

5-1-2013

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Blair, Matthew Whitman, "Constitutional Cheap Shots: Targeting Undocumented Residents With the Second Amendment" (2013).
Law School Student Scholarship. 331.
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Constitutional Cheap Shots: Targeting Undocumented Residents With the Second Amendment

Matthew Blair¹

I. Introduction

*Illegal aliens are those who ... are likely to maintain no permanent address in this country, elude detection through an assumed identity, and—already living outside the law—resort to illegal activities to maintain a livelihood 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.*²

In June 2011, the Fifth Circuit Court of Appeals, motivated apparently at least in part by this fear of ninja-like noncitizen assassins, ruled that undocumented residents lack Second Amendment rights under the federal Constitution. Although the 1986 amendments to the federal Omnibus Crime Control Act denied undocumented residents the right to bear arms³, this ruling nevertheless broke new ground in the federal circuits by virtue of the way that it arrived at its conclusion. Circuit Judge Garwood's majority opinion upheld the constitutionality of 18 U.S.C. Sec. 922(g)(5) by declaring that undocumented residents are not to be considered "people" for the purposes of the Second Amendment.⁴ Though undoubtedly certain court watchers will

¹ J.D., 2013, Seton Hall University School of Law; B.A., 2007, College of William and Mary. I would like to thank Professor John Wefing in advance for his certification that this paper meets the Advanced Writing Requirement. I would also like to thank the Academy.

² *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).

³ *See* 18 U.S.C.A. § 922 (West); *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.")

⁴ *Portillo-Munoz*, 643 F.3d at 442 (5th Cir. 2011).

consider this ruling to have some net positive effect on American society, this Note suggests that the decision in *United States v. Portillo-Munoz* has misinterpreted the recent guidance of the United States Supreme Court regarding gun rights, and that this confusion will open up the door to further uncertainty of the constitutional rights of undocumented persons in the United States. This Note will argue for the necessity of resolving that uncertainty.

II. Background

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.⁵ The police officers found a .22 caliber handgun in his vehicle, and a dollar bill with a white powdery substance inside the folds.⁶ Portillo-Munoz admitted to being a citizen of Mexico who was illegally present in the United States. He was arrested and charged with unlawfully carrying a weapon and for possession of a controlled substance.⁷ Prior to this arrest, Portillo-Munoz had obtained the gun to help him protect the chickens on the ranch from coyotes.⁸ He was sentenced to ten months’ imprisonment, followed by three years of supervised release.⁹

On appeal, Portillo argued that his conviction under 18 U.S.C. § 922(g)(5), a federal gun law, violated his right under the Second Amendment.¹⁰ The United States Code provision states that it is “unlawful for any person ... who, being an alien ... illegally or unlawfully in the United

⁵ *Id.* at 438.

⁶ *Id.* at 438.

⁷ *Id.* at 438.

⁸ *Id.* at 439.

⁹ *Id.* at 439.

¹⁰ *United States v. Portillo-Munoz*, 643 F.3d 437, 439 (5th Cir. 2011).

States ... to ... possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.”¹¹ Portillo argued that this law conflicts with the Second Amendment, 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.”¹² Portillo further argued that, despite his illegal status, he should count as a member of “the people” in constitutional parlance.¹³ He argued that the Supreme Court had in the past defined the concept of “people” to include more than just the nation’s citizenry¹⁴, and that the Fifth Circuit itself had previously employed a broader test to determine what “people” were due the Fourth Amendment’s similarly-worded protection against unreasonable searches and seizures.¹⁵

As a matter of first impression in the federal circuits, the Fifth Circuit Court of Appeals upheld the constitutionality of § 922(g)(5), the provision of the law which was applicable to noncitizens present in the country illegally.¹⁶ The court based its holding primarily on the recent Supreme Court case *District of Columbia v. Heller*¹⁷, which held that the Second Amendment “conferred an individual right to keep and bear arms,” independent from a person’s involvement in a militia. Justice Scalia, writing for the majority in *Heller*, stated: “And whatever else it leaves to future evaluation, it surely elevates above all other interests the right of law-abiding,

¹¹ 18 U.S.C. Sec. 922(g)(5).

¹² U.S. CONST. amend. II.

¹³ Brief for Petitioner at 10, *United States v. Portillo-Munoz*, 643 F.3d 437, 439 (5th Cir. 2011)(No. No. 11-10086).

¹⁴ *Id.* at 12.

¹⁵ *Id.* at 11.

¹⁶ *Portillo-Munoz*, 643 F.3d at 442.

¹⁷ *District of Columbia v. Heller*, 554 U.S. 570, 595 (2008).

responsible citizens to use arms in defense of hearth and home.”¹⁸ However, while the effect of the *Heller* decision was to overrule certain gun restrictions in the District of Columbia, the Court took care to confine the scope of its decision to those who would have been denied firearms prior to its holding.¹⁹ 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.”²⁰ In a footnote to this statement, the Court added that those were identified “only as examples” and that the “list does not purport to be exhaustive.”²¹

The Fifth Circuit Court of Appeals held that, based on the recent *Heller* decision, any Second Amendment rights now available to American citizens should remain foreclosed to undocumented residents like Portillo-Munoz.²² The court specifically stated that the “language in *Heller* invalidates Portillo's attempt to extend the protections of the Second Amendment to undocumented residents. Undocumented residents are not ‘law-abiding, responsible citizens’ or ‘members of the political community.’”²³ The court stated that the *Heller* decision, in addition to affirming the Second Amendment as an individual right, also had the effect of reinterpreting the

¹⁸ *Id.* at 635.

¹⁹ *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.”

²⁰ *Id.* at 626-27.

²¹ *Id.* at n. 26.

²² *See Portillo-Munoz*, 643 F.3d at 440.

²³ *Id.* at 440, *citing Heller*, 554 U.S. at 644.

meaning of the phrase “the people,” at least for purposes of the Second Amendment.²⁴ The Court of Appeals acknowledged that the Supreme Court’s prior interpretation of the word “people” in the context of the Fourth Amendment²⁵ had “indicated that the same analysis would extend to the text of the Second Amendment.”²⁶ Nevertheless, the court declined to analogize the identical wording of the two amendments, instead declaring, “The Second Amendment grants an affirmative right to keep and bear arms, while the Fourth Amendment is at its core a protective right against abuses by the government.”²⁷ Based on this perception of a dichotomy between the two amendments, as well as its citizen-focused interpretation of the *Heller* decision, the Fifth Circuit Court of Appeals refused to apply the broader definition of “the people” that was embraced by the most on-point Supreme Court case, *United States v. Verdugo-Urquidez*.²⁸

The majority in *United States v. Verdugo-Urquidez* held that the Fourth Amendment’s protection against unreasonable searches and seizures is not implicated by a search that occurs outside of the nation’s borders and targets a nonresident alien.²⁹ In this case, the Drug Enforcement Agency arrested a Mexican citizen who was believed to be a leader of a large and violent narcotrafficking operation.³⁰ Verdugo-Urquidez was arrested in his own country by Mexican police officers, and transported to California, where he was arrested by United States

²⁴ *Id.* at 440.

²⁵ 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”).

²⁶ *Portillo-Munoz*, 643 F.3d at 440.

²⁷ *Id.* at 440.

²⁸ *Id.* at 440.

²⁹ *United States v. Verdugo-Urquidez*, 494 U.S. 259, 275 (1990).

³⁰ *Id.* at 262.

marshals and held for trial.³¹ 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.³²

The majority of the Supreme Court found that Verdugo-Urquidez did not qualify as one of “the people” protected by the “Fourth Amendment [nor] the First and Second Amendments.”³³ However, a plurality of the Court did not make that determination based solely on the defendant’s want of United States citizenship; rather, the Court stated that he could not be considered one of “the people” because he was not part 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.”³⁴ Justice Kennedy concurred in the result, but expressed dissatisfaction that the majority was focusing on the defendant’s status, and not the government’s conduct.³⁵ However, the majority did not seem eager to apply that test to aliens who reside in the country illegally, and in fact, seemed to back away from prior case law that had assumed that illegally-residing aliens would have Fourth Amendment rights.³⁶ Nevertheless, having just propounded a test based on sufficient connections, the Court was unwilling to carve out a special exception for illegally-residing aliens in the United States who in many cases may have been

³¹ *Id.* at 262.

³² *Id.* at 262–63.

³³ *Id.* at 265.

³⁴ *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990).

³⁵ *See id.* at 276 (“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.”)(Kennedy, J., concurring).

³⁶ *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.”)

able to show sufficient connections to the country. In the end, the Court neither affirmatively granted the Fourth Amendment right to undocumented residents, nor did it categorically bar them from the constitutional provision.³⁷

Twenty-one years later, the Fifth Circuit Court of Appeals in *Portillo-Munoz* interpreted the *Heller* decision as clarifying the *Verdugo-Urquidez* standard of “sufficient connection” in regard to undocumented residents.³⁸ 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.³⁹ However, the *Portillo-Munoz* court interpreted *Heller* as closing the door to any claims brought by undocumented United States residents. Though *Heller* quotes verbatim 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,”⁴⁰ Justice Scalia on the same page paraphrases the quote when he restates that “the people”, as a term of art, “unambiguously refers to all members of the political community, not an unspecified subset.”⁴¹ 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

³⁷ *Id.* at 272-3. (“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.”)

³⁸ *Portillo-Munoz*, 643 F.3d at 440.

³⁹ See for example *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 Organisation*, 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).

⁴⁰ *Heller*, 554 U.S. at 580, *quoting Verdugo-Urquidez*, 494 U.S. at 265.

⁴¹ *Id.* at 580.

States.⁴² This limitation on the sufficient connections test, coupled with the Supreme Court's reference in *Heller* to citizens⁴³, foreclosed any previously-held possibility that Mr. Portillo-Munoz is a member of "the people" for purposes of either the Second or Fourth Amendment.

III. Analysis

Although the Fifth Circuit Court of Appeals has now held that undocumented residents lack Second Amendment rights based on the *Heller* decision, a closer reading of *Heller* shows that it does not support that proposition. The judgment that aliens residing in the country illegally should not have access to firearms is not ~~a~~^{an} reasonable proposition. However, any decision that results in that disallowance must be the product of careful weighing of the relevant government and societal interests at stake. It cannot be the result of simply a blanket policy of excluding all rights and privileges to those who lack documentation in our country. And 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.

A. The text of *Heller* does not support a narrower reading of "the people"

The Fifth Circuit court emphasized the importance of the language in *Heller*, and points to two examples in the *Heller* decision in which the word choice used rules out undocumented

⁴² 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.").

⁴³ 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.'"

residents.⁴⁴ Specifically, the court points to the Scalia majority's use of the phrases "law-abiding, responsible citizens"⁴⁵ and "members of the political community"⁴⁶ to establish the proposition that, according to *Heller*, a person cannot be a member of "the people" unless he is also a citizen. The Fifth Circuit court reinforced this idea by concluding: "Aliens who enter or remain in this country illegally and without authorization are not Americans as that word is commonly understood."⁴⁷

The *Portillo-Munoz* majority offers no further guidelines on who is "commonly understood" to be an American. Nor does it offer any textual support for this declaration, leaving the skeptical reader with a sneaking suspicion that the common understanding is common only to the opinions of three circuit judges. One could presume that the judges are referring to those who have United States citizenship. However, the phrases from *Heller* that the majority cites do not simply state that the person who qualifies as a member must be simply 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"⁴⁸, it is hard to translate the other two characteristics into workable tests for who should be allowed a gun. "Responsible" is a highly

⁴⁴ *Portillo-Munoz*, 643 F.3d at 440.

⁴⁵ 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.'"

⁴⁶ 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."

⁴⁷ *Portillo-Munoz*, 643 F.3d at 440.

⁴⁸ 18 U.S.C. § 922(g)(5).

subjective characteristic, and is also not necessarily correlated with gun ownership at all.⁴⁹

Similarly, no one contends that being a member of a political community, i.e., voting, should be one of the determinants for gun access. So then why are courts so quick to conflate citizenship with Second Amendment rights?

The other major problem with equating just a few words with a new constitutional rule is that words are often ambiguous. The Oxford English Dictionary, for example, defines “citizen” in its first definition as “an inhabitant of a city or (often) of a town; esp. one possessing civic rights and privileges, a burgess or freeman of a city”; then 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.”⁵⁰ Only then does the dictionary, in its second definition, turn to what the *Portillo-Munoz* majority emphasizes is the correct interpretation: “A member of a state, an enfranchised inhabitant of a country, as opposed to an alien....”⁵¹ The distinction between “citizen” meaning “person who possesses United States citizenship” and “citizen” meaning “everyday person” should not come as a surprise to anyone who is accustomed to reading bombastic Supreme Court decisions⁵², especially those written by

⁴⁹ 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).

⁵⁰ OXFORD ENGLISH DICTIONARY 249 (2d. ed. 1989).

⁵¹ OXFORD ENGLISH DICTIONARY 250 (2d. ed. 1989).

⁵² 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).

Justice Scalia.⁵³ The word “citizen” may sometimes resonate with more patriotism and grandiosity than its simpler, yet more accurate counterpart, “person.” However, that 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*⁵⁴, for example, Justice Scalia states, “This 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.”⁵⁵ One who performs even a cursory survey of Justice Scalia’s past majority opinions is sure to find that this overbroad use of “citizen” is not an uncommon turn of the phrase.⁵⁶ Patriotically-spirited as it may be, it is not to be taken literally as a constitutional test.

⁵³ See e.g. 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/>.

⁵⁴ 505 U.S. 1003 (1992).

⁵⁵ *Id.* at 1027 (emphasis added).

⁵⁶ See e.g. *Brown v. Entm’t Merchants Ass’n*, 131 S. Ct. 2729, 2755, 180 L. Ed. 2d 708 (2011) (“The Republic would require virtuous *citizens*, which necessitated proper training from childhood.”); *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 scheduled flight abroad.”); *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.”); *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”); *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.”); *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*.”); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 592 (1992) (“Similarly, [petitioners’] 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.”);

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 at one point 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.”⁵⁷ If we use the strict reading of “citizen” that the Fifth Circuit requires, then the statement then reads: “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”⁵⁸), one cannot escape the impression that Justice Scalia has used the word “citizen” for the purpose of rhetorical flourish at least once during his opinion. A similar example can be found where the opinion states: “Thus, 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.”⁵⁹ Again, Justice Scalia

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.”); 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.”); 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*.”)(emphases added)

⁵⁷ *Heller*, 554 U.S. at 634.

⁵⁸ See D.C. Code § 7-2507.06: “A person who ... possesses a pistol, or firearm that could otherwise be registered, shall be fined not more than \$1,000 or imprisoned....”

⁵⁹ *Heller*, 554 U.S. at 595.

could not have intended 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.⁶⁰

Even if we assume that the *Heller* Court intended for the language in its opinion to be taken literally, we still encounter logistical problems. Assuming for the sake of argument that *Heller* actually does hold that ~~those~~^{those} only 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 of which Portillo-Munoz ran afoul. The Code provision states that it is “unlawful for any person ... who, being an alien ... illegally or unlawfully in the United States ... to ... possess ... any firearm or ammunition....”⁶¹ If *Heller* restricts guns to United States citizens, and § 922(g)(5) allows guns to any alien who is not in the country illegally, then the two in conjunction have created a twilight zone of gun legality for the nation’s 12.5 million legal permanent residents (those immigrants who are lawfully in the country but do not have citizenship).⁶² Far from being hypothetical, this issue has already come up multiple times in federal court, and for the concerned legal permanent resident who may or may not have now committed a felony under this holding, this uncertainty can spell out the difference between deportation and eventual full citizenship rights.⁶³

⁶⁰ 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.”).

⁶¹ 18 U.S.C. § 922(g)(5),

⁶² 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.

⁶³ 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.*

B. The text of *Heller* is not a constitutional test for noncitizens

The Fifth Circuit Court of Appeals is the first federal appellate level court to review the constitutionality of § 922(g)(5), pertaining to aliens unlawfully in the country.⁶⁴ A number of district courts have already upheld § 922(g)(5) as constitutional post-*Heller*.⁶⁵ The primary rationale in these cases has been split into two camps: those courts that have upheld the disallowance of alien gun rights based on the presumed constitutionality of § 922(g)(5)⁶⁶, and those courts that have upheld the disallowance by holding that undocumented residents are not members of “the people” of the Second Amendment.⁶⁷ The Fifth Circuit Court of Appeals based its holding on the latter reasoning, which misconstrues precedent and creates a much more precarious constitutional position for undocumented residents in the Fifth Circuit.

Brissett, 720 F. Supp. 90, 91 (S.D. Tex. 1989)(holding alien whose application for legalization was pending at the time he purchased firearm could not be prosecuted under § 922(g)(5)).

⁶⁴ *Portillo-Munoz*, 643 F.3d at 439.

⁶⁵ See *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).

⁶⁶ 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.”)

⁶⁷ 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.”)

The constitutional rights afforded to noncitizens both today and in the history of the United States can be described as murky at best.⁶⁸ However, a brief summary can still establish why *Heller* did not establish a new constitutional test.

The Supreme Court has stated for more than a century that it will grant great deference to acts of Congress in the immigration sphere⁶⁹ in what has come to be referred to as the “plenary power doctrine.” At the same time, the Court has also made it clear that it will still consider itself competent to weigh in on some of the more fundamental constitutional issues involving noncitizens in the United States.⁷⁰ Since 1886, the Supreme Court has recognized both that noncitizens do have due process rights under the Fourteen Amendment and that the judiciary has authority to rule on those claims.⁷¹ In recent years, the Supreme Court has continued to expand the applicability of due process claims. In *Plyler v. Doe*⁷², the Court overturned a Texas law that barred undocumented children from attending public schools. Again ruling on the paramount

⁶⁸ 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.”).

⁶⁹ 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.”) .

⁷⁰ 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.”).

⁷¹ 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...”).

⁷² *Plyler v. Doe*, 457 U.S. 202, 207 (1982).

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.”⁷³ The Brennan majority vindicated the principle that, in addition to the traditional due process guarantees to all persons inside the United States, the equal protection clause would also provide constitutional safeguards to a person regardless of their immigration status.⁷⁴ The majority pressed forward, also 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.⁷⁵

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 states⁷⁶, the Fourteenth Amendment has also served as a vehicle to afford noncitizens other constitutional protections.⁷⁷ For example, the Supreme Court held more than a half-

⁷³ *Id.* at 210.

⁷⁴ *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.”).

⁷⁵ *Plyler v. Doe*, 457 U.S. at 212, *citing* *Yick Wo*, 118 U.S. at 369.

⁷⁶ *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 guarantees of the Bill of Rights deemed to be fundamental and thereby makes those guarantees applicable to the states.”).

⁷⁷ *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

century ago that noncitizens have free speech rights under the First Amendment.⁷⁸ Noncitizens have also been historically protected by the Fourth Amendment. In *I.N.S. v. Lopez-Mendoza*⁷⁹, the Supreme Court considered whether the exclusionary rule was required to correct Fourth Amendment violations in deportation proceedings. While the Court ultimately held that the Fourth Amendment remedy was unnecessary because it was not a criminal trial, it decided the case explicitly under the impression that aliens possess Fourth Amendment rights.⁸⁰ The Court specifically stated: “Important 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.” Far from being a groundbreaking holding, the case merely reaffirmed the strong undercurrent 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.⁸¹ The right attaches even when the person is

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.”).

⁷⁸ *See* *Bridges v. Wixon*, 326 U.S. 135, 148 (1945) (“Freedom of speech and of press is accorded aliens residing in this country.”).

⁷⁹ *I.N.S. v. Lopez-Mendoza*, 468 U.S. 1032, 1046 (1984).

⁸⁰ *See id.* at 1046 (emphasis added).

⁸¹ *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.”); *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.”)(Douglas, J., dissenting); *See* *Au Yi Lau v. U.S. Immigration & Naturalization Serv.*, 445 F.2d 217, 223 (D.C. Cir. 1971)(“Since aliens in this country are sheltered by the Fourth Amendment in common with citizens, such a reading

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."⁸²

However, in 1990, the Supreme Court's decision in *Verdugo-Urquidez*, demanded a reexamination of its past holdings regarding noncitizens and the Fourth Amendment. It can be seen as representing both a step forward and a step back for undocumented residents seeking constitutional parity with United States citizens. On one hand, it did clearly establish a definition of "the people" for the purposes of the Fourth Amendment, as well as the First and Second Amendments.⁸³ The Court stated, without mentioning any citizenship requirement, that "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."⁸⁴ The Court further held that *Verdugo-Urquidez* was not a member of the "people" because as an alien who had not come here willingly, he had "no previous significant voluntary connection with the United States...."⁸⁵ Therefore, the Fourth Amendment did not apply to him.

However, the Court refused to acknowledge the inescapable conclusion that, under its new holding, an undocumented resident could establish a Fourth Amendment right provided that

of the Congressional mandate must be controlled by the constitutional standards governing similar detentions made by other law enforcement officials...."; *See Matter of Sandoval*, 17 I. & N. Dec. 70 (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.").

⁸² *United States v. Barbera*, 514 F.2d 294, 296 (2d Cir. 1975).

⁸³ *See Verdugo-Urquidez*, 494 U.S. at 265.

⁸⁴ *Id.* at 265.

⁸⁵ *Id.* at 271.

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 earlier⁸⁶, which presumed that undocumented residents could have violable Fourth Amendment rights did not in fact decide whether the Fourth Amendment could even apply to the undocumented residents. The Court stated that even though “a majority of Justices assumed that the Fourth Amendment applied to undocumented residents in the United States ... our decision did not expressly address the proposition gleaned by the court below.”⁸⁷ This clever bit of revisionist jurisprudence allowed the Court to reinvent the wheel, and produce the substantial connections test, which would subsequently govern the decision of who could now be afforded the protections of the Fourth Amendment.

The previous section is intended to support the proposition that noncitizens have traditionally been covered by many of the provisions of the Constitution. The Due Process Clause, which applies in full force even to those in the country illegally⁸⁸, has incorporated the majority of the Bill of Rights to the States, and most recently the Second Amendment itself.⁸⁹

⁸⁶ *INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984).

⁸⁷ *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.”)

⁸⁸ 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).

⁸⁹ *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

Because of this concern over the fundamentality of due process rights, the Supreme Court has afforded noncitizens other rights like the First and Fourth Amendments.⁹⁰ 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 lumped 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”⁹¹ without distinction. Absent any other textual distinction, “the people” in one amendment surely means the “the people”, as both commonsense and the Supreme Court recognize. And that the definition of “the people”, the Court went on, “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.”

Therefore, if the *Portillo-Muniz* court were correct in interpreting *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 did not simply take away the Second Amendment from noncitizens, but also the longstanding protections of the First and Fourth Amendments. The Supreme Court clearly did not intend for such wide-reaching implications for so many

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*.”).

⁹⁰ See e.g. *INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984); *Bridges v. Wixon*, 326 U.S. 135, 148 (1945).

⁹¹ *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990).

constitutional rights. So then what is the appropriate test for determining who has Second Amendment rights?

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

Today the Second Amendment's right to bear arms is foreclosed to an undocumented resident. Some courts considering the constitutionality of § 922(g)(5) have upheld the federal law as a presumptively valid exercise of congressional power.⁹² Some, like the *Portillo-Munoz* court, have gone 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.⁹³ However, neither route 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.⁹⁴ The second line of thinking, involving a perversion of the word "people" is equally unsatisfactory because of its incongruence with past 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: the "sufficient connection" test developed by the *Verdugo-Urquidez* plurality; the "governed" test of the *Verdugo-Urquidez* dissent; the test of the "active vs. passive right", espoused by the *Portillo-Munoz* court; and the intermediate scrutiny test. Two propositions are

⁹² See *United States v. Solis-Gonzalez*, No. 3:08-CR-145-MR-DCK-1, 2008 WL 4539663 (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 *United States v. Wells* (rejecting Commerce Clause argument); *United States v. Bostic* (rejecting Tenth Amendment argument); *United States v. Mitchell* (rejecting Fifth Amendment Due Process claim) (citations omitted).

⁹³ See *United States v. Yanez-Vasquez*, No. 09-40056-01-SAC, 2010 WL 411112 (D. Kan. Jan. 28, 2010) ("Plaintiff has not shown that illegal aliens are among 'the people' contemplated by the Second Amendment.").

⁹⁴ See e.g. *Scarborough v. U. S.*, 431 U.S. 563, 572 (1977).

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 propositions⁹⁵, neither are viable constitutional positions today in light of both longstanding⁹⁶ and more recent⁹⁷ cases.

The remaining tests will be examined based on their consistency and fairness. Although this author does subscribe to a preferred test, the following Section is not written to advance any one point of view. Instead, it exists to show that there are a wide variety of approaches available which take into account the complex nature of one's rights and status in society, and go beyond the notion of constitutional rights as a zero-sum game, with citizens alone taking all the winnings.

A. Sufficient connections test- *Verdugo-Urquidez* plurality

In deciding that a Mexican citizen would not have any Fourth Amendment protection in his home outside the United States, the *Verdugo-Urquidez* plurality held that a person is only a member of the people if he can be classified as being a member of "a class of persons who are

⁹⁵ 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.").

⁹⁶ See e.g. *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886).

⁹⁷ See e.g. *Dist. of Columbia v. Heller*, 554 U.S. 570, 595 (2008).

part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community.”⁹⁸ The Court also suggested that this test would apply with equal force to other similarly-worded amendments, including the Second Amendment.⁹⁹

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 properly viewed as a member of the community. This standard reflects the rational view that not all aliens are created equal, and that an undocumented alien who lives in the United States, holds a job, and pays Social Security taxes for any amount of time should not be automatically grouped with a drug runner who has not voluntarily entered the country.¹⁰⁰ The former promotes some benefit to the community¹⁰¹; the other certainly does not. This view reflects a realistic notion of the complexity of immigration issues today.¹⁰² It is also in line with the legislative

⁹⁸ *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990).

⁹⁹ *Id.* at 265. (“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 ...”).

¹⁰⁰ Won Kidane, *The Alienage Spectrum Disorder: The Bill of Rights from Chinese Exclusion to Guantanamo*, 20 *Berkeley La Raza L.J.* 89 (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.”).

¹⁰¹ See e.g. Eduardo Porter, *Illegal Immigrants Are Bolstering Social Security With Billions*. N.Y. TIMES. April 5, 2005, <http://www.nytimes.com/2005/04/05/business/05immigration.html?ex=1270353600&en=78c87ac4641dc383&ei=5090>.

¹⁰² See e.g. *Plyler v. Doe*, 457 U.S. 202, 219 (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.”).

approach to deportable aliens, which includes provisions to cancel an alien's removal from the country based on the attainment of certain ties.¹⁰³ It 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)¹⁰⁴, 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.

However, the sufficient connections test is not without its criticism. The dissenters in *Verdugo-Urquidez* assailed the uncertainty that inhered in the rule, stating: "The Court admits that "the people" extends beyond the citizenry, but leaves the precise contours of its "sufficient connection" test unclear." (Brennan, J., dissenting).¹⁰⁵ 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 someday deemed insufficient by a capricious judge. 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 them, this additional wrinkle in Fourth Amendment jurisprudence will only add to the unease produced

¹⁰³ 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.").

¹⁰⁴ See also 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.).

¹⁰⁵ See *id.* at 282.

by not knowing what course of action they can pursue when confronted with a suspect of ambiguous citizenship.¹⁰⁶

Other critics have argued that the sufficient connections test “created an expansive gray area”, which has led to inconsistent lower court rulings.¹⁰⁷ A brief look at a few examples of post-*Verdugo* cases will show 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 federal district court of Vermont ruled on the availability of the exclusionary rule for a Canadian citizen on a fraudulently-obtained visa arrested in a United States airport.¹⁰⁸ The court, granting in part the motion to suppress evidence that was the product of an illegal search, stated as a threshold issue 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 ...”¹⁰⁹ That case can be contrasted to the decision of a Texas appellate court which upheld the conviction of a Colombian national who had been unlawfully present in the United States for two

¹⁰⁶ 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.”).

¹⁰⁷ 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.”).

¹⁰⁸ *United States v. Tehrani*, 826 F. Supp. 789 (D. Vt. 1993) *aff'd*, 49 F.3d 54 (2d Cir. 1995).

¹⁰⁹ *Id.* at 793.

years.¹¹⁰ Although the court's *Verdugo* analysis was ultimately not dispositive, it still stated that he 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."¹¹¹

The Fifth Circuit Court of Appeals itself produced an important case- one cited in the *Portillo-Munoz* dissent in arguing that Portillo-Munoz was one of "the people."¹¹² In *Martinez-Aguero v. Gonzalez*, the court held that a Mexican citizen who crossed the border once a month had a Fourth Amendment right to pursue a remedy when she attempted to cross with a recently-invalidated visa.¹¹³ 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.'"¹¹⁴

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

¹¹⁰ *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).

¹¹¹ *Id.* at 143. ("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.").

¹¹² *Portillo-Munoz*, 643 F.3d at 445 (5th Cir. 2011).

¹¹³ *Martinez-Aguero v. Gonzalez*, 459 F.3d 618 (5th Cir. 2006).

¹¹⁴ *Id.* at 625. ("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.").

pretenses is a member of “the people”¹¹⁵, while a two-year resident is not.¹¹⁶ And 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, the voluntary presence- may have made this test too complex for lower courts to apply consistently.

B. “We the governed”- the test of the *Verdugo-Urquidez* dissent

The dissenters in *Verdugo-Urquidez*, Justices Brennan and Marshall, 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.”¹¹⁷ The dissent admonished the rest of the court that whenever agents of the United States government seeks to enforce American 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.”¹¹⁸ 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

¹¹⁵ *United States v. Tehrani*, 826 F. Supp. 789 (D. Vt. 1993) *aff’d*, 49 F.3d 54 (2d Cir. 1995).

¹¹⁶ *Torres v. State*, 818 S.W.2d 141, 143 (Tex. App. 1991).

¹¹⁷ *Verdugo-Urquidez*, 494 U.S. 259 at 284.

¹¹⁸ *Id.* at 284.

States. Whenever the authority of the United States tries to govern him, the defendant “become[s], quite literally, one of the governed.”¹¹⁹

Besides the clear advantage of simplicity and predictive value, there are other reasons to approve of “the governed” test of the dissent. At its most basic level, 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.¹²⁰ Perhaps it is the echo of the Golden Rule that rings true in the dissent’s statement: “If we expect aliens to obey our laws, aliens should be able to expect that we will obey our Constitution when we investigate, prosecute, and punish them.”¹²¹ 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 the history, arguing that the majority was missing the forest for the trees in suggesting that such a right so fundamental to the founding of the country should be read narrowly.¹²² Refusing to make a decision based solely on the social compact theory of the Constitution, Justice Brennan’s dissent (and Justice Kennedy’s concurrence)¹²³ instead stated: “Thus, the Framers of the Bill of Rights did not purport to ‘create’

¹¹⁹ *Id.* at 284.

¹²⁰ *Id.* at 286.

¹²¹ *Id.* at 284.

¹²² *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' fundamental conception of a Bill of Rights as a limitation on the Government's conduct with respect to all whom it seeks to govern.”).

¹²³ *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

rights. Rather, they designed the Bill of Rights to prohibit our Government from infringing rights and liberties presumed to be pre-existing.”¹²⁴ Ironically, this originalist focus, rejected by Justice Scalia in *Verdugo-Urquidez* for the Fourth Amendment, would twenty years later become his main selling point for striking down gun control laws when he stated: “... it has always been widely understood that the Second Amendment, like the First and Fourth Amendments, codified a pre-existing right. The very text of the Second Amendment implicitly recognizes the pre-existence of the right and declares only that it shall not be infringed.”¹²⁵

The major critique of the dissent’s “governed” rule is the refrain commonly delivered in response to such idealistic arguments- it is “impracticable.”¹²⁶ Justice Kennedy, for example, believed that the difficulties such as the “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”¹²⁷ would make the Fourth Amendment potentially much harder to comply with abroad. Justice Rehnquist, writing for the plurality, took an even more pragmatic approach: “For better or for worse, we live in a world of nation-states in which our Government must be able to functio[n] effectively in the company of sovereign nations.”¹²⁸ He continued: “Situations threatening to important American interests

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)).

¹²⁴ *Verdugo-Urquidez*, 494 U.S. 259 at 288.

¹²⁵ *Heller*, 554 U.S. at 592, further *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.”).

¹²⁶ *Verdugo-Urquidez*, 494 U.S. at 275 (Kennedy, J., concurring)(*citing* *Reid v. Covert*, 354 U.S. 1, 74 (1957)(Harlan, J., concurring)).

¹²⁷ *Id.* at 278.

¹²⁸ *Id.* at 274, *citing* *Perez v. Brownell*, 356 U.S. 44, 57 (1958).

may arise half-way around the globe, situations which in the view of the political branches of our Government require an American response with armed force.”¹²⁹ This point of view would take on heightened importance after the attacks of September 11th, as courts began to question just how much constitutional protection should be afforded when dealing with alleged terrorists.¹³⁰ In many cases, some protections of the Constitution were sacrificed to similar concerns of practicality.¹³¹

C. “Affirmative vs. passive right” test- *Portillo-Munoz* majority

The Fifth Circuit Court of Appeals, while still holding that the Fourth Amendment does not apply to undocumented residents¹³², 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” test¹³³, 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.¹³⁴ To shore up

¹²⁹ *Id.* at 274.

¹³⁰ 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.”).

¹³¹ See e.g. Tung Yin, “*Anything but Bush?*”: *The Obama Administration and Guantanamo Bay*, 34 HARV. J.L. & PUB. POL’Y 453 (2011)

¹³² *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.”).

¹³³ 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.

¹³⁴ 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.).

its interpretation of the Second Amendment, the majority stated: “...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.”¹³⁵ The court continued: “the purposes of the Second and the Fourth Amendment are different. The Second Amendment grants an affirmative right to keep and bear arms, while the Fourth Amendment is at its core a protective right against abuses by the government.”¹³⁶ 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.”¹³⁷ One may criticize the *Portillo-Munoz* court’s decision for its inconsistency. It says essentially: first, undocumented residents do not have Fourth Amendment rights or Second Amendment rights; but second, even if they do have Fourth Amendment rights, they do not have Second Amendment rights.

But how strong is its argument that there is a difference between affirmative and passive 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 your house. However, the *Portillo-Munoz* majority cites no support for this statement. In fact, this deceptively-simple statement comes from the Government’s brief, which argued: “The Fourth Amendment is a passive, or defensive right that protects the people against unreasonable searches and seizures. In contrast, the Second Amendment codifies an affirmative right to use arms. Accordingly, one cannot define the scope

¹³⁵ *Portillo-Munoz*, 643 F.3d at 440.

¹³⁶ *Id.* at 440-41.

¹³⁷ *Id.* at 441.

of the Second Amendment by analogy to the Fourth.”¹³⁸ For the first half of its proposition, the Government cites *Verdugo-Urquidez*¹³⁹; for the second half, it cites *Heller*’s focus on “law-abiding, responsible citizens”¹⁴⁰. However, when one searches for a reference to the “affirmative right” of the Second Amendment, one finds that it does not appear until much later, deep into the dissent of *Heller*. Justice Stevens, dissenting vigorously¹⁴¹ from the Court’s new vindication of the Second Amendment as a personal right, states, “by 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.”¹⁴² 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 is skating on thin ice whenever 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

¹³⁸ *Id.* at 9-10.

¹³⁹ *Id.* at 10, citing *Verdugo-Urquidez*, 494 U.S. at 266. (“the purpose of the Fourth Amendment was to protect the people of the United States against arbitrary action by their own Government.”)

¹⁴⁰ *Id.* at 10, citing *Heller*, 554 U.S. at 635.

¹⁴¹ See *Heller*, 554 U.S. at 678, 666, 648, 639, 652 (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.”)(Stevens, J., dissenting).

¹⁴² *Id.* at 646.

majority opinion that the lower court is purporting to affirm.¹⁴³ The Fifth Circuit uses the *Heller* majority opinion¹⁴⁴ for the ruling, and the antithetical dissent¹⁴⁵ for the rationale.

Thus the primary disadvantage to the “affirmative versus passive right” test is that it apparently lacks any sort of precedential support, even in its own circuit.¹⁴⁶ On this basis alone, it seems unlikely that any other court would use such a rule. A judge who used such a rule in a future determination on some other provision of the Bill of Rights would be vulnerable to criticism that he or she was ruling subjectively. If the Supreme Court has repeatedly established that the concurrently-passed amendments in the Bill of Rights refer to the same people¹⁴⁷, 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 irreconcilable with the idea of a Constitution as creating “a government of laws, and not of men.”¹⁴⁸ The “affirmative versus passive right” test also opens up the door to the possibility that future courts could strip away more rights from noncitizens simply by designating them as “affirmative,” and not “passive.”

¹⁴³ 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 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, *citing the same*.

¹⁴⁴ *Id.* 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.”).

¹⁴⁵ *Heller*, 554 U.S. at 645 (“it 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’ share of the divided sovereignty created by the Constitution.”)(Stevens, J., dissenting).

¹⁴⁶ 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.”).

¹⁴⁷ See *Heller*, 554 U.S. at 579; *United States v. Verdugo-Urquidez*, 494 U.S. at 265.

¹⁴⁸ *Marbury v. Madison*, 5 U.S. 137, 163 (1803).

For example, due process, though guaranteed to noncitizens since 1886¹⁴⁹, 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.¹⁵⁰ Rather than go into too much review of the standards applied by courts when determining if legislation is constitutional¹⁵¹, it suffices to say that the *Heller* majority pointedly refused to decide on 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.”¹⁵² In a footnote, Justice Scalia added that rational basis would be especially inappropriate as a standard of review, as the gun law was

¹⁴⁹ 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.”).

¹⁵⁰ 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?”).

¹⁵¹ For a more thorough discussion on the standards of review and how they have been applied to gun laws after *Heller*, See e.g. 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.”).

¹⁵² *Dist. of Columbia v. Heller*, 554 U.S. 570, 628–29.

within the scope of the Bill of Rights.¹⁵³ The dissent criticized the majority for this purposeful omission: “How 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.”¹⁵⁴ Justice Breyer, in dissent, instead argues for a balancing-test to weigh the interests of the government against the constitutionally protected right of the people.¹⁵⁵ However, the majority firmly rejects such a test as inconsistent with the Court’s past treatment of constitutional rights.¹⁵⁶

As a result, lower courts have been inconsistent in determining what level of review is now appropriate when ruling on the constitutionality of §922(g) post-*Heller*.¹⁵⁷ Some courts have continued to apply rational basis, finding that *Heller* “specifically stated the particular

¹⁵³ *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.”)(referencing *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 ...”).

¹⁵⁴ *Id.* at 687–88 (Breyer, J., dissenting).

¹⁵⁵ *Id.* at 689–90 (“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.”)(Breyer, J., dissenting).

¹⁵⁶ *Id.* at 634 (“We know of no other enumerated constitutional right whose core protection has been subjected to a freestanding “interest-balancing” approach.”).

¹⁵⁷ *Portillo-Munoz*, 643 F.3d at 443 (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)(Dennis, J., concurring in part and dissenting in part).

regulations were constitutional, as regarding felons and the mentally ill, § 922(g)(1) and (4), or via analogy to the so called ‘presumptively lawful regulations.’”¹⁵⁸ Nevertheless, the most common approach has been to uphold different provisions of the federal gun law under some form of intermediate scrutiny.¹⁵⁹ 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.”¹⁶⁰

The primary advantage to using such a test is that it takes real account of the complexity of the current 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 laws were of a much different scale. 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 other governmental interests which might

¹⁵⁸ *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).

¹⁵⁹ *Id.* at 443, 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.* In *United States v. Chester*, 628 F.3d 673 (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.” *Id.* at 683 (internal quotation marks and citation omitted).

¹⁶⁰ *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).

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 citizenThe alien who has not declared an intention to become a citizen has no obligation to defend the State or the community.”¹⁶¹ Such a statement is of course no longer true, both in light of Heller’s new pronouncement of individual (and not militia) gun ownership¹⁶², as well as the strong encouragement of noncitizens to serve in the United States Armed Forces.¹⁶³

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.”¹⁶⁴ For example: “If 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.”¹⁶⁵ If we analogize this example to the case of noncitizens, we find such a law exists in the form of § 922(g)(5), and courts have routinely upheld it as rational. But because under intermediate scrutiny “the government bears the burden

¹⁶¹ Brief for Respondent at 9-10, *State v. Hernandez-Mercado*, 879 P.2d 283 (Wash. 1994), No. 60220-4.

¹⁶² *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.”).

¹⁶³ *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 18th birthday.).

¹⁶⁴ Adam Winkler, *Scrutinizing the Second Amendment*, 105 MICH. L. REV. 683, 717 (2007).

¹⁶⁵ *Id.* at 717.

of justifying its regulation in the context of heightened scrutiny review,”¹⁶⁶ courts will now be required to examine those stereotypes of undocumented residents that led to the passage of such gun laws and see if they have any basis in reality.¹⁶⁷ For some at least, an objective look at facts and statistics may yield a surprise and a new 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.¹⁶⁸ 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.”¹⁶⁹ The second type presumes that U.S.C. §922(g) is constitutional as a “longstanding prohibition” that is a “presumptively lawful

¹⁶⁶ *United States v. Chester*, 628 F.3d 673, 680 (4th Cir. 2010).

¹⁶⁷ 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.”).

¹⁶⁸ See e.g. *United States v. Solis-Gonzalez*, No. 3:08-CR-145-MR-DCK-1, 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.”)

¹⁶⁹ See e.g. *Portillo-Munoz*, 643 F.3d at 442 (5th Cir. 2011).

regulatory measure[]....”¹⁷⁰ Some decisions, like the recent Fifth Circuit Court of Appeals case of *United States v. Portillo-Muniz*, employ both philosophies. However, neither approach is correct.

The Supreme Court’s landmark decision, to be sure, represented a “dramatic upheaval in the law.”¹⁷¹ It did, in fact, as the dissent predicted, “throw into doubt the constitutionality of gun laws throughout the United States.”¹⁷² However, what it did not do was strip away the rights of noncitizens for the purposes of the Second Amendment (as well as the identically-worded First and Fourth Amendments).¹⁷³ Though some have suggested that this may represent Justice Scalia’s ulterior motive in the *Heller* decision,¹⁷⁴ such a broad and momentous holding cannot and should not be read into a few words of dicta. Despite the *Portillo-Munoz* court’s erroneous interpretation, the Supreme Court has not overruled the *Verdugo-Urquidez* “sufficient

¹⁷⁰ *Heller*, 554 U.S. at 626–27.

¹⁷¹ *Id.* at 639 (Stevens, J., dissenting).

¹⁷² *Id.* at 722 (Breyer, J., dissenting).

¹⁷³ *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).

¹⁷⁴ See Gulasekaram, *supra* fn. 172 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.”).

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.¹⁷⁵ The *Heller* decision commands that, for better or worse, gun control laws must now pass some higher level of scrutiny than was previously applied.¹⁷⁶ Courts should continue to uphold some restrictions in U.S.C. §922(g), such as that which prevents former felons from owning firearms as being substantially related to an important government purpose. Indeed, some restrictions should in fact be tightened, when they are found not to be doing enough to support public safety.¹⁷⁷ For other restrictions, such as those that prevent undocumented residents from owning firearms solely because of their status, courts may have a more difficult time establishing the relationship between the group and the “fundamental”¹⁷⁸ right at stake.

The Supreme Court once noted: “ The 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

¹⁷⁵ 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....”).

¹⁷⁶ *Heller*, 554 U.S. at 626–27.

¹⁷⁷ 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. (“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.”).

¹⁷⁸ *McDonald v. City of Chicago, Ill.*, 130 S. Ct. 3020, 3042 (2010).

demonstrated that they may not be trusted to possess a firearm without becoming a threat to society.”¹⁷⁹ 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”¹⁸⁰ 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?”¹⁸¹

¹⁷⁹ *Scarborough v. U. S.*, 431 U.S. 563, 572 (1977).

¹⁸⁰ See e.g. 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. (“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.”).

¹⁸¹ See *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 ”)