word “person”),<sup>71</sup> one cannot escape the impression that Justice Scalia used the word “citizen” for the purpose of rhetorical flourish at least once in *Heller*. An example

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scheduled flight abroad.”) (emphasis added); *Virginia v. Moore*, 553 U.S. 164, 170 (2008) (“Moreover, even though several state constitutions also prohibited unreasonable searches and seizures, *citizens* who claimed officers had violated state restrictions on arrest did not claim that the violations also ran afoul of the state constitutions.”) (emphasis added); *Hudson v. Michigan*, 547 U.S. 586 (2006) (“The interests protected by the knock-and-announce rule include human life and limb (because an unannounced entry may provoke violence from a surprised resident), property (because *citizens* presumably would open the door upon an announcement, whereas a forcible entry may destroy it), and privacy and dignity”) (emphasis added); *Kyllo v. United States*, 533 U.S. 27, 33–34 (2001) (“It would be foolish to contend that the degree of privacy secured to *citizens* by the Fourth Amendment has been entirely unaffected by the advance of technology.”) (emphasis added); *Printz v. United States*, 521 U.S. 898, 920 (1997) (“The Constitution thus contemplates that a State’s government will represent and remain accountable to its own *citizens*.”) (emphasis added); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 592 (1992) (“Similarly, [petitioners’s] professional backgrounds in wildlife preservation . . . also make it likely—at least far more likely than for the average *citizen*—that they would choose to visit these areas of the world where species are vanishing.”) (emphasis added); *California v. Hodari D.*, 499 U.S. 621, 628 (1991) (“*Mendenhall* establishes that the test for existence of a ‘show of authority’ is an objective one: not whether the *citizen* perceived that he was being ordered to restrict his movement, but whether the officer’s words and actions would have conveyed that to a reasonable person.”) (emphasis added); *City of Columbia v. Omni Outdoor Adver., Inc.*, 499 U.S. 365, 368 (1991) (“COA was not alone in urging this course; concerned about the city’s recent explosion of billboards, a number of *citizens* including writers of articles and editorials in local newspapers advocated restrictions.”) (emphasis added); *Griffin v. Wisconsin*, 483 U.S. 868, 876 (1987) (“Although a probation officer is not an impartial magistrate, neither is he the police officer who normally conducts searches against the ordinary *citizen*.”) (emphasis added).

<sup>70</sup> *District of Columbia v. Heller*, 554 U.S. 570, 634 (2008).

<sup>71</sup> See D.C. Code § 7-2507.06 (2007) (“A person who . . . possesses a pistol, or firearm that could otherwise be registered, shall be fined not more than \$1,000 or imprisoned . . .”).

of similar flourish occurs when *Heller* states that “we do not read the Second Amendment to protect the right of citizens to carry arms for *any sort* of confrontation, just as we do not read the First Amendment to protect the right of citizens to speak for *any purpose*.”<sup>72</sup> Again, Justice Scalia likely did not intend for that one sentence to establish that the First Amendment protects only the right of persons with United States citizenship to speak for any purpose.<sup>73</sup>

Even supposing that *Heller* intended that the language in its opinion should be taken literally, there are still practical problems. Assuming for the sake of argument that *Heller* actually holds that only those persons with United States citizenship should be allowed guns, a conflict arises when this new pronouncement is read against 18 U.S.C. § 922(g)(5), the federal firearms law that Portillo-Munoz violated. The Code provision states that it is “unlawful for any person . . . being an alien . . . illegally or unlawfully in the United States . . . to . . . possess . . . any firearm or ammunition . . . .”<sup>74</sup> If *Heller* restricts guns to United States citizens, and Section 922(g)(5) allows guns to any alien who is not in the country illegally, then the two in conjunction create a twilight zone of gun legality for the nation’s 12.5 million legal permanent residents (those immigrants who are lawfully in the United States but do not have citizenship).<sup>75</sup> Far from being hypothetical, this issue has already come up multiple times in the federal courts, and for the concerned legal permanent resident, who may or may not be committing a felony by simply owning a gun, this uncertainty can spell out the difference between removal from the United States and full citizenship rights.<sup>76</sup>

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<sup>72</sup> *Heller*, 554 U.S. at 595.

<sup>73</sup> See *Bridges v. Wixon*, 326 U.S. 135, 161 (1945) (“But once an alien lawfully enters and resides in this country he becomes invested with the rights guaranteed by the Constitution to all people within our borders. Such rights include those protected by the First and the Fifth Amendments and by the due process clause of the Fourteenth Amendment.”).

<sup>74</sup> 18 U.S.C. § 922(g)(5)(2012).

<sup>75</sup> See Nancy Rytina, *Estimates of the Legal Permanent Resident Population in 2009*, Department of Homeland Security (Nov. 12, 2011), [http://www.dhs.gov/xlibrary/assets/statistics/publications/lpr\\_pe\\_2009.pdf](http://www.dhs.gov/xlibrary/assets/statistics/publications/lpr_pe_2009.pdf).

<sup>76</sup> See, e.g., *United States v. Hernandez*, 913 F.2d 1506, 1513 (10th Cir. 1990) (“Because aliens in the process of applying for legalization of their immigration status may not be deported, 8 U.S.C. §§ 1160(d) & 1255a(e), they are not unlawfully in the United States and thereby subject to prosecution under § 922(a)(6)”). See also *United States v. Brissett*, 720 F. Supp. 90, 91 (S.D. Tex. 1989) (holding that alien whose application for legalization was pending at the time he purchased firearm could not be prosecuted under § 922(g)(5)).

*B. The Text of Heller is Not a Constitutional Test for Noncitizens*

The Fifth Circuit is the first federal appellate level court to review the constitutionality of § 922(g)(5) as it pertains to aliens living unlawfully in the United States.<sup>77</sup> A number of district courts, however, have already upheld Section 922(g)(5) as constitutional post-*Heller*.<sup>78</sup> The primary rationale in these cases has been split between two camps: those courts that have upheld the disallowance of alien gun rights based on the presumed constitutionality of Section 922(g)(5),<sup>79</sup> and those courts that have upheld the disallowance by holding that undocumented residents are not members of “the people” as defined by the Second Amendment.<sup>80</sup> The Fifth Circuit based its holding on the latter reasoning, which misconstrues precedent and creates a precarious constitutional position for undocumented residents in that region of the country.<sup>81</sup>

The constitutional rights afforded to noncitizens both today and in the history of the United States can be described as murky at best.<sup>82</sup> The Supreme Court has stated for more than a century that it will grant great deference to acts of Congress in the immigration sphere<sup>83</sup> in what is referred to as the “plenary power doctrine.”<sup>84</sup> At the same time, the Court has not wholly abandoned its role in adjudicating some fundamental constitutional issues involving noncitizens in the United

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<sup>77</sup> *Portillo-Munoz*, 643 F.3d at 439.

<sup>78</sup> See, e.g., *United States v. Flores-Higuera*, No. 1:11-CR-182-TCB-CCH, 2011 WL 3329286 (N.D. Ga. July 6, 2011) (listing eight cases upholding § 922(g)(5) prior to July 2011).

<sup>79</sup> See, e.g., *United States v. Flores*, No. 10-178 JNE JSM, 2010 WL 4720223 (D. Minn. Nov. 15, 2010) (“Even if illegal aliens fall within the ambit of the Second Amendment, § 922(g)(5)(A) is constitutional as a ‘presumptively lawful regulatory measure’ prohibiting the possession of firearms.”).

<sup>80</sup> See, e.g., *United States v. Yanez-Vasquez*, No. 09-40056-01-SAC, 2010 WL 411112 (D. Kan. Jan. 28, 2010) (“First, the defendant has not shown that as an illegal alien he has any Second Amendment rights, before or after *Heller*. Plaintiff has not shown that illegal aliens are among ‘the people’ contemplated by the Second Amendment.”).

<sup>81</sup> *Portillo-Munoz*, 643 F.3d at 442 (5th Cir. 2011).

<sup>82</sup> See Won Kidane, *The Alienage Spectrum Disorder: The Bill of Rights from Chinese Exclusion to Guantanamo*, 20 BERKELEY LA RAZA L.J. 89, 90 (2010) (“... a closer examination of the century-old jurisprudence suggests that the spectrum itself is replete with inconsistencies and is utterly disordered.”).

<sup>83</sup> See, e.g., *Harisiades v. Shaughnessy*, 342 U.S. 580, 589 (1952) (“Such matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference.”); see also *Chae Chan Ping v. United States*, 130 U.S. 581, 603 (1889) (“When once it is established that congress possesses the power to pass an act, our province ends with its construction and its application to cases as they are presented for determination.”).

<sup>84</sup> See, e.g., Meredith K. Olafson, *The Concept of Limited Sovereignty and the Immigration Law Plenary Power Doctrine*, 13 Geo. Immigr. L.J. 433 (1999).

States.<sup>85</sup> Since 1886, the Supreme Court has recognized both that noncitizens have due process rights under the Fourteenth Amendment and that the judiciary has authority to rule on those claims.<sup>86</sup> In recent years, the Supreme Court has continued to expand the applicability of due process claims. For example, in *Plyler v. Doe*,<sup>87</sup> the Court overturned a Texas law that barred undocumented children from attending public schools. Again ruling on the paramount importance of the Fourteenth Amendment, the Court stated “[w]hatever his status under the immigration laws, an alien is surely a ‘person’ in any ordinary sense of that term.”<sup>88</sup> The majority vindicated the principle that, in addition to the traditional due process guarantees to all persons in the United States, the Equal Protection Clause also provides constitutional safeguards to a person regardless of their immigration status.<sup>89</sup> The Court pressed forward, stating:

In concluding that “all persons within the territory of the United States,” including aliens unlawfully present, may invoke the Fifth and Sixth Amendments to challenge actions of the Federal Government, we reasoned from the understanding that the Fourteenth Amendment was designed to afford its protection to all within the boundaries of a State.<sup>90</sup>

The *Plyler* decision represents the Court’s reaffirmation of the inviolability of certain rights – namely, the Fifth, Sixth and Fourteenth Amendments – that apply without regard to the status of the person seeking the protection. As the Due Process Clause also incorporates those provisions of the Bill of Rights to the individual states,<sup>91</sup> the

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<sup>85</sup> See, e.g., *I.N.S. v. Chadha*, 462 U.S. 919, 940-41 (1983) (“The plenary authority of Congress over aliens . . . is not open to question, but what is challenged here is whether Congress has chosen a constitutionally permissible means of implementing that power.”).

<sup>86</sup> See *Yamataya v. Fisher*, 189 U.S. 86 (1903) (“But this court has never held, nor must we now be understood as holding, that administrative officers, when executing the provisions of a statute involving the liberty of persons, may disregard the fundamental principles that inhere in ‘due process of law’ as understood at the time of the adoption of the Constitution.”); *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886) (“The Fourteenth Amendment to the constitution is not confined to the protection of citizens . . . . These provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality . . .”).

<sup>87</sup> *Plyler v. Doe*, 457 U.S. 202, 207 (1982).

<sup>88</sup> *Id.* at 210.

<sup>89</sup> *Id.* at 212 (quoting *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886) (“The Fourteenth Amendment to the Constitution is not confined to the protection of citizens . . . and the protection of the laws is a pledge of the protection of equal laws.”)).

<sup>90</sup> *Plyler*, 457 U.S. at 212 (citing *Yick Wo*, 118 U.S. at 369).

<sup>91</sup> See, e.g., Jerold H. Israel, *Selective Incorporation: Revisited*, 71 GEO. L.J. 253 (1982) (“Justice Brennan advocated adoption of what is now commonly described as the ‘selective incorporation’ theory of the Fourteenth Amendment. That theory, simply put, holds that the Fourteenth Amendment’s due process clause fully incorporates all of those



Fourteenth Amendment serves as a vehicle to afford noncitizens other constitutional protections.<sup>92</sup> For example, more than a half-century ago, the Supreme Court held that noncitizens have free speech rights under the First Amendment.<sup>93</sup> The Fourth Amendment has also historically protected noncitizens. In *INS v. Lopez-Mendoza*, the Supreme Court considered whether the exclusionary rule was required to correct Fourth Amendment violations in deportation proceedings.<sup>94</sup> While the Court ultimately held that the Fourth Amendment violation remedy was unnecessary because it was not a criminal trial, it decided the case explicitly under the impression that aliens possess Fourth Amendment rights.<sup>95</sup> The Court specifically stated that “[i]mportant as it is to protect the Fourth Amendment rights of *all persons*, there is no convincing indication that application of the exclusionary rule in civil deportation proceedings will contribute materially to that end.”<sup>96</sup>

Far from being a groundbreaking holding, *INS v. Lopez-Mendoza* merely reaffirmed the strong principle of jurisprudence that, even though the remedy for a Fourth Amendment violation may be up for debate, the right itself is not. Other courts have affirmed the notion that the Fourth Amendment applies to the government and is not concerned with the status of the person seeking its protection.<sup>97</sup> The Second Circuit held that

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guarantees of the Bill of Rights deemed to be fundamental and thereby makes those guarantees applicable to the states.”).

<sup>92</sup> See, e.g., *Bridges v. State of Cal.*, 314 U.S. 252, 280 (1941) (“Which one of the various limitations upon state power introduced by the Fourteenth Amendment absorbs the First . . . only the Due Process Clause assures constitutional protection of civil liberties to aliens and corporations.”) See also *Choudhry v. Jenkins*, 559 F.2d 1085, 1087 (7th Cir. 1977) (“A lawfully admitted resident alien, of course, is a person within the meaning of the Fourteenth Amendment . . . Therefore, he enjoys the protection of those amendments in the Bill of Rights which are incorporated through the Fourteenth Amendment so as to be applicable to the states, at least in matters wholly unrelated to immigration and naturalization.”).

<sup>93</sup> *Bridges v. Wixon*, 326 U.S. 135, 148 (1945) (“Freedom of speech and of press is accorded aliens residing in this country.”).

<sup>94</sup> *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1046 (1984).

<sup>95</sup> See *id.*

<sup>96</sup> *Id.* (emphasis added).

<sup>97</sup> See also *Almeida-Sanchez v. United States*, 413 U.S. 266, 273 (1973) (“In the absence of probable cause or consent, that search violated the petitioner’s [a Mexican citizen with a valid United States work permit] Fourth Amendment right to be free of unreasonable searches and seizures.”) (internal quotation marks omitted); see *Abel v. United States*, 362 U.S. 217, 247 (1960) (“This is a protection given not only to citizens but to aliens as well, as the opinion of the Court by implication holds. The right ‘of the people’ covered by the Fourth Amendment certainly gives security to aliens in the same degree that ‘person’ in the Fifth and ‘the accused’ in the Sixth Amendments also protects them.”); see *Au Yi Lau v. U.S. Immigration & Naturalization Serv.*, 445 F.2d 217, 223 (D.C. Cir. 1971) (“[s]ince aliens in this country are sheltered by the Fourth Amendment in common with citizens, such a reading of the Congressional mandate must be controlled

the right attaches even when the person is in the country illegally: "An alien within the United States has standing to assert a violation of constitutional rights even if his presence is illegal . . . . The Government here does not suggest that appellee is not entitled to the same Fourth Amendment protection as are citizens."<sup>98</sup>

In 1990, however, the Supreme Court's decision in *Verdugo-Urquidez* demanded a reexamination of its past holdings regarding noncitizens and the Fourth Amendment. This holding represented both a step forward and a step back for undocumented residents seeking constitutional parity with United States citizens. On one hand, it clearly established a definition of "the people" for the purposes of the First, Second, and Fourth Amendments.<sup>99</sup> The Court stated that, without mentioning any citizenship requirement, "the people" "refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community."<sup>100</sup> The Court further held that Verdugo-Urquidez was not a member of "the people" because, as an alien who had not come to the United States willingly, he had "no previous significant voluntary connection with the United States . . . ."<sup>101</sup> Based on that reasoning, the Fourth Amendment did not apply to him.

The Court, however, refused to acknowledge the inescapable conclusion that, under its new holding, an undocumented resident could establish a Fourth Amendment right provided that he or she meet could establish a sufficient connection with the community. Additionally, the Court tried to undo the scope of several decades of precedent by reopening the question of previously settled law regarding the universality of the Fourth Amendment. The plurality opinion stated that the *Lopez-Mendoza* case decided five years earlier,<sup>102</sup> which presumed that undocumented residents could have violable Fourth Amendment rights, did not in fact decide whether the Fourth Amendment could apply to undocumented residents. The Court stated that even though "a majority of Justices assumed that the Fourth Amendment applied to illegal aliens in the United States . . . [o]ur decision did not expressly

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by the constitutional standards governing similar detentions made by other law enforcement officials."; see *Matter of Sandoval*, 17 I. & N. Dec. 70, 81 (BIA 1979) ("Thus, even though the suppression of evidence may be the most cumbersome and unproven tool of deterrence, it is the approach most likely to be pursued by an alien whose Fourth Amendment rights have been violated because of its 'windfall' effect.").

<sup>98</sup> *United States v. Barbera*, 514 F.2d 294, 296 n. 3 (2d Cir. 1975).

<sup>99</sup> See *Verdugo-Urquidez*, 494 U.S. at 265.

<sup>100</sup> *Id.* at 265.

<sup>101</sup> *Id.* at 271.

<sup>102</sup> *INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984).



address the proposition gleaned by the court below.”<sup>103</sup> This clever bit of revisionist jurisprudence allowed the Court to reinvent the wheel and produce the substantial connections test, which would subsequently govern decisions determining who is protected by the Fourth Amendment.

The previous section of this Comment supports the proposition that many constitutional provisions have traditionally covered noncitizens. The Due Process Clause, which applies in full force even to those in the country illegally,<sup>104</sup> incorporated the majority of the Bill of Rights to the States, and most recently the Second Amendment.<sup>105</sup> Because of this concern over the fundamentality of due process rights, the Supreme Court has afforded noncitizens other rights like those granted by the First and Fourth Amendments.<sup>106</sup> It is worth noting here that the First Amendment, like the Fourth Amendment, contains identical wording to that of the Second Amendment in describing the “people” to whom it applies. The Supreme Court itself recognized the congruence of these amendments when it grouped them together in the *Verdugo-Urquidez* decision, referring to the “‘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” without distinction.<sup>107</sup> Absent any other textual distinction, “the people” in one amendment surely means “the people,” as both common sense and the Supreme Court recognize the term, as “refer[ring] to a class of persons who are part of a national community or who have otherwise

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<sup>103</sup> *Verdugo-Urquidez*, 494 U.S. at 272 (“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.”).

<sup>104</sup> See, e.g., *Mathews v. Diaz*, 426 U.S. 67, 77 (1976) (“There are literally millions of aliens within the jurisdiction of the United States. The Fifth Amendment, as well as the Fourteenth Amendment, protects every one of these persons from deprivation of life, liberty, or property without due process of law. . . . *Even one whose presence in this country is unlawful, involuntary, or transitory is entitled to that constitutional protection.*”) (emphasis added).

<sup>105</sup> *McDonald v. City of Chicago, Ill.*, 130 S. Ct. 3020, 3050 (2010) (“Unless considerations of *stare decisis* counsel otherwise, a provision of the Bill of Rights that protects a right that is fundamental from an American perspective applies equally to the Federal Government and the States . . . We therefore hold that the Due Process Clause of the Fourteenth Amendment incorporates the Second Amendment right recognized in *Heller*.”).

<sup>106</sup> See, e.g., *INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984); *Bridges v. Wixon*, 326 U.S. 135, 148 (1945).

<sup>107</sup> *Verdugo-Urquidez*, 494 U.S. at 265.

developed sufficient connection with this country to be considered part of that community.”<sup>108</sup>

Therefore, if the *Portillo-Muniz* court correctly interpreted *Heller* as removing noncitizens from the category of “people” in the Bill of Rights, then the logical implication of this revelation is that the Court took away not only the Second Amendment from noncitizens, but also the longstanding protections of the First and Fourth Amendments. The Supreme Court could not have intended to generate such wide-reaching implications for so many constitutional rights. The question, then, is how do the courts determine who has Second Amendment rights.

### C. *Five Tests for Determining Who Should Obtain Second Amendment Rights*

Today, Section 922(g)(5) forecloses the Second Amendment’s right to bear arms from undocumented immigrants.<sup>109</sup> Some courts considering the constitutionality of Section 922(g)(5) upheld the federal law as a presumptively valid exercise of congressional power.<sup>110</sup> Some, like the *Portillo-Munoz* court, went so far as to say that those undocumented residents are not “people” at all for the purposes of the Bill of Rights, and have ruled on that basis.<sup>111</sup> Neither route, however, is ideal. The first rationale seems less than reasonable when one considers that the original intent of the firearm ban was to keep guns out of the hands of people who are dangerous to society.<sup>112</sup> The second line of thinking, involving a perversion of the word “people,” is equally unsatisfactory because of its incongruence with Supreme Court precedent.

A survey of the law indicates that there are at least four other potential tests for determining who should be afforded Second Amendment and other constitutional rights. These are: (1) the “sufficient connections” test developed by the *Verdugo-Urquidez* plurality; (2) the

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<sup>108</sup> *Id.*

<sup>109</sup> See 18 U.S.C. Sec. 922(g)(5).

<sup>110</sup> See *United States v. Solis-Gonzalez*, No. 3:08-CR-145-MR-DCK-1, 2008 WL 4539663, at \*3 (W.D.N.C. Sept. 26, 2008) (“Although the Court need not look beyond *Heller* in denying Defendant’s motion to dismiss, it is important to note that the Fourth Circuit has addressed the constitutionality of 18 U.S.C. § 922(g) on several occasions and squarely rejected each challenge.”); see also *United States v. Wells* (rejecting Commerce Clause argument); see also *United States v. Bostic* (rejecting Tenth Amendment argument); see also *United States v. Mitchell* (rejecting Fifth Amendment Due Process claim) (citations omitted).

<sup>111</sup> See *United States v. Yanez-Vasquez*, No. 09-40056-01-SAC, 2010 WL 411112, at \*2 (D. Kan. Jan. 28, 2010) (“Plaintiff has not shown that illegal aliens are among ‘the people’ contemplated by the Second Amendment.”).

<sup>112</sup> See, e.g., *Scarborough v. United States*, 431 U.S. 563, 572 (1977).

“governed” test of the *Verdugo-Urquidez* dissent; (3) the test of the “active versus passive right” espoused by the *Portillo-Munoz* court; and (4) the “intermediate scrutiny” test. Two propositions are not discussed here: that undocumented residents should not receive any constitutional protections; or alternatively, that the Second Amendment is not applicable to anyone outside of a militia context. Despite the strength of the argument for at least one of these propositions,<sup>113</sup> neither are viable constitutional positions today in light of both longstanding and more recent cases.<sup>114</sup> Of the four potential approaches, the Tenth Circuit’s intermediate-scrutiny analysis is preferable, as it allows courts to best examine the complex nature of the issue.

### 1. Sufficient Connections Test – *Verdugo-Urquidez* Plurality

In deciding that a Mexican citizen did not have Fourth Amendment protection in his home outside the United States, the *Verdugo-Urquidez* plurality held that “the people” under the Fourth Amendment are members of “a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community.”<sup>115</sup> The Court also suggested that this test would apply with equal force to other similarly worded amendments, including the Second Amendment.<sup>116</sup>

One might commend this decision as an arguably sensible compromise to constitutional rights for aliens – namely, that an undocumented resident, despite his lack of official entry, may be

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<sup>113</sup> See, e.g., *United States v. Miller*, 307 U.S. 174, 178 (1939) (“In the absence of any evidence tending to show that possession or use of a ‘shotgun having a barrel of less than eighteen inches in length’ at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument. Certainly it is not within judicial notice that this weapon is any part of the ordinary military equipment or that its use could contribute to the common defense.”); See also David Yassky, *The Second Amendment: Structure, History, and Constitutional Change*, 99 MICH. L. REV. 588, 589 (2000) (“The question at the heart of this debate is whether the Amendment restricts the government’s ability to regulate the private possession of firearms. Since at least 1939 – when the Supreme Court decided *United States v. Miller*, its only decision squarely addressing the scope of the right to “keep and bear Arms” – the answer to that question has been an unqualified ‘no.’ Courts have brushed aside Second Amendment challenges to gun control legislation, reading the Amendment to forbid only laws that interfere with states’ militias.”).

<sup>114</sup> See, e.g., *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886); see also *Dist. of Columbia v. Heller*, 554 U.S. 570, 595 (2008).

<sup>115</sup> *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990).

<sup>116</sup> *Id.* (“While this textual exegesis is by no means conclusive 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 . . .”).

properly viewed as a member of the community. This standard reflects the reasonable view that not all undocumented immigrants are created equal, and that an undocumented resident of the United States who holds a job and pays Social Security taxes should not be categorically grouped with a drug runner who involuntarily entered the country.<sup>117</sup> The former provides some benefit to the community;<sup>118</sup> the latter certainly does not. This view reflects a realistic notion of the complexity of immigration issues today.<sup>119</sup> It is also in line with the congressional approach to removing aliens, which includes provisions to cancel an alien's deportation based on certain community ties.<sup>120</sup> This approach would presumably create an incentive, similar to the one provided for by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, for undocumented residents to maintain community presence and obey the nation's laws in the hope that these actions could someday be counted in their favor. Because of its resemblance to the current law (as well as others recently proposed),<sup>121</sup> the sufficient connections test meets the expectations of those undocumented residents who are more familiar with the well-defined rules of immigration law than the vagaries of the Supreme Court's holdings.

The sufficient connections test, however, is not without its critics. The dissenters, led by Justice Brennan in *Verdugo-Urquidez*, assailed the

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<sup>117</sup> Won Kidane, *The Alienage Spectrum Disorder: The Bill of Rights from Chinese Exclusion to Guantanamo*, 20 BERKELEY LA RAZA L.J. 89, 125 (2010) ("All three branches of government do their own share of crafting immigration laws and policies. Together, about a century ago, they created this notion that some immigrants are more alien than others and repeated the same theme consistently throughout the last century.").

<sup>118</sup> See, e.g., Eduardo Porter, *Illegal Immigrants Are Bolstering Social Security With Billions*, N.Y. TIMES, Apr. 5, 2005, <http://www.nytimes.com/2005/04/05/business/05immigration.html?ex=1270353600&en=78c87ac4641dc383&ei=5090>.

<sup>119</sup> See, e.g., *Plyler v. Doe*, 457 U.S. 202, 218 n. 17 (1982) (quoting Joint Hearing before the Subcommittee on Immigration, Refugees, and International Law of the House Committee on the Judiciary and the Subcommittee on Immigration and Refugee Policy of the Senate Committee on the Judiciary, 97th Cong., 1st Sess., 9 (1981) (testimony of William French Smith, Attorney General) ("We have neither the resources, the capability, nor the motivation to uproot and deport millions of illegal aliens, many of whom have become, in effect, members of the community.")).

<sup>120</sup> See 8 U.S.C. §1229b(b)(1) (stating that the Attorney General may cancel removal of a deportable alien if the alien has been present in the United States for the last ten years, has been a person of good moral character, and establishes that removal would "result in exceptional and extremely unusual hardship to the alien's spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence.").

<sup>121</sup> See Development, Relief and Education for Alien Minors Act, S. 729, 111th Cong. (2009) (proposing conditional permanent residency to certain illegal aliens who arrived in the country as minors, have graduated from high school, and maintain a good moral character).

uncertainty in the rule, stating that “[t]he Court admits that ‘the people’ extends beyond the citizenry, but leaves the precise contours of its ‘sufficient connection’ test unclear.”<sup>122</sup> Indeed, only the most self-assured undocumented resident would feel safe under that test; all others would be left with the nagging suspicion that their connections to the community might be deemed insufficient. This uncertainty, of course, will not be confined only to those undocumented residents; law enforcement officers, for example, will also feel the pinch from this test. To government agents, this additional wrinkle in Fourth Amendment jurisprudence will only add to the unease produced by not knowing what course of action they can pursue when confronted with a suspect of ambiguous citizenship.<sup>123</sup>

Other critics have argued that the sufficient connections test “created an expansive gray area[,]” which has led to inconsistent lower court rulings.<sup>124</sup> A brief look at a few examples of post-*Verdugo* cases demonstrates that the sufficient connections test has shown itself to be of little predictive value for determining who will obtain the protections of the Fourth Amendment. In one case, the District Court of Vermont ruled on the availability of the exclusionary rule for a Canadian citizen arrested in a United States airport with a fraudulently-procured visa.<sup>125</sup> The district court, granting the motion to suppress evidence from the illegal search, stated that the Fourth Amendment was applicable to the noncitizen because “the defendants’ presence in the United States was voluntary, and they had gained admission, albeit surreptitiously, for a temporary visit as tourists. Such connections . . . constitute the type of connections which would vest in aliens the protections afforded by the Fourth Amendment . . . .”<sup>126</sup> In contrast, a Texas appellate court upheld the conviction of a Colombian national who had been unlawfully present in the United States for two years.<sup>127</sup> Although the court’s *Verdugo*-

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<sup>122</sup> *Verdugo-Urquidez*, 494 U.S. at 282 (Brennan, J., dissenting).

<sup>123</sup> See, e.g., *United States v. Brignoni-Ponce*, 422 U.S. 873, 885–86 (1975) (“In this case the officers relied on a single factor to justify stopping respondent’s car: the apparent Mexican ancestry of the occupants. We cannot conclude that this furnished reasonable grounds to believe that the three occupants were aliens.”).

<sup>124</sup> Douglas I. Koff, *Post-Verdugo-Urquidez: The Sufficient Connection Test – Substantially Ambiguous, Substantially Unworkable*, 25 COLUM. HUM. RTS. L. REV. 435, 471 (1994) (“Although it is easy to determine when an alien’s connection has not reached the level of *Verdugo-Urquidez*’s, it is difficult to determine whether the alien who has developed more of a connection with the United States than *Verdugo-Urquidez* is afforded Fourth Amendment protection.”).

<sup>125</sup> *United States v. Tehrani*, 826 F. Supp. 789 (D. Vt. 1993) *aff’d*, 49 F.3d 54 (2d Cir. 1995).

<sup>126</sup> *Id.* at 793 n. 1.

<sup>127</sup> *Torres v. State*, 818 S.W.2d 141, 143 (Tex. App. 1991) *review granted in part, decision vacated*, 825 S.W.2d 124 (Tex. Crim. App. 1992).

*Urquidez* analysis was ultimately not dispositive, it still stated that the defendant would not have standing to challenge the search because he “had not been employed during his two years in the United States and was living off money given him by his brothers, who were convicted drug traffickers or charged with drug trafficking and on fugitive status.”<sup>128</sup>

The Fifth Circuit has itself produced an important precedential case – one cited in the *Portillo-Munoz* dissent, which suggests that *Portillo-Munoz* is one of “the people.”<sup>129</sup> In *Martinez-Aguero v. Gonzalez*, the court held that a Mexican citizen who crossed the border into the United States once a month had a Fourth Amendment right to pursue a remedy when she attempted to cross with a recently invalidated visa.<sup>130</sup> The court agreed that “her regular and lawful entry of the United States pursuant to a valid border-crossing card and her acquiescence in the U.S. system of immigration constitute[d] her voluntary acceptance of societal obligations, rising to the level of ‘substantial connections.’”<sup>131</sup>

One might criticize the *Verdugo-Urquidez* test for injecting more confusion into the area of constitutional rights. From the above cases, it should be clear that there is little predictive value in the test. A foreign national who comes across the border for a few days under false pretenses is a member of “the people,”<sup>132</sup> while a two-year resident is not.<sup>133</sup> A Mexican citizen who has never had any intention of developing any sort of substantial relationship with the United States becomes one of “the people” because her monthly acquiescence to Border Patrol could constitute her voluntary acceptance of societal obligations. The *Verdugo-Urquidez* court’s conflation of several distinct and potentially conflicting factors – the sufficient connections, the national community, and the voluntary presence – may have made this test too complex for lower courts to apply consistently.

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<sup>128</sup> *Id.* at 146 n. 1 (“Appellant demonstrated no meaningful ties to the community and we do not find he is entitled to the protection accorded ‘We the people of the United States’ as originally intended by the framers of either the federal or state constitutions.”).

<sup>129</sup> *Portillo-Munoz*, 643 F.3d 437, 445 (2011) (Dennis, J., dissenting).

<sup>130</sup> *Martinez-Aguero v. Gonzalez*, 459 F.3d 618, 625 (5th Cir. 2006).

<sup>131</sup> *Id.* (“There may be cases in which an alien’s connection with the United States is so tenuous that he cannot reasonably expect the protection of its constitutional guarantees; the nature and duration of Martinez-Aguero’s contacts with the United States, however, are sufficient to confer Fourth Amendment rights.”).

<sup>132</sup> *United States v. Tehrani*, 826 F. Supp. 789, 798 (D. Vt. 1993) *aff’d*, 49 F.3d 54 (2d Cir. 1995).

<sup>133</sup> *Torres v. State*, 818 S.W.2d 141, 143 (Tex. App. 1991).



## 2. “We the Governed” – The *Verdugo-Urquidez* Dissent

Justices Brennan and Marshall, the dissenters in *Verdugo-Urquidez*, proposed a broader and simpler test for determining who are “people” for the purposes of the Bill of Rights. They stated that *Verdugo-Urquidez* should be considered included in the protections because “our Government, by investigating him and attempting to hold him accountable under United States criminal laws, has treated him as a member of our community for purposes of enforcing our laws.”<sup>134</sup> The dissent argued that whenever agents of the United States government seek to enforce U.S. criminal laws upon those outside the citizenry or the territoriality, they “in turn are obliged to respect certain correlative rights, among them the Fourth Amendment.”<sup>135</sup> The dissent thus opted for a much simpler rule that, if nothing else, prevents a headache to any undocumented resident, law enforcement officer, judge or even frustrated law student trying impatiently to determine who is sufficiently connected to the United States. Whenever the authority of the United States tries to govern him, the defendant “become[s], quite literally, one of the governed.”<sup>136</sup>

Besides the clear advantages of simplicity and predictive value, there are other reasons to approve of “the governed” test of the dissent. Fundamentally, the rule appeals to a sense of “mutuality and fundamental fairness that are central to our Nation’s constitutional conscience[,]” that one might argue is often absent when it comes to considering the rights of noncitizens.<sup>137</sup> Perhaps it is the echo of the Golden Rule that rings true in the dissent’s statement that “[i]f we expect aliens to obey our laws, aliens should be able to expect that we will obey our Constitution when we investigate, prosecute, and punish them.”<sup>138</sup> When viewed against such a statement of basic equity, any argument for denying rights to less-connected aliens seems unreasonable.

The dissent also bolsters its argument with an appeal to history, arguing that the majority missed the forest for the trees by suggesting that a right so fundamental to the founding of the country should be read narrowly.<sup>139</sup> Refusing to make a decision based solely on the social

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<sup>134</sup> *Verdugo-Urquidez*, 494 U.S. at 284.

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> *Id.* at 286.

<sup>138</sup> *Id.* at 284.

<sup>139</sup> *Verdugo-Urquidez*, 494 U.S. 259 at 287–88 (“Whereas the British Parliament was unconstrained, the Framers intended to create a Government of limited powers. Bestowing rights and delineating protected groups would have been inconsistent with the Drafters’s fundamental conception of a Bill of Rights as a limitation on the Government’s conduct with respect to all whom it seeks to govern.”).

compact theory of the Constitution, Justice Brennan's dissent (and Justice Kennedy's concurrence)<sup>140</sup> instead stated that "the Framers of the Bill of Rights did not purport to 'create' rights" but "[r]ather, they designed the Bill of Rights to prohibit our Government from infringing rights and liberties presumed to be pre-existing."<sup>141</sup> Ironically, this originalist focus, rejected by Justice Scalia in *Verdugo-Urquidez* when applied to the Fourth Amendment, would twenty years later become his main selling point for striking down gun control laws when he stated that "it has always been widely understood that the Second Amendment, like the First and Fourth Amendments, codified a pre-existing right" and "[t]he very text of the Second Amendment implicitly recognizes the pre-existence of the right and declares only that it shall not be infringed."<sup>142</sup>

The major critique of the dissent's "governed" rule is the refrain commonly delivered in response to such idealistic arguments – it is "impracticable."<sup>143</sup> Justice Kennedy, for example, believed that the difficulties such as "[t]he absence of local judges or magistrates available to issue warrants, the differing and perhaps unascertainable conceptions of reasonableness and privacy that prevail abroad, and the need to cooperate with foreign officials" would make the Fourth Amendment potentially much harder to comply with abroad.<sup>144</sup> Justice Rehnquist, writing for the plurality, took an even more pragmatic approach, holding that "[f]or better or for worse, we live in a world of nation-states in which our Government must be able to function effectively in the company of sovereign nations."<sup>145</sup> He continued, "[s]ituations threatening to important American interests may arise halfway around the globe, situations which in the view of the political branches of our Government require an American response with armed force."<sup>146</sup> This point of view would take on heightened importance after the attacks of September 11th, as courts began to question just how much

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<sup>140</sup> *Id.* at 276 (Kennedy, J., concurring) ("A government may originate in the voluntary compact or assent of the people of several states . . . . But the difficulty in asserting it to be a compact between the people of each state, and all the people of the other states is, that the constitution itself contains no such expression, and no such designation of parties." (quoting Story, 1 Commentaries on the Constitution § 365, p. 335 (1833))).

<sup>141</sup> *Verdugo-Urquidez*, 494 U.S. 259 at 288.

<sup>142</sup> *Heller*, 554 U.S. at 592 (quoting *United States v. Cruikshank*, 92 U.S. 542, 553 (1876) ("[t]his is not a right granted by the Constitution. Neither is it in any manner dependent upon that instrument for its existence.")).

<sup>143</sup> *Verdugo-Urquidez*, 494 U.S. at 275 (Kennedy, J., concurring) (citing *Reid v. Covert*, 354 U.S. 1, 74 (1957) (Harlan, J., concurring)).

<sup>144</sup> *Id.* at 278.

<sup>145</sup> *Id.* at 275 (citing *Perez v. Brownell*, 356 U.S. 44, 57 (1958)).

<sup>146</sup> *Id.* at 274.



constitutional protection should be afforded when dealing with alleged terrorists.<sup>147</sup> In many cases, some protections of the Constitution were sacrificed to similar concerns of practicality.<sup>148</sup>

### 3. “Affirmative Versus Passive Right” Test – *Portillo-Munoz* Majority

The Fifth Circuit, while still holding that the Fourth Amendment does not apply to undocumented residents,<sup>149</sup> did not rest its decision on the inapplicability of the *Verdugo-Urquidez* standard alone. The court, perhaps recognizing that it was treading on uncertain ground in such a strict reading of the “sufficient connections” test,<sup>150</sup> sought to distinguish its gun holding, of which there was no contradicting precedent, from its interpretation of the Fourth Amendment, which was not supported by even its own precedent.<sup>151</sup> To shore up its interpretation of the Second Amendment, the majority stated that “. . . we do not find that the use of ‘the people’ in both the Second and the Fourth Amendment mandates a holding that the two amendments cover exactly the same groups of people.”<sup>152</sup> The court continued saying that “[t]he purposes of the Second and the Fourth Amendment are different[,] . . . . [t]he Second Amendment grants an affirmative right to keep and bear arms, while the Fourth Amendment is at its core a protective right against abuses by the government.”<sup>153</sup> Because of this difference in intention, the court reasoned that it was “reasonable that an affirmative right would be extended to fewer groups than would a protective right.”<sup>154</sup> One may criticize the *Portillo-Munoz* court’s decision for its inconsistency. Essentially, the court states that undocumented residents do not have

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<sup>147</sup> See generally *Rasul v. Bush*, 542 U.S. 466, 497–98 (2004) (“Today, the Court springs a trap on the Executive, subjecting Guantanamo Bay to the oversight of the federal courts even though it has never before been thought to be within their jurisdiction—and thus making it a foolish place to have housed alien wartime detainees.”).

<sup>148</sup> See, e.g., Tung Yin, *President Obama’s First Two Years: A Legal Reflection: “Anything but Bush?”: The Obama Administration and Guantanamo Bay*, 34 HARV. J.L. & PUB. POL’Y 453 (2011).

<sup>149</sup> *Portillo-Munoz*, 643 F.3d at 440 (“ . . . neither this court nor the Supreme Court has held that the Fourth Amendment extends to a native and citizen of another nation who entered and remained in the United States illegally.”).

<sup>150</sup> Note the unsure language: “Moreover, even if there were precedent for the proposition that illegal aliens generally are covered by the Fourth Amendment . . . .”; *Id.* at 440.

<sup>151</sup> See, e.g., *Martinez-Aguero v. Gonzalez*, 459 F.3d 618 (5th Cir. 2006) (holding that a Mexican citizen who had inadvertently attempted an unlawful border crossing still had sufficient connections to be protected by the Fourth Amendment).

<sup>152</sup> *Portillo-Munoz*, 643 F.3d at 440.

<sup>153</sup> *Id.* at 440–41.

<sup>154</sup> *Id.* at 441.

either Second or Fourth Amendment rights, but that, paradoxically, even if undocumented residents do have Fourth Amendment rights, they still do not have Second Amendment rights.

The majority's affirmative versus passive rights distinction may sound convincing at first blush for those who suspect deep down there is some difference between brandishing a gun and keeping the government out of one's house. *Portillo-Munoz*, however, cited no support for this statement. In fact, this deceptively simple statement comes from the Government's brief, which argued that "[t]he Fourth Amendment is a passive, or defensive right that protects the people against unreasonable searches and seizures" and that "[i]n contrast, the Second Amendment codifies an affirmative right to use arms. The Government concluded that "[a]ccordingly, one cannot define the scope of the Second Amendment by analogy to the Fourth [Amendment]."<sup>155</sup> For the first half of its proposition, the Government cited *Verdugo-Urquidez*.<sup>156</sup> For the second half, it cited *Heller*'s focus on "law-abiding, responsible citizens[.]"<sup>157</sup> When one searches for a reference to the "affirmative right" of the Second Amendment, however, one finds that it does not appear until much later, deep into the dissent of *Heller*. Justice Stevens, dissenting vigorously from the Court's new vindication of the Second Amendment as a personal right,<sup>158</sup> stated, "[b]y way of contrast, the Fourth Amendment describes a right *against* governmental interference rather than an affirmative right *to* engage in protected conduct, and so refers to a right to protect a purely individual interest."<sup>159</sup> This dissenting opinion is the source of the textual support that the Government argues, and the *Portillo-Munoz* majority subsequently ratifies into Fifth Circuit law. While a lower court acts questionably when it decides a case based on the dissenting opinion of a Supreme Court ruling, the situation is even more suspect when that dissenting opinion runs contrary to the majority opinion that the lower court is purporting to affirm.<sup>160</sup> The Fifth Circuit

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<sup>155</sup> Brief for Respondent at 9–10, *United States v. Portillo-Munoz*, 643 F.3d 437, 439 (5th Cir. 2011) (No. 11-10086).

<sup>156</sup> *Id.* at 10 ("... [t]he purpose of the Fourth Amendment was to protect the people of the United States against arbitrary action by their own Government.").

<sup>157</sup> *Id.* at 10 (citing *Heller*, 554 U.S. at 635).

<sup>158</sup> *See Heller*, 554 U.S. 570, 678, 666, 649, 639, 652 (2008) (Stevens, J., dissenting) (referring to the majority's analysis as being "simply wrong," "without any real analysis," "fundamentally fail[ing] to grasp the point," and "feeble."). Perhaps most damning, Justice Stevens also states "not a word in the constitutional text even arguably supports the Court's overwrought and novel description of the Second Amendment . . .").

<sup>159</sup> *Id.* at 646 (emphasis added).

<sup>160</sup> *See also Verdugo-Urquidez*, 494 U.S. at 265 ("it suggests that 'the people' protected by the Fourth Amendment, and by the First and Second Amendments, and to

used the *Heller* majority opinion<sup>161</sup> for the ruling, and the antithetical dissent for the rationale.<sup>162</sup>

Thus, the primary disadvantage to the “affirmative versus passive right” test is that it lacks any sort of precedential support, even in its own circuit.<sup>163</sup> On this basis alone, it seems unlikely that any other court would use such a rule. If the Supreme Court has repeatedly established that the concurrently-passed amendments in the Bill of Rights refer to the same people,<sup>164</sup> then absent any newly-discovered historical evidence, it would seem arbitrary to pick and choose those that will apply only to citizens. This outcome seems inimical to the idea of the Constitution creating “a government of laws, and not of men.”<sup>165</sup> The “affirmative versus passive right” test also opens up the door to the possibility that courts could strip away more rights from noncitizens simply by designating them as “affirmative,” and not “passive.” For example, due process, though guaranteed to noncitizens since 1886,<sup>166</sup> might still be someday deemed “affirmative” under this test if certain provisions of due process require some active participation of the defendant.

#### *D. The Intermediate-Scrutiny Test*

One of the major questions that the *Heller* majority left unanswered is what standard of review should be applied when reviewing gun legislation.<sup>167</sup> When deciding whether a law impermissibly burdens a

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whom rights and powers are reserved in the Ninth and Tenth Amendments, refers to a class of persons . . .”); *See also Heller*, 554 U.S. at 579.

<sup>161</sup> *Heller*, 554 U.S. at 595 (“There seems to us no doubt, on the basis of both text and history, that the Second Amendment conferred an individual right to keep and bear arms.”).

<sup>162</sup> *Id.* at 645 (Stevens, J., dissenting) (“[i]t is the collective action of individuals having a duty to serve in the militia that the text directly protects and, perhaps more importantly, that the ultimate purpose of the Amendment was to protect the States’s share of the divided sovereignty created by the Constitution”).

<sup>163</sup> *See United States v. Emerson*, 270 F.3d 203, 227–28 (5th Cir. 2001) (“There is no evidence in the text of the Second Amendment, or any other part of the Constitution, that the words ‘the people’ have a different connotation within the Second Amendment than when employed elsewhere in the Constitution. In fact, the text of the Constitution, as a whole, strongly suggests that the words ‘the people’ have precisely the same meaning within the Second Amendment as without.”).

<sup>164</sup> *See Heller*, 554 U.S. at 579; *Verdugo-Urquidez*, 494 U.S. at 265.

<sup>165</sup> *Marbury v. Madison*, 5 U.S. 137, 163 (1803).

<sup>166</sup> *See Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886) (“The Fourteenth Amendment to the Constitution is not confined to the protection of citizens.”).

<sup>167</sup> *See, e.g., Jason T. Anderson, Second Amendment Standards of Review: What the Supreme Court Left Unanswered in District of Columbia v. Heller*, 82 S. CAL. L. REV. 547, 547–48 (2009) (“But the Court left the door open for a new debate to begin in the Second Amendment context: what standard of review applies to legislation that restricts an individual’s right to bear arms?”).

person's constitutional right, a court will traditionally try to measure the importance of the government interest at stake against how closely related the law is to that achieving that interest.<sup>168</sup> *Heller* pointedly refused to decide what level of review was being used to strike down the District of Columbia gun law as unconstitutional, instead stating: "Under any of the standards of scrutiny that we have applied to enumerated constitutional rights, banning from the home 'the most preferred firearm in the nation to 'keep' and use for protection of one's home and family,' would fail constitutional muster."<sup>169</sup> In a footnote, Justice Scalia added that rational basis would be especially inappropriate as a standard of review, as the gun law was within the scope of the Bill of Rights.<sup>170</sup> The dissent criticized the majority for this purposeful omission by asking "[h]ow is a court to determine whether a particular firearm regulation (here, the District's restriction on handguns) is consistent with the Second Amendment? What kind of constitutional standard should the court use? How high a protective hurdle does the Amendment erect? The question matters."<sup>171</sup> Justice Breyer, in dissent, instead argued for a balancing-test to weigh the interests of the government against the constitutionally-protected rights of the people.<sup>172</sup> The majority, however,

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<sup>168</sup> For a more thorough discussion on the standards of review and how they have been applied to gun laws after *Heller*, see Sarah Perkins, *District of Columbia v. Heller: The Second Amendment Shoots One Down*, 70 LA. L. REV. 1061, 1074 (2010) ("The Supreme Court traditionally uses three levels of constitutional scrutiny-rationality review, intermediate scrutiny, and strict scrutiny-in evaluating claims that a person's constitutional rights have been infringed. Each of these three levels of constitutional scrutiny contains two prongs in its analysis. The first prong determines the government interest in a particular regulation at issue, while the second prong examines the connection between the government interest and the regulation.").

<sup>169</sup> *District of Columbia v. Heller*, 554 U.S. 570, 628–29 (2008) (citation omitted).

<sup>170</sup> *Id.* at 629 ("But rational-basis scrutiny is a mode of analysis we have used when evaluating laws under constitutional commands that are themselves prohibitions on irrational laws . . . . Obviously, the same test could not be used to evaluate the extent to which a legislature may regulate a specific, enumerated right, be it the freedom of speech, the guarantee against double jeopardy, the right to counsel, or the right to keep and bear arms.") (quoting *United States v. Carolene Products Co.*, 304 U.S. 144, 152, n. 4 (1938) ("There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments . . .").

<sup>171</sup> *Id.* at 687–88 (Breyer, J., dissenting).

<sup>172</sup> *Id.* at 689–90 (Breyer, J., dissenting) ("I would simply adopt such an interest-balancing inquiry explicitly. The fact that important interests lie on both sides of the constitutional equation suggests that review of gun-control regulation is not a context in which a court should effectively presume either constitutionality (as in rational-basis review) or unconstitutionality (as in strict scrutiny). Rather, where a law significantly implicates competing constitutionally protected interests in complex ways, the Court generally asks whether the statute burdens a protected interest in a way or to an extent that is out of proportion to the statute's salutary effects upon other important governmental interests.) (citations omitted) (internal quotation marks omitted).

firmly rejected such a test as inconsistent with the Court's past treatment of constitutional rights.<sup>173</sup>

As a result, lower courts have been inconsistent in determining what level of review is now appropriate when ruling on the constitutionality of Section 922(g) post-*Heller*.<sup>174</sup> Some courts have continued to apply rational basis, finding that *Heller* "specifically stated the particular regulations were constitutional, as regarding felons and the mentally ill, Sections 922(g)(1) and (4), or via analogy to the so called 'presumptively lawful regulations.'"<sup>175</sup> Nevertheless, the most common approach has been to uphold different provisions of the federal gun law under some form of intermediate scrutiny.<sup>176</sup> Situated between rational basis and strict scrutiny, intermediate scrutiny is a "flexible standard [that] generally requires the government to establish that the challenged law is substantially related to an important governmental interest."<sup>177</sup> This is the same analysis that the Tenth Circuit applied in *Huitron-Guizar*.<sup>178</sup>

The primary advantage to using such a test is that it accounts for the complexity of the issue, and does make its case solely on the obscure and ambiguous intentions of a generation long past. For the question of undocumented residents and firearms, for example, this test profits greatly from the fact that our conceptions have dramatically changed over the past couple centuries, from when both immigration and gun

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<sup>173</sup> *Id.* at 634 ("We know of no other enumerated constitutional right whose core protection has been subjected to a freestanding 'interest-balancing' approach.").

<sup>174</sup> *Portillo-Munoz*, 643 F.3d at 443 (Dennis, J., concurring in part and dissenting in part) (commenting that courts of appeal have taken various approaches to scrutinizing laws regarding firearms, including a substantial burden test, declining to label the level of scrutiny being applied, applying a sliding scale test, and intermediate scrutiny).

<sup>175</sup> *United States v. Chester*, 367 F. App'x 392, 396–97, *reh'g granted* (Dec. 30, 2010), *opinion vacated on reh'g*, 628 F.3d 673 (4th Cir. 2010) (nevertheless concluding that intermediate scrutiny was more appropriate because Court dicta could not control every gun challenge).

<sup>176</sup> *Portillo-Munoz*, 643 F.3d at 443–44, n. 4 (Dennis, J., concurring in part and dissenting in part). Although it should be noted that several appellate courts, while still using intermediate scrutiny, have found creative ways to rework the standard. *See, e.g., United States v. Chester*, 628 F.3d 673, 683 (4th Cir. 2010) (developing "a two-prong analysis to determine whether a regulation violates a defendant's Second Amendment right to bear arms. A district court must first determine whether the right sought to be regulated is within the scope of the Second Amendment's protection . . . . If the district court finds that the right is protected by the Second Amendment, the court . . . should apply intermediate scrutiny to determine whether there is a reasonable fit between the challenged regulation and a substantial government objective.") (citation omitted) (internal quotation marks).

<sup>177</sup> *United States v. Skoien*, 587 F.3d 803, 812 (7th Cir. 2009) *reh'g en banc granted, opinion vacated*, 08-3770, 2010 WL 1267262 (7th Cir. Feb. 22, 2010) *and on reh'g en banc*, 614 F.3d 638 (7th Cir. 2010).

<sup>178</sup> *United States v. Huitron-Guizar*, 678 F.3d at 1169.

laws were of a wholly different magnitude.<sup>179</sup> The intermediate scrutiny test would take into account, to give just one example, the difficulty in firearm registration for a group of people who generally lack valid documentation. The other standards ignore such a critical practical issue when deciding Second Amendment rights. A judge might decide to examine any of the myriad of other governmental interests which might ultimately be dispositive. For example, the Government, in a brief for one case, offered this justification for keeping guns out of the hands of noncitizens: “‘Defense of the State’ or the community, is a duty peculiar to the citizen . . . . The alien who has not declared an intention to become a citizen has no obligation to defend the State or the community.”<sup>180</sup> Such a statement is of course no longer true, both in light of *Heller*’s new pronouncement of individual (and not militia) gun ownership,<sup>181</sup> as well as the strong encouragement of noncitizens to serve in the United States Armed Forces.<sup>182</sup>

Under an intermediate scrutiny analysis, a court could no longer ask merely “whether the challenged law is a reasonable method of regulating the right to bear arms.”<sup>183</sup> For example, “[i]f a state attempted to disarm its citizenry completely, such a law might well survive rational basis review, assuming the goal is public safety and that a rational legislator could conclude that banning all firearms furthers public safety.”<sup>184</sup> If we analogize this example to the case of noncitizens, we find such a law exists in the form of Section 922(g)(5), and courts have routinely upheld it as rational. But because under intermediate scrutiny “[t]he government bears the burden of justifying its regulation in the context of heightened

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<sup>179</sup> See, e.g., *id.* (“We know, for instance, that the founders’s notion of citizenship was less rigid than ours, largely tied to the franchise, which itself was often based on little more than a period of residence and being a male with some capital.”).

<sup>180</sup> Brief for Respondent at 9-10, *State v. Hernandez-Mercado*, 879 P.2d 283, No. 60220-4 (Wash. 1994).

<sup>181</sup> See *Heller*, 554 U.S. at 595 (“There seems to us no doubt, on the basis of both text and history, that the Second Amendment conferred an individual right to keep and bear arms.”).

<sup>182</sup> See 8 U.S.C.A. § 1439 (West) (“A person who has served honorably at any time in the armed forces of the United States for a period or periods aggregating one year . . . may be naturalized without having resided, continuously immediately preceding the date of filing such person’s application, in the United States for at least five years . . .”); See also *Who Must Register Chart*, Selective Service System (Dec. 4, 2011), <http://www.sss.gov/PDFs/WhoMustRegisterChart.pdf> (showing that the Selective Service Act requires that virtually all male citizens and aliens, even those who are undocumented, must register for the United States draft upon their eighteenth birthday.).

<sup>183</sup> Adam Winkler, *Scrutinizing the Second Amendment*, 105 MICH. L. REV. 683, 717 (2007).

<sup>184</sup> *Id.*



scrutiny review,”<sup>185</sup> courts will now be required to examine the stereotypes of undocumented residents that led to the passage of such gun laws and see if they have any basis in reality.<sup>186</sup> For some at least, an objective look at facts and statistics may yield a surprisingly fresh perspective on immigration in the United States today. To give just one example, studies have shown that native-born Americans are significantly more likely to be incarcerated than those born abroad, including those who migrate here illegally.<sup>187</sup> A court, when presented with such statistics, may find that the public safety justification for the firearm ban for undocumented residents no longer carries as much force.

#### IV. CONCLUSION

There are primarily two lines of decisions in recent court holdings denying undocumented residents gun rights. The first type of decision presumes that *Heller* decided that the Second Amendment applies only to United States citizens, and anyone outside of the group could not be counted as a member of “the people.”<sup>188</sup> The second type presumes that § 922(g) is constitutional as a “longstanding prohibition” that is a “presumptively lawful regulatory measure[] . . . .”<sup>189</sup> Some decisions, like the recent Fifth Circuit case of *United States v. Portillo-Munoz*, employ both philosophies. Neither approach is correct.

The Supreme Court’s landmark decision in *Heller*, to be sure, represented a “dramatic upheaval in the law.”<sup>190</sup> *Heller* did, in fact, as the dissent predicted, “throw into doubt the constitutionality of gun laws throughout the United States.”<sup>191</sup> What it did not do, however, was strip away the rights of noncitizens for the purposes of the Second Amendment (as well as the identically-worded First and Fourth

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<sup>185</sup> *United States v. Chester*, 628 F.3d 673, 680 (4th Cir. 2010).

<sup>186</sup> See, e.g., Pratheepan Gulasekaram, *‘The People’ of the Second Amendment: Citizenship and the Right to Bear Arms*, 85 N.Y.U. L. REV. 1521, 1527 (2010) (“showcas[ing] the ways in which citizenship restrictions in the firearms context have operated as a proxy for racial discrimination, helped construct sinister versions of the foreign ‘other’ unfit to wield arms, and contributed to the indeterminacy of citizenship’s content.”).

<sup>187</sup> See, e.g., Brief for Defendant at \*1 n. 1, *United States v. Solis-Gonzalez*, 2008 WL 4539663 (W.D.N.C. Sept. 26, 2008) (referencing Ruben G. Rumbaut & Walter A. Ewing, *The Myth of Immigrant Criminality and the Paradox of Assimilation: Incarceration Rates among Native and Foreign-Born Men* (Immigration Policy Center, Spring 2007) (“In contrast to felons and those previously found to be seriously mentally ill, persons “illegally or unlawfully in the United States” are no more likely than persons legally in the United States to commit violent crimes.”)).

<sup>188</sup> See, e.g., *Portillo-Munoz*, 643 F.3d at 442.

<sup>189</sup> *Heller*, 554 U.S. at 626–27.

<sup>190</sup> *Id.* at 639 (Stevens, J., dissenting).

<sup>191</sup> *Id.* at 722 (Breyer, J., dissenting).

Amendments).<sup>192</sup> Though critics have suggested that this may represent Justice Scalia's ulterior motive in the *Heller* decision,<sup>193</sup> courts should not fashion such a broad holding out of a few words of dicta. Despite the *Portillo-Munoz* court's erroneous interpretation, the Supreme Court has not overruled the *Verdugo-Urquidez* "sufficient connections" holding. The *Verdugo-Urquidez* standard therefore remains the primary test of who will be counted among "the people" of the Constitution.

Nevertheless, any constitutional right, fundamental or otherwise, may still have reasonable restrictions imposed upon it.<sup>194</sup> The *Heller* decision commands that, for better or worse, gun control laws must now pass some higher level of scrutiny than was previously applied.<sup>195</sup> Courts should continue to uphold some restrictions in U.S.C. §922(g), such as those that prevent former felons from owning firearms as being substantially related to an important government purpose. Indeed, courts should tighten restrictions when they are found not to be doing enough to support public safety.<sup>196</sup> For other restrictions, such as those that prevent undocumented residents from owning firearms solely because of their

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<sup>192</sup> *Id.* at 580, incorrectly citing *Verdugo-Urquidez*, 494 U.S. at 265 ("What is more, in all six other provisions of the Constitution that mention 'the people,' the term unambiguously refers to all members of the *political* community, not an unspecified subset. As we said in *United States v. Verdugo-Urquidez* . . . '[T]he people' seems to have been a term of art employed in select parts of the Constitution .... [that] 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.") (emphasis added).

<sup>193</sup> See Gulasekaram, *supra* fn. 188 at 1536 ("Second, Scalia's formulation of "the people" in *Heller* contradicts, while purporting to affirm, *Verdugo-Urquidez*'s definition. Citing *Verdugo-Urquidez*, the *Heller* majority suggests that it adopts that opinion's understanding that 'the people' meant 'all members of the political community.' This misquotation of the prior opinion appears to be a sleight of hand intended to constrict the constitutional definition of 'the people.' Reformulating membership with a 'political' rather than a 'national' lens is significant because the former implies only those with political rights – e.g., voting, public office – while the latter is malleable, potentially including all who believe in the ideals of, and are connected to, the nation."); see also Charles Sullivan, Professor, Seton Hall Law, *Hidden Legacies of the Supreme Court's 2010-2011 Employment Decisions* (Oct. 24, 2011) ("For every big juicy worm Scalia gives you, he always hides a hook in his opinions.").

<sup>194</sup> See, e.g., *United States v. Vongxay*, 594 F.3d 1111, 1117 (9th Cir. 2010) (citing *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) ("[G]overnment may impose reasonable restrictions on the time, place, or manner of protected speech . . .").

<sup>195</sup> *Heller*, 554 U.S. at 628–29.

<sup>196</sup> See, e.g., Michael Luo, *Felons Finding It Easy to Regain Gun Rights*, N.Y. TIMES, Nov. 13, 2011, [http://www.nytimes.com/2011/11/14/us/felons-finding-it-easy-to-regain-gun-rights.html?\\_r=1&ref=us](http://www.nytimes.com/2011/11/14/us/felons-finding-it-easy-to-regain-gun-rights.html?_r=1&ref=us) ("Yet every year, thousands of felons across the country have those rights reinstated, often with little or no review. In several states, they include people convicted of violent crimes, including first-degree murder and manslaughter, an examination by The New York Times has found.").



status, courts may have a more difficult time establishing the relationship between the group and the “fundamental” right at stake.<sup>197</sup>

The Supreme Court once noted that “[t]he legislative history [of the firearms act] . . . supports the view that Congress sought to rule broadly to keep guns out of the hands of those who have demonstrated that ‘they may not be trusted to possess a firearm without becoming a threat to society.’”<sup>198</sup> Twenty-five years later, when we read stories in the newspaper about new state laws that are “intended to drive illegal immigrants from the state by making every aspect of their life difficult,”<sup>199</sup> we begin to appreciate that maybe the question we should be asking is not “Are undocumented residents a threat to our society,” but instead, “Is our society becoming a threat to them?”<sup>200</sup>

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<sup>197</sup> McDonald v. City of Chicago, 130 S. Ct. 3020, 3042 (2010).

<sup>198</sup> Scarborough v. United States, 431 U.S. 563, 572 (1977).

<sup>199</sup> Campbell Robertson, *Critics See ‘Chilling Effect’ in Alabama Immigration Law*, N.Y. TIMES, Oct. 27, 2011, [http://www.nytimes.com/2011/10/28/us/alabama-immigration-laws-critics-question-target.html?\\_r=1&src=recg](http://www.nytimes.com/2011/10/28/us/alabama-immigration-laws-critics-question-target.html?_r=1&src=recg). (“The champions of Alabama’s far-reaching immigration law have said that it is intended to drive illegal immigrants from the state by making every aspect of their life difficult.”).

<sup>200</sup> See, e.g., *The Twilight Zone: The Monsters Are Due on Maple Street* (CBS television broadcast Mar. 4, 1960) (“There are weapons that are simply thoughts, attitudes, prejudices, to be found only in the minds of men. For the record, prejudices can kill and suspicion can destroy . . .”).

