

Second Amendment Rights Come Second to Citizenship: Why Illegal Immigrants Are Not Included in “The People” of the Second Amendment

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I. INTRODUCTION

On December 26, 2018, California police corporal Ronil Singh was shot to death while conducting a traffic stop after he suspected the driver was driving under the influence.¹ The driver, 32-year-old Gustavo Perez Arriaga,² an illegal immigrant³ and citizen of Mexico, was formally charged with his murder two days later.⁴ Officer Singh's death sparked another national debate in the already controversial arena of illegal immigration. More specifically, it highlighted a constitutional concern: whether illegal immigrants have a Second Amendment right to bear arms.

The Second Amendment states, "A well regulated Militia, being necessary to the security of a free State, the right of *the people* to keep and bear Arms, shall not be infringed."⁵ The phrase "the people" appears throughout the Constitution—specifically, five times in the Bill of Rights.⁶ The First, Second, and Fourth Amendments refer to "the right of the people," while the Ninth and Tenth reserve to "the people" non-enumerated rights and powers. The circuits are split on the scope

1. See Alex Dobuzinskis, *Police Arrest Illegal Immigrant Suspected in California Officer's Killing*, REUTERS (Dec. 28, 2018, 2:19 PM), <https://www.reuters.com/article/us-california-crime/police-arrest-illegal-immigrant-suspected-in-california-officers-killing-idUSKCN1OR1IV>.

2. Perez Arriaga admitted "that his real name is Paulo Virgen Mendoza, but authorities [are] still referring to him as Perez Arriaga." See *Suspect Accused of Killing Cop Makes First Court Appearance, Does Not Enter Plea*, CBS NEWS (Jan. 2, 2019, 10:52 PM), <https://www.cbsnews.com/news/gustavo-perez-arriaga-court-appearance-today-charged-with-ronil-singh-shooting-death-2019-01-02/>. The complaint lists three aliases for him. *Id.*

3. This Note will predominantly use the term "illegal immigrant(s)," rather than "illegal alien(s)." However, "alien" is the precise language of 18 U.S.C. § 922(g)(5)(A) (2012). See *infra* note 10.

4. See Emily Shapiro, *Suspected Killer of California Officer Ronil Singh Had 7 Alleged Accomplices*, ABC NEWS (Dec. 28, 2018, 2:13 PM), <https://abcnews.go.com/US/man-accused-killing-northern-california-police-officer-ronil/story?id=60048463> ("Arriaga, who worked as a farm laborer, has two prior DUI arrests and is affiliated with the Sureños street gang, authorities said.").

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

6. See U.S. CONST. amends. I, II, IV, IX, X.

of “the people,” including the phrase’s use within the Second Amendment.⁷

Courts have been forced to consider this question when illegal immigrants challenge the validity of 18 U.S.C. § 922(g)(5) under the Second Amendment.⁸ Section 922(g) is a federal prohibition on the possession of firearms for certain classes of people.⁹ Section 922(g)(5)(A) reads:

It shall be unlawful for any person—who, being an alien—is illegally or unlawfully in the United States . . . to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.¹⁰

When an illegal immigrant argues that 18 U.S.C. § 922(g)(5)(A) impermissibly infringes on his or her constitutional rights, a court must answer two questions. First, a court must decide whether the Second Amendment applies to the defendant, an immigrant illegally residing in the United States. Second, in light of the first question, the court typically must determine whether 18 U.S.C. § 922(g)(5) is constitutional. When faced with the first question, the Fourth, Fifth, and Eighth Circuits have held that illegal immigrants are not included in “the people” of the Second Amendment.¹¹ Conversely, the Seventh Circuit has

7. *See* *United States v. Meza-Rodriguez*, 798 F.3d 664, 672 n.1 (7th Cir. 2015) (acknowledging in a footnote that this case’s holding creates a split between the Seventh Circuit and the Fourth, Fifth, and Eighth Circuits).

8. While subsection A of the statute makes it a crime for any illegal alien in the United States to possess a firearm, subsection B also makes it unlawful for any alien admitted into the United States under a non-immigrant visa to possess a firearm. This Note will not discuss subsection B.

9. Some of the groups of people included in the statute are convicted felons, fugitives from justice, unlawful users of controlled substances, the mentally ill, and illegal aliens.

10. 18 U.S.C. § 922(g)(5)(A) (2018).

11. *See* *United States v. Carpio-Leon*, 701 F.3d 974, 981 (4th Cir. 2012); *United States v. Portillo-Munoz*, 643 F.3d 437, 442 (5th Cir. 2011); *United States v. Flores*, 663 F.3d 1022, 1023 (8th Cir. 2011) (*per curiam*).

held that illegal immigrants are included in “the people.”¹² To date, the Ninth and Tenth Circuits have declined to answer.¹³ All, however, have upheld the constitutionality of the federal statute, thereby answering yes to the second question.¹⁴

Notably, the Seventh Circuit applied the test that the Supreme Court articulated in *United States v. Verdugo-Urquidez* to determine whether a non-citizen could invoke the Fourth Amendment.¹⁵ According to the *Verdugo-Urquidez* Court, in order for immigrants to be included in “the people” of the Fourth Amendment and thus receive extraterritorial application of those rights, the test requires proof that they have “developed sufficient connection” to the United States and “accepted some societal obligations” to be considered part of the “national community.”¹⁶ In addition to applying this “sufficient connection” test to illegal immigrants asserting Second Amendment rights, the Seventh Circuit simultaneously upheld 18 U.S.C. § 922(g)(5) because of its relation to the important government interest of keeping firearms out of the hands of those who are difficult to track and who have an interest in eluding law enforcement.¹⁷

This Note argues that illegal immigrants should not be included in “the people” of the Second Amendment based on the audience the Framers intended to protect as well as the important interest that Congress and society have in protecting the public. This Note asserts that the “sufficient connection” test is not appropriate for the context of the Second Amendment and that the Seventh Circuit’s application of it is inconsistent and flawed. More specifically, the “sufficient connection” test provides illegal immigrants who are sufficiently connected to the

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

13. See *United States v. Torres*, 911 F.3d 1253, 1261 (9th Cir. 2019); *United States v. Huitron-Guizar*, 678 F.3d 1164, 1168–69 (10th Cir. 2012).

14. See *Torres*, 911 F.3d at 1264; *Meza-Rodriguez*, 798 F.3d at 673; *Huitron-Guizar*, 678 F.3d at 1170; *Carpio-Leon*, 701 F.3d at 983; *Portillo-Munoz*, 643 F.3d at 442; *Flores*, 663 F.3d at 1023.

15. *Meza-Rodriguez*, 798 F.3d at 670–72.

16. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265, 273 (1990). The language originally used by the Supreme Court in *Verdugo-Urquidez* was “sufficient” connections. The Seventh Circuit and other lower courts thereafter used the words “sufficient” and “substantial” interchangeably. For purposes of consistency, this Note will use the term “sufficient.”

17. *Meza-Rodriguez*, 798 F.3d at 673.

United States with the right to bear arms while conversely upholding the federal statute that completely bans illegal immigrants from possessing firearms due to their disconnection from American society.

Part II of this Note evaluates key Supreme Court decisions relating to the development of both legal and illegal immigrants' constitutional rights, particularly the effect of *United States v. Verdugo-Urquidez*. This Part also analyzes the history and background of the Second Amendment, Congress's power to limit this right through statutes such as 18 U.S.C. § 922(g), and the impact on lower courts by the Supreme Court's decision in *District of Columbia v. Heller*. Part III discusses the circuit split regarding illegal immigrants' right to bear arms and how courts have arrived at varying conclusions. Part IV argues, in light of the Seventh Circuit's decision in *Meza-Rodriguez*, that the "sufficient connection" test should only apply to the Fourth Amendment. Finally, Part IV asserts that the correct way to interpret *District of Columbia v. Heller* and historical evidence is to exclude illegal immigrants from the definition of "the people" under the Second Amendment. Part V briefly concludes.

II. HISTORICAL BACKGROUND OF IMMIGRANTS' CONSTITUTIONAL RIGHTS AND THE SECOND AMENDMENT

The question of whether the Second Amendment guarantees illegal immigrants the right to bear arms is particularly challenging because it combines two unsettled and controversial issues in constitutional law: (1) the extent to which illegal immigrants are afforded constitutional rights and (2) the scope of the general right to bear arms under the Second Amendment.¹⁸ An estimated 10.5 million illegal immigrants were living in the United States as of 2017.¹⁹ In the last

18. Both immigration and gun policy were ranked among the top five most important issues to registered voters during midterm voting this past election cycle. See Frank Newport, *Top Issues for Voters: Healthcare, Economy, Immigration*, GALLUP (Nov. 2, 2018), <https://news.gallup.com/poll/244367/top-issues-voters-healthcare-economy-immigration.aspx>.

19. Jeffrey S. Passel, *Measuring Illegal Immigration: How Pew Research Center Counts Unauthorized Immigrants in the U.S.*, PEW RES. CTR. (July 12, 2019), <https://www.pewresearch.org/fact-tank/2019/07/12/how-pew-research-center-counts-unauthorized-immigrants-in-us/>.

twelve years—that is, post-*Heller*—the Second Amendment has received more judicial scrutiny than it had in the previous two hundred years.²⁰ Recognizing that the Second Amendment is a core, fundamental right, and interpreting it as an individual right rather than a collective one, presents the question of whether those 10.5 million illegal immigrants in the United States are also entitled to its protections.

A. Development of Immigrants' Constitutional Rights

The Supreme Court has repeatedly held that Congress may make laws applicable to immigrants that would otherwise be unconstitutional if applied to American citizens.²¹ However, the Court has also recognized that immigrants, whether here legally or illegally, are entitled to *some* protection under the U.S. Constitution.²² The Supreme Court determined as early as the 1890s that immigrants, even those here

20. See *The Supreme Court & the Second Amendment*, GIFFORDS L. CTR., <https://lawcenter.giffords.org/gun-laws/the-second-amendment/the-supreme-court-the-second-amendment/> (last visited Feb. 10, 2019) (detailing post-*Heller* litigation).

21. Congress's near plenary power over immigration enables it to adopt policies and pass numerous laws affecting illegal immigrants. That same power enables Congress to enact legislation that would otherwise run afoul of the Constitution if those same laws were applied to legal citizens. In *Mathews v. Diaz*, appellees were lawful resident aliens and challenged a law that limited Medicare Part B eligibility to aliens who had been admitted for permanent residence and had lived here for at least five years. 426 U.S. 67, 69–70 (1976). The Court held that “[n]either the overnight visitor, the unfriendly agent of a hostile foreign power, the resident diplomat, nor the illegal entrant, can advance even a colorable constitutional claim to a share in the bounty that a conscientious sovereign makes available to its own citizens and *some* of its guests.” *Id.* at 80 (emphasis added); see also *Demore v. Kim*, 538 U.S. 510, 522 (2003) (“[T]his Court has firmly and repeatedly endorsed the proposition that Congress may make rules as to aliens that would be unacceptable if applied to citizens.”).

22. See *Plyler v. Doe*, 457 U.S. 202, 210 (1982). Here, the Supreme Court asserted, “an alien is surely a ‘person’ in any ordinary sense of that term.” *Id.* The Court held that a Texas law which essentially barred illegal immigrant minors from attending public schools was invalid. *Id.* at 202. The Court noted that while public education is not a “right” granted by the Constitution, it is still vitally important. *Id.* at 221. Public education, from the perspective of American people, is “the primary vehicle for transmitting ‘the values on which our society rests.’” *Id.*

illegally, were afforded Fifth,²³ Sixth,²⁴ and Fourteenth²⁵ Amendment protections.²⁶ Yet, legislation, if targeted towards those with an illegal or unlawful status, can considerably limit those constitutional protections.²⁷

While the Court has extended constitutional protections to illegal immigrants under several amendments, it is the extension of rights and the test used under the Fourth Amendment that has influenced how some lower courts determine whether an illegal immigrant has Second Amendment rights. In *United States v. Verdugo-Urquidez*, the Court addressed whether the Fourth Amendment applied to a citizen and resident of Mexico where the place searched was located outside of the United States.²⁸ After the United States Government charged the de-

23. See *Wong Wing v. United States*, 163 U.S. 228, 238 (1896) (“Applying this reasoning to the [F]ifth and [S]ixth [A]mendments, it must be concluded that all persons within the territory of the United States are entitled to the protection guaranteed by those amendments, and that even aliens shall not be held to answer for a capital or other infamous crime, unless on a presentment or indictment of a grand jury, nor be deprived of life, liberty, or property without due process of law.”).

24. See *id.*

25. The Court’s decision in *Plyler v. Doe* reaffirmed that illegal aliens “have long been recognized as ‘persons’ guaranteed due process of law by the Fifth and Fourteenth Amendments.” 457 U.S. at 210 (citations omitted). The Court, however, limited illegal aliens’ protections by determining that they are not a “suspect class” warranting strict judicial scrutiny under the Equal Protection Clause of the Fourteenth Amendment because their undocumented status “is the product of voluntary action . . . [that] is itself a crime.” *Id.* at 219 n.19.

26. Other than textual differences, it is uncertain why the Supreme Court interprets “the people” differently depending on the amendments. See Note, *The Meaning(s) of “The People” in the Constitution*, 126 HARV. L. REV. 1078, 1088 (2013) (“The phrase ‘the people’ is not defined in the Constitution, nor is its meaning clear on its face. It might refer to citizens, or to all citizens and some noncitizens (such as those persons with substantial connections), or to everyone in the United States. Each of these interpretations has received at least some support from courts or individual Justices.”).

27. See *Plyler*, 457 U.S. at 220 (“Of course, undocumented status is not irrelevant to any proper legislative goal.”); see also Jennifer Paulson, *We the People: Analyzing the 7th Circuit’s Decision in United States v. Meza-Rodriguez*, 41 S. ILL. U. L.J. 163, 179 (2016) (discussing how *Plyler*’s holding allows Congress to limit certain rights of illegal immigrants through legislative efforts).

28. 494 U.S. 259, 261 (1990). The Fourth Amendment reads:

fendant with multiple narcotics-related charges, Mexican officers apprehended Verdugo-Urquidez at his home in Mexico and brought him to a U.S. Border Patrol station in California.²⁹ DEA agents, working alongside Mexican authorities, then searched Verdugo-Urquidez's properties in Mexico and obtained evidence that the Government sought to use against him at trial.³⁰ At trial, the defendant argued he was entitled to protection under the Fourth Amendment, and, therefore, the evidence obtained from the search of his homes was inadmissible because the DEA agents failed to obtain a search warrant.³¹ The Supreme Court disagreed, denying him any Fourth Amendment protection.³²

The *Verdugo-Urquidez* plurality noted that the term “the people” is a “term of art” used in parts of the Constitution.³³ More specifically, it stated: “[T]he people’ protected by the Fourth Amendment, and by the First and Second Amendments . . . refers to a class of persons who are part of a national community or who have otherwise developed *sufficient connection* with this country to be considered part of that

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

29. *See Verdugo-Urquidez*, 494 U.S. at 262. The United States Drug Enforcement Agency (DEA) believed Rene Martin Verdugo-Urquidez to be one of the leaders of a large, violent organization that smuggled narcotics into the United States. *Id.* Six months after obtaining a warrant for his arrest, he was apprehended in Mexico. *Id.*

30. *See id.* Following his arrest, DEA agents in Calexico, CA and in Mexico City received authorization from the Director General of the Mexican Federal Judicial Police to search the properties of the defendant. *Id.*

31. *Id.* at 263. “The District Court granted Verdugo-Urquidez’s motion to suppress evidence seized during the searches, concluding that the Fourth Amendment applied to the searches and that the DEA agents had failed to justify searching respondent’s premises without a warrant.” *Id.* “A divided panel of the Court of Appeals for the Ninth Circuit affirmed.” *Id.*

32. *See id.* at 261 (“The question presented by this case is whether the Fourth Amendment applies to the search and seizure by United States agents of property that is owned by a nonresident alien and located in a foreign country. We hold that it does not.”).

33. *Id.* at 265.

community.”³⁴ The Court noted that the defendant, a citizen and resident of Mexico, had “no voluntary attachment to the United States” and had accepted no societal obligations that might place him among “the people” of the Fourth Amendment.³⁵ He was lawfully, but involuntarily, present in the United States only a matter of days prior to the search of his home.³⁶ Additionally, the Court relied on historical data that showed that the amendment’s purpose was to safeguard “the people of the United States against arbitrary action by their own Government; it was never suggested that the provision was intended to restrain the actions of the Federal Government against aliens outside of the” country.³⁷

The Court’s “sufficient connection” test did not rule out the possibility of immigrants having Fourth Amendment rights, nor did it automatically include everyone in “the people” of the Fourth Amendment. It did, however, create a certain scenario in which non-citizens can be considered part of “the people” for purposes of the Fourth Amendment—when they become part of the national community or otherwise develop sufficient connection with the United States.³⁸ The Court also noted that its analysis was “by no means conclusive” and failed to define the precise contours of the “sufficient connection”

34. *Id.* (emphasis added). This exact language of the opinion will be used by lower courts and the Supreme Court again and again in subsequent decisions. It is important to note that by mentioning the similarity of “the people” in the First, Second, and Fourth Amendments, the Court created an opportunity for lower courts to incorrectly apply the “sufficient connection” test to more than just the Fourth Amendment.

35. *Id.* at 274–75. Additionally, the search itself did not even take place in the United States—the properties searched were located in Mexico. *Id.* at 262. The locations of both of his properties were in the Mexican state of Baja California in northern Mexico—specifically, Mexicali and San Felipe. *Id.*

36. *Id.* at 271–72.

37. *Id.* at 266.

38. See Jennifer Daskal, *The Un-Territoriality of Data*, 125 YALE L.J. 326, 340–41 (2015) (“*Verdugo-Urquidez* thus established a two-step decision tree. First, where does the search or seizure take place? If in the United States, the Fourth Amendment applies. If outside the United States, then turn to the question of identity: Is the target of the search or seizure a U.S. citizen or an alien with substantial voluntary connections to the United States? If yes, then the Fourth Amendment applies, and the test is one of reasonableness. If, on the other hand, the target is a noncitizen lacking substantial connections to the United States, the Fourth Amendment does not apply” (footnote omitted)).

test.³⁹ More importantly, the Court asserted that its ruling was not dispositive of how it might rule on a claim by illegal immigrants in the United States—as such a claim was not directly before them.⁴⁰

In sum, the Court has conclusively determined that illegal immigrants are afforded some constitutional rights. The Fifth and Sixth Amendments, for example, regulate procedure in criminal cases for any “person” or “accused,” which extends to illegal immigrants, and as described above, the Court has also guaranteed some limited Fourteenth Amendment rights.⁴¹ Immigrants are also potentially protected under the Fourth Amendment, although the Supreme Court has not explicitly held that the Fourth Amendment protects an immigrant who illegally entered and remained in the United States.⁴² Because the regulation of immigration is “a fundamental sovereign attribute exercised by the Government’s political departments,” the judiciary owes Congress great deference while being mindful of the constitutional protections illegal immigrants are afforded.⁴³

39. *Verdugo-Urquidez*, 494 U.S. at 265.

40. *See id.* at 272 (“Our statements . . . 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.”).

41. *See Plyler v. Doe*, 457 U.S. 202, 210 (1982); *Wong Wing v. United States*, 163 U.S. 228, 238 (1896).

42. *See Verdugo-Urquidez*, 494 U.S. at 272. The *Verdugo-Urquidez* Court criticized the appellate court’s reliance on one of its earlier decisions, *INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984). The Court wrote,

We cannot fault the Court of Appeals for placing some reliance on the case, but . . . [t]he 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

Verdugo-Urquidez, 494 U.S. at 272.

43. *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 210 (1953).

B. *Background of the Second Amendment, 18 U.S.C. § 922(g), and District of Columbia v. Heller*

The Second Amendment is another controversial area of law that has garnered increasing attention over the past decade.⁴⁴ A great deal has changed since the Second Amendment's adoption.⁴⁵ From the time of its ratification in 1791 through the nineteenth century, the Supreme Court addressed the meaning of the Second Amendment only three times.⁴⁶ Each time, the Court concluded that the Second Amendment granted the people a right to bear arms when partaking in militia-related activities.⁴⁷ This collective rights interpretation of the Second Amendment lasted for centuries until it came to a halt in 2008 when the

44. "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." U.S. CONST. amend. II. The debate over how to interpret the Second Amendment results in two competing sides. One favors the latter clause and reads it as creating an individual right to possess firearms. The other side, in contrast, emphasizes the beginning clause and asserts that it is only a right for purposes of service in the militia. See ERWIN CHERMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 956 (5th ed. 2015).

45. See Glenn Harlan Reynolds, *A Critical Guide to the Second Amendment*, 62 TENN. L. REV. 461, 461 (1995) ("Although the Second Amendment was almost completely ignored by the academic community for the first two centuries of its existence, the past several years have seen an explosion of scholarship."); see also Nelson Lund & Adam Winkler, *Common Interpretation: The Second Amendment*, CONST. CTR., <https://constitutioncenter.org/interactive-constitution/interpretation/amendment-ii/interps/99> (last visited Nov. 13, 2019) ("Modern debates about the Second Amendment have focused on whether it protects a private right of individuals to keep and bear arms, or a right that can be exercised only through militia organizations like the National Guard. This question, however, was not even raised until long after the Bill of Rights was adopted.").

46. In *United States v. Cruikshank*, 92 U.S. 542, 553 (1876), the Court held the Second Amendment was intended only to restrict the actions of the federal government and did not apply to citizens or states. In *Presser v. Illinois*, 116 U.S. 252, 265 (1886), the Court held the Second Amendment related to an individual's right to bear arms for the good of the United States, such as serving in the militia during times of need. In *United States v. Miller*, 307 U.S. 174, 178–79 (1939), the Court held that the purpose of the Second Amendment was to maintain effective state militias. The Court also discussed the Second Amendment in *Miller v. Texas*, 153 U.S. 535, 538 (1894); however, it refused to decide the claim because its powers of adjudication were limited to the review of errors assigned in the lower court.

47. See *supra* text accompanying note 46.

Court decided *District of Columbia v. Heller*.⁴⁸ From then on, the Court acknowledged that although one of the goals of the Framers when designing the Second Amendment was to secure state militias, the right to keep and bear arms was not limited to merely militia service.⁴⁹

In 2008, the seminal Supreme Court decision *District of Columbia v. Heller* finally spoke to an issue that had divided the country for decades. In *Heller*, Respondent challenged D.C.'s statute banning usable handguns in the home as a violation of the Second Amendment.⁵⁰ The Court went through an extensive historical analysis looking to the history of gun rights in England and the states before the Constitution's ratification, post-ratification commentary, pre-Civil War cases, and post-Civil War legislation.⁵¹ Relying heavily on historical sources, Justice Scalia, writing for the majority, determined that the Framers understood the Second Amendment to protect a right to bear arms for private purposes.⁵² When discussing the text of the Amendment itself, Justice Scalia distinguished the prefatory clause, concerning militias, from the operative clause, about the right to bear arms, and concluded that the former cannot negate the latter.⁵³ Through roughly forty-five pages of opinion, the majority held that the right to bear arms confers an individual right regardless of whether individuals were acting as part

48. 554 U.S. 570 (2008).

49. See *id.* at 584 (“From our review of founding-era sources, we conclude that . . . [i]n numerous instances, ‘bear arms’ was unambiguously used to refer to the carrying of weapons outside of an organized militia.”).

50. *Id.* at 575–76. The respondent, Dick Heller, was a special police officer who was allowed to carry a handgun while on duty. *Id.* at 575. He applied for a registration in order to keep his gun at home; however, the District refused to grant it. *Id.* He then filed a lawsuit against the District on Second Amendment grounds seeking, among other things, to enjoin the city from enforcing the bar on the registration of handguns. *Id.* at 575–76.

51. See *id.* at 598–602.

52. See ADAM WINKLER, *GUNFIGHT: THE BATTLE OVER THE RIGHT TO BEAR ARMS IN AMERICA* 280 (2011).

53. *Heller*, 554 U.S. at 577. Justice Scalia wrote, “The Second Amendment is naturally divided into two parts: its prefatory clause and its operative clause. The former does not limit the latter grammatically, but rather announces a purpose.” *Id.*

of a militia or rebellion, reasoning that “the inherent right of self-defense has been central to the Second Amendment right.”⁵⁴

However, Justice Scalia cautioned that “the right secured by the Second Amendment is not unlimited.”⁵⁵ The Court identified historical restraints that the founders imposed on the right to bear arms and some “presumptively lawful regulatory measures” already in place which would not violate the Second Amendment.⁵⁶ The Court stated, “[N]othing in our 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.”⁵⁷

As a result of *Heller*’s declaration and congressional attempts to restrict access to firearms, Second Amendment jurisprudence has exploded in the past decade and forced courts to consider the scope of the right and the level of scrutiny to apply when it is constitutionally challenged.⁵⁸ Following Justice Scalia’s non-exhaustive list of limitations

54. *Id.* at 628. In a 5-4 decision, the majority held that the right to bear arms belongs to “the people” as individuals regardless of whether they are acting as part of a militia or in a military capacity. *See id.* at 580–81. The reasoning in the opinion has been criticized as purporting to be “originalist” although reflecting a largely modern understanding of gun rights. *See WINKLER, supra* note 52, at 287 (“The primary justification for the right of individuals to bear arms, in Scalia’s view, is self-defense in the home. At the time of the founding, however, the primary justifications for it were to preserve the right of the people to throw off a tyrannical government, to serve in a militia for a national defense, or to go out into wilderness and hunt. Few, if any, arguments for the right rested on the ability to defend your home against a criminal attack. The right envisioned by the founders was anything but homebound.”).

55. *Heller*, 554 U.S. at 626.

56. *Id.* at 626–27 n.26. *See also WINKLER, supra* note 52, at 286–87 (“The founders did have gun control, so there are historical precedents one can look to in determining what types of gun control laws the founding generation thought to be consistent with the right to bear arms. At the time of the founding, laws required the armed citizenry to report with their guns to militia musters, where weapons would be inspected and the citizens trained. . . . The founders also imposed more severe limitations, including complete bans on gun ownership by free blacks, slaves, and political dissenters.”).

57. *Heller*, 554 U.S. at 626.

58. This Note will not discuss what approach courts should take when scrutinizing laws regarding firearms. However, the majority of federal appellate courts tend to apply intermediate scrutiny. *See Maria Stracqualursi, Undocumented Immigrants*

to the right to bear arms,⁵⁹ lower courts have adopted a two-step inquiry for any challenged law regulating the possession of firearms.⁶⁰ The first question asked is

whether the challenged law imposes a burden on conduct falling within the scope of the Second Amendment's guarantee. This historical inquiry seeks to determine whether the conduct at issue was understood to be within the scope of the right at the time of ratification. If it was not, then the challenged law is valid.⁶¹

Caught in the Crossfire: Resolving the Circuit Split on "The People" and The Applicable Level of Scrutiny for Second Amendment Challenges, 57 B.C. L. REV. 1447, 1477 (2016) ("Strict scrutiny is applied in cases in which a law restricts the core, fundamental right, whereas intermediate scrutiny is applied in cases restricting the general individual right."). When applying intermediate scrutiny, the government must have an important interest and the law must be substantially related to the interest. *See id.* at 1478. The First, Second, Third, Fourth, Fifth, Sixth, Seventh, Ninth, Tenth, and D.C. Circuits apply intermediate scrutiny in resolving Second Amendment challenges. *See e.g.*, *United States v. Carpio-Leon*, 701 F.3d 974, 976 (4th Cir. 2012) ("[T]he court ruled that §922(g)(5) survives intermediate scrutiny, the relevant standard, because '[g]iven Congress's legitimate concerns about the dangers potentially posed by individuals who have violated this country's immigration laws and either entered or remain present inside its borders illegally, §922(g)(5)(A) reasonably addresses the governmental objective of keeping firearms out of the possession of illegal aliens.'"). If a court were to go a step further and apply strict scrutiny to the statute, the government must have a compelling interest and the law must be narrowly-tailored to the interest. Stacqualursi, *supra* note 58, at 1459 n.74. Only a few district courts have called for application of strict scrutiny in Second Amendment challenges. *Id.* at 1460.

59. *Heller*, 554 U.S. at 627 n.26 ("We identify these presumptively lawful regulatory measures only as examples; our list does not purport to be exhaustive.").

60. *See, e.g.*, *United States v. Chovan*, 735 F.3d 1127, 1136 (9th Cir. 2013); *United States v. Greeno*, 679 F.3d 510, 518 (6th Cir. 2012); *Ezell v. City of Chicago*, 651 F.3d 684, 704 (7th Cir. 2011); *United States v. Chester*, 628 F.3d 673, 680 (4th Cir. 2010); *United States v. Marzarella*, 614 F.3d 85, 89 (3d Cir. 2010); *United States v. Reese*, 627 F.3d 792, 800–01 (10th Cir. 2010). Although those courts were dealing with individuals charged under other provisions of § 922 or under other firearm laws, the same analysis is applicable to possession by illegal immigrants under 18 U.S.C. § (g)(5) (2018).

61. *Carpio-Leon*, 701 F.3d at 977 (quoting *Chester*, 628 F.3d at 680) (internal quotation marks and citations omitted).

The second step of the two-part inquiry is only necessary if the regulation is found to actually burden conduct that falls within the Second Amendment's scope of protections.⁶² This step involves "applying an appropriate form of means-end scrutiny."⁶³ *Heller*, however, left unanswered what standard of review to apply.⁶⁴

One federal restriction in particular, 18 U.S.C. § 922(g), has received a number of challenges during this era of post-*Heller* litigation.⁶⁵ Section 922(g) prevents particular groups of people—including immigrants illegally or unlawfully in the United States—from possessing firearms.⁶⁶ Congress enacted the statute with the broad purpose

62. *See Chester*, 628 F.3d at 680. The courts that do not believe illegal immigrants are included in "the people" of the Second Amendment would not, therefore, need to do the second step of this inquiry as they would fall outside of the scope of the right.

63. *Id.* ("If the challenged regulation burdens conduct that was within the scope of the Second Amendment as historically understood, then we move to the second step of applying an appropriate form of means-end scrutiny.>").

64. The Court did infer in a footnote that the rational basis test would be an inappropriate level of scrutiny to apply to Second Amendment challenges. *Heller*, 554 U.S. at 628 n.27. The Court stated, "If all that was required to overcome the right to keep and bear arms was a rational basis, the Second Amendment would be redundant with the separate constitutional prohibitions on irrational laws, and would have no effect." *Id.*; *see also* WINKLER, *supra* note 52, at 278 ("Scalia brushed aside all of the arguments offered by [Respondent's lawyers and Petitioner's lawyers] about the standard of review that should be applied to judge the constitutionality of gun laws. The Court didn't embrace the hard-to-satisfy strict-scrutiny standard Nor did the Court embrace the more lenient tests Scalia's opinion for the majority declined to commit to any set, determinative standard for courts to apply to future cases challenging gun control.>").

65. There are quite a few gun-related federal criminal offenses and § 922 of the Criminal Code is where a lot are found. Section 922(g) also targets other groups of people, in addition to illegal aliens, including felons and the mentally ill. *See* 18 U.S.C. § 922(g) (2018). But of all federally prosecuted gun violations, the third most frequently prosecuted under is § 922(g)(5)(A). *See Federal Weapons Prosecutions Rise for Third Consecutive Year*, TRAC REPS. (Nov. 29, 2017), <http://trac.syr.edu/tracreports/crim/492/>. With a total of 226 individuals prosecuted under it in fiscal year 2017, this provision accounted for 3.3% of gun prosecutions during the last five years. *Id.*

66. The nine targeted groups under § 922(g) include: (1) convicted felons; (2) fugitives from justice; (3) unlawful users of controlled substances; (4) those who have

of “keep[ing] guns out of the hands of presumptively risky people” and to “suppress[] armed violence.”⁶⁷ Congress found that those targeted groups are “a burden on commerce or threat affecting the free flow of commerce,” “a threat to the safety of the President of the United States and Vice President of the United States,” and “a threat to the continued and effective operation of the Government of the United States and of the government of each State guaranteed by Article IV of the Constitution.”⁶⁸ Additionally, a principal purpose of the law was to “make it possible to keep firearms out of the hands of those not legally entitled to possess them because of age, criminal background, or incompetency and to assist law enforcement authorities in the States and their subdivisions in combating the increasing prevalence of crime.”⁶⁹

Although *Heller* never specifically mentioned one’s unlawful or lawful status in the country, Justice Scalia began the opinion by noting that there is “a strong presumption that the Second Amendment right is exercised individually and belongs to all *Americans*.”⁷⁰ More notably, the Court stated that the provisions in the Constitution that contain the

been adjudicated as a mental defective or who have been committed to a mental institution; (5) aliens illegally or unlawfully in the U.S.; (6) those who have been discharged from the Armed Forces under dishonorable conditions; (7) those who have renounced their U.S. citizenship; (8) those subject to a court order from stalking, harassing, or threatening an intimate partner or child; and (9) those convicted in any court of a crime of domestic violence. 18 U.S.C. § 922(g).

67. *United States v. Yancey*, 621 F.3d 681, 683–84 (7th Cir. 2010) (charging a defendant under § 922(g)(3), the statute which makes it a felony for a person who is an unlawful user of or addicted to any controlled substance to possess a gun); *see also* S. REP. NO. 90-1501, at 22 (1968) (“The ready availability, that is, the ease with which any person can anonymously acquire firearms (including criminals, juveniles without the consent of their parents or guardians, narcotic addicts, mental defectives, armed groups who would supplant duly constituted public authorities, and others whose possession of firearms is similarly contrary to the public interest) is a matter of serious national concern.”).

68. Omnibus Crime Control and Safe Streets Act, Pub. L. No. 90-351, § 1201, 82 Stat. 197 (1968).

69. S. REP. NO. 90-1501, at 22 (1968).

70. *District of Columbia v. Heller*, 554 U.S. 570, 581 (2008) (emphasis added).

phrase “the people” “unambiguously refers to all members of the political community”⁷¹ and to “law-abiding, responsible citizens.”⁷² Consequently, lower courts have continued to uphold laws such as 18 U.S.C. § 922(g)(5) based on the language of the *Heller* Court⁷³ and mindful of Congress’s broad power to make laws governing immigrants that would otherwise be unconstitutional if applied to American citizens.⁷⁴

III. CIRCUIT SPLIT

The text of the Second Amendment clearly states that the right “to keep and bear Arms” belongs to “the people.”⁷⁵ Far from clear, however, is the scope of who is included in “the people.” This is precisely where courts have differed, culminating in a circuit split.⁷⁶ When addressing the issue of 18 U.S.C. § 922(g)(5)’s constitutionality, courts have relied on *United States v. Verdugo-Urquidez* and *District of Columbia v. Heller* to varying degrees in reaching their conclusions.

On one side of the split, the Fifth and Eighth Circuits held illegal immigrants are not included in “the people.”⁷⁷ Drawing on the language of *Heller*, these courts found that illegal immigrants are not

71. *Id.* at 580.

72. *Id.* at 635. Forty years before *Heller* was decided, when Congress enacted 18 U.S.C. § 922(g), the Senate Report even noted that “[i]t is not the purpose of the title to place any undue or unnecessary restrictions or burdens on *responsible, law-abiding citizens* with respect to acquisition, possession . . . personal possession, or any other lawful activity.” S. REP. NO. 90-1501, at 22 (1968) (emphasis added).

73. *See* *United States v. Solis-Gonzalez*, No. 3:08-CR-145-MR, 2008 WL 4539663, at *2 (W.D. N.C. Sept. 26, 2008) (“Since *Heller*, other courts have faced similar challenges to 18 U.S.C. § 922(g) and have consistently concluded that *Heller* ‘did not disturb or implicate the constitutionality of § 922(g), and was not intended to open the door to a raft of Second Amendment challenges to § 922(g) convictions.’” (quoting *United States v. White*, No. 07-00361-WS, 2008 WL 3211298, at *1 (S.D. Ala. Aug. 6, 2008))).

74. *See* *Demore v. Kim*, 538 U.S. 510, 521–22 (2003).

75. U.S. CONST. amend. II.

76. *See* *United States v. Meza-Rodriguez*, 798 F.3d 664, 672 n.1 (7th Cir. 2015) (acknowledging in a footnote that this case’s holding creates a split between the Seventh Circuit and the Fourth, Fifth, and Eighth Circuits).

77. *See infra* Section III.A.

“law-abiding, responsible citizens” or “members of the political community.”⁷⁸ Further, the Fifth Circuit explained that although “the people” is used in both the Second and Fourth Amendments, that fact does not “mandate[] a holding” that they both cover the same groups of people.⁷⁹ Similarly, the Fourth Circuit reached the same conclusion but with differing justifications.⁸⁰ The Fourth Circuit emphasized *Heller*’s specific usage of the terms “law-abiding,” “Americans,” and “citizenship” and employed the same historical analysis that *Heller* used—to conclude that the right to bear arms is an individual right—to reach its conclusion that illegal immigrants are not part of “the people.”⁸¹ On the other side of the split, the Seventh Circuit relied more on the *Verdugo-Urquidez* opinion to reach its conclusion that illegal immigrants are protected under the Second Amendment.⁸² Accordingly, the court adopted the “sufficient connection” test to determine if an unlawful immigrant fell within the scope of “the people.”⁸³ While all of these circuits have ultimately upheld the federal statute, the method and reasoning employed by each court to reach that conclusion varies.

A. *The Fifth Circuit (United States v. Portillo-Munoz)*

The Fifth Circuit was the first circuit to answer the question of whether illegal immigrants fall within “the people” under the Second Amendment.⁸⁴ Defendant Portillo-Munoz, a native Mexican who had been residing in the United States for a year and a half, was arrested for unlawfully carrying a weapon and possession of a controlled substance.⁸⁵ He was found “spinning around” on a motorcycle at the Rodeo Arena with a gun on his waistband and a dollar bill with white powder in his pocket.⁸⁶ At the time of arrest, he was working as a ranch hand and stated the firearm was used to protect the chickens at the ranch

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

79. *Id.*

80. *See infra* Section III.B.

81. *United States v. Carpio-Leon*, 701 F.3d 974, 978–79 (4th Cir. 2012).

82. *See infra* Section III.D.

83. *United States v. Meza-Rodriguez*, 798 F.3d 664, 670–71 (7th Cir. 2015).

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

85. *Id.* at 438–39.

86. *Id.*

from coyotes.⁸⁷ The defendant had no prior criminal history, arrests, or previous encounters with immigration officials.⁸⁸

Portillo-Munoz challenged his conviction by asserting that § 922(g)(5)(A) infringed on his right to bear arms.⁸⁹ In the Fifth Circuit’s holding that illegal immigrants are not part of “the people” under the Second Amendment, the court referred to a portion of the *Heller* opinion that stated the Second Amendment “surely elevates above all other interests the right of law-abiding, responsible citizens” and applies to all members of the “political community.”⁹⁰ The court reiterated *Heller*’s beginning presumption that the Second Amendment is a right that “belongs to all Americans.”⁹¹ Because the defendant did not qualify as a law-abiding, responsible citizen; a member of the political community; or an American, he was not to be included in the definition of “the people.”⁹²

Portillo-Munoz, relying on *Verdugo-Urquidez*, argued that he had sufficient connection with the United States to be considered part of “the people.”⁹³ The Fifth Circuit responded by noting that the Supreme Court has never extended the Fourth Amendment to a native and citizen of another country who illegally entered and lived in the United States.⁹⁴ Further, the court reasoned that, even if there was precedent that illegal immigrants are afforded Fourth Amendment rights, the use of “the people” in both the Second and Fourth Amendments does not “mandate[] a holding that the two amendments cover exactly the same groups of people.”⁹⁵ The court went on to draw a distinction between

87. *Id.* at 439.

88. *Id.*

89. *Id.*

90. *Id.* at 440 (quoting *District of Columbia v. Heller*, 554 U.S. 570, 635, 580 (2008)).

91. *Id.*

92. *See id.*

93. *See id.* The defendant asserted that “his presence in the U.S. was voluntary, that he had been present in the United States for some time prior to his arrest, and that he ‘assumed voluntary social obligations like paying rent and financially supporting his girlfriend and her daughter.’ He also noted that he was entrusted with caring for his employer’s livestock.” Brief for Appellant at 14–15, *United States v. Portillo-Munoz*, 643 F.3d 437 (5th Cir. 2011) (No. 11-10086), 2011 WL 2115675, at *14–15.

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

95. *Id.*

the Second Amendment and the Fourth Amendment by describing the former as an affirmative right and the latter as a protective right.⁹⁶ It concluded that an affirmative right, such as the Second Amendment, would reasonably “extend[] to fewer groups [of people] than would a protective right.”⁹⁷

96. See *id.* at 441 (“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. Attempts to *precisely* analogize the scope of these two amendments is misguided, and we find it reasonable that an affirmative right would be extended to fewer groups than would a protective right.”). This argument regarding the Second Amendment being an affirmative right versus the Fourth Amendment granting a protective right has been criticized for departing from the holding in *Heller* by “limit[ing] the constitutional rights’ applicability according to the types of rights they grant rather than by the definition of ‘the people’ shared by the constitutional amendments employing the term.” Mathilda McGee-Tubb, *Sometimes You’re In, Sometimes You’re Out: Undocumented Immigrants and the Fifth Circuit’s Definition of “The People”* in *United States v. Portillo-Munoz*, 53 B.C. L. REV. 75, 85 (2012); see also D. McNair Nichols Jr., *Guns and Alienage: Correcting a Dangerous Contradiction*, 73 WASH. & LEE L. REV. 2089, 2120 (2016) (noting that even if the Fifth Circuit was correct in its argument that the amendments differ, the court did not offer any justification for why affirmative rights might generally be more limited in scope than protective rights, specifically why it would mean not extending to illegal immigrants). It has also been criticized for lacking any precedential support. Justice Stevens, dissenting in *Heller*, did assert, however, that “[b]y way of contrast, the Fourth Amendment describes a right *against* governmental interference rather than an affirmative right *to* engage in protected conduct, and so refers to a right to protect a purely individual interest.” *Heller*, 554 U.S. at 646 (Stevens, J., dissenting).

97. *Portillo-Munoz*, 643 F.3d at 441. The court continued by citing to a Second Circuit case because it believed that decision had laid out compelling reasons for why illegal aliens could not claim that the predecessor statute to § 922(g)(5) violated their Fifth Amendment right to equal protection. *Id.* The Second Circuit court said, “[I]llegal aliens are those who . . . are likely to maintain no permanent address in this country, elude detection through an assumed identity, and—already living outside the law—resort to illegal activities to maintain a livelihood.” *United States v. Toner*, 728 F.2d 115, 128–29 (2d Cir. 1984). The Second Circuit went on to say that “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.” *Id.* at 129.

The majority emphasized Congress’s power to make laws governing the conduct of immigrants that would be unconstitutional as applied to citizens.⁹⁸ Further, it noted that courts have indicated the Constitution does not forbid Congress from making laws that differentiate between immigrants and citizens and between legal and illegal immigrants.⁹⁹

Shortly after the Fifth Circuit’s decision, the Eighth Circuit, in a *per curiam* decision, affirmed the lower court and, without explanation, agreed with the Fifth Circuit’s reasoning that the protections of the Second Amendment do not extend to illegal immigrants.¹⁰⁰ Several district courts have likewise held that the Second Amendment does not extend to illegal immigrants and applied the reasoning from the Fifth Circuit.¹⁰¹

B. *The Fourth Circuit (United States v. Carpio-Leon)*

Shortly after the Fifth Circuit’s decision, the Fourth Circuit, applying different reasoning, held that “the people” of the Second

98. See *Portillo-Munoz*, 643 F.3d at 441.

99. See *id.* at 442.

100. *United States v. Flores*, 663 F.3d 1022, 1023 (8th Cir. 2011) (“[T]he protections of the Second Amendment do not extend to aliens illegally present in this country . . .”).

101. From the Sixth Circuit, see *United States v. Cordoba*, No. 3:15-CR-067, 2015 WL 6680890, at *2 (S.D. Ohio Oct. 30, 2015) (“Based on the reasoning set forth in *Carpio-Leon*, *Portillo-Munoz* and *Flores*, and the myriad of district court cases cited above, this Court finds that illegal aliens do not fall within the scope of ‘people’ guaranteed the right to bear arms by Second Amendment.”). From the Eleventh Circuit, see *United States v. Boffil-Rivera*, No. 08-20437, 2008 U.S. Dist. LEXIS 84633 (S.D. Fla. Aug. 12, 2008), *United States v. Lewis*, No. 1:10-CR-007-RWS-CCH, 2010 WL 3370754 (N.D. Ga. May 26, 2010), and *United States v. Martinez-Guillen*, No. 2:10cr192-MEF, 2011 WL 588350 (M.D. Ala. Jan. 12, 2011). From the Tenth Circuit, see *United States v. Yanez-Vasquez*, No. 09-40056, 2010 WL 411112 (D. Kan. Jan. 28, 2010). From the Eighth Circuit, see *United States v. Alkhaldi*, No. 4:12CR00001-01, 2012 WL 5415787 (E.D. Ark. Sept. 17, 2012). From the Fourth Circuit, see *United States v. Horma*, No. 3:18cr18, 2018 WL 4214136 (E.D. Va. Sept. 4, 2018).

Amendment did not include illegal immigrants.¹⁰² Following a consensual search of his home, the defendant, Carpio-Leon, a Mexican citizen, was arrested for possession of a .22 caliber rifle, a 9 mm pistol, and ammunition.¹⁰³ He was charged and convicted of illegal reentry and possession under § 922(g)(5)(A).¹⁰⁴ Carpio-Leon, relying on *Heller*, argued that the firearms he possessed were of the type that would be used for protection of his home and family.¹⁰⁵

The court began its opinion with *Heller*, noting that the *Heller* Court connected the Second Amendment to law-abiding, responsible citizens by walking through a historical analysis.¹⁰⁶ And while *Heller* did not consider a law that disallowed firearm possession to a certain group of people, the Fourth Circuit found that the historical analysis employed by *Heller* would still be applicable in such a case.¹⁰⁷ Carpio-Leon argued that the drafters of “the Second Amendment could not have . . . intended to exclude illegal” immigrants from “the people” given that immigrants in 1791 were necessary to the creation and existence of the new nation.¹⁰⁸ The Fourth Circuit did not completely dispute that argument; however, it concluded that such an assertion does not extend Second Amendment rights to people who were not considered part of the political community and who did not abide by the rules of the community.¹⁰⁹

102. See *United States v. Carpio-Leon*, 701 F.3d 974, 976 (4th Cir. 2012) (“On Carpio-Leon’s Second Amendment challenge, we conclude that the scope of the Second Amendment does not extend to provide protection to illegal aliens because illegal aliens are not law-abiding members of the political community and aliens who have entered the United States unlawfully have no more rights under the Second Amendment than do aliens outside of the United States seeking admittance.”).

103. *Id.*

104. *Id.*

105. *Id.* Defendant had resided in the United States with his wife for the past “13 years and had three children, all of whom were born in the United States.” He had no prior criminal history and “had filed [his] income tax returns.” *Id.* at 975.

106. *Id.* at 979.

107. See *id.*

108. *Id.* at 976.

109. *Id.* at 981.

The court relied heavily on the fact that Carpio-Leon’s status in the country was illegal and unlawful¹¹⁰ and that the political branches have broad authority to regulate immigration.¹¹¹ In particular, the court stated, “the crime of illegal entry inherently carries this additional aspect that leaves an illegal alien’s status substantially unprotected by the Constitution in many respects.”¹¹² The Supreme Court has stressed that “over no conceivable subject is the legislative power of Congress more complete than it is over the admission of aliens.”¹¹³ Thus, when Congress enacts laws such as 18 U.S.C. § 922(g)(5)(A), it is operating in “a special area of law” dedicated principally to the political branches and on which the judiciary owes special deference.¹¹⁴ Because the court concluded the Second Amendment does not apply to illegal immigrants, there was no need to proceed to the second step of applying an appropriate form of scrutiny to the statute.¹¹⁵

Although the Fourth and Fifth Circuits had different reasonings, both reached the same conclusion that illegal immigrants were not in-

110. Carpio-Leon, citing to empirical studies, contended that illegal immigrants are no more dangerous to society than are American citizens. *Id.* at 983. The court responded by addressing the fact that the cited studies compared incarceration rates of people born in the United States with the incarceration rates of foreign-born people, which did not establish that illegal entrants are less dangerous. *Id.* The court explained:

Those data compare incarceration rates based on a person’s place of birth, not on whether a person is lawfully or unlawfully present in the United States. The other evidence cited by Carpio-Leon is a comparison between the overall level of crime in the United States with the number of unlawful entrants. But again, this comparison is not useful because of the high number of variables.

Id.

111. *See id.* at 981 (“Defining aliens as illegal emanates from ‘the power to expel or exclude aliens [which is] a fundamental *sovereign attribute* exercised by the Government’s political departments [that is] largely immune from judicial control.’” (alterations in original) (emphasis added) (quoting *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 210 (1953))).

112. *Id.*

113. *Id.* at 981–82 (quoting *Fiallo v. Bell*, 430 U.S. 787, 792 (1977)).

114. *Id.*

115. *See id.*

cluded in “the people” of the Second Amendment. Both courts emphasized, though, that *Heller* should be central to any Second Amendment analysis.

C. *The Tenth Circuit (United States v. Huitron-Guizar)*

Nearly one year after the Fifth Circuit’s decision in *Portillo-Munoz*, facing the same issue of an illegal immigrant alleging § 922(g)(5)(A) violated the Constitution, the Tenth Circuit avoided answering the constitutional question of whether illegal immigrants are part of “the people.”¹¹⁶ Here, the defendant, Huitron-Guizar, a Mexican citizen brought to the United States at a young age, was found in possession of three firearms after officers executed a search warrant on his home.¹¹⁷ Huitron-Guizar acknowledged that it is sensible to take away the right to possess firearms from those who are guilty of serious crimes or who are mentally ill, which are other categories of prohibited persons under 922(g); however, he “wonder[ed] what it is about aliens that permits Congress to impose what he consider[ed] a similar disability?”¹¹⁸ The Tenth Circuit answered by quoting Justice Jackson and employing an interesting discussion of the “ascending scale of constitutional rights.”¹¹⁹

116. See *United States v. Huitron-Guizar*, 678 F.3d 1164, 1166–69 (10th Cir. 2012).

117. See *id.* at 1165. Despite having lived in the United States for over twenty-two years, Defendant had never made any lawful attempt at admission into the country. He also had a criminal conviction of unauthorized use of identity. See Brief for Appellee at 16, *United States v. Huitron-Guizar*, 678 F.3d 1164 (10th Cir. 2012) (No. 11-8051), 2011 WL 6917201, at *9.

118. *Huitron-Guizar*, 678 F.3d at 1166.

119. In *Johnson v. Eisentrager*, Justice Jackson wrote,

The alien, to whom the United States has been traditionally hospitable, has been accorded a generous and ascending scale of rights as he increases his identity with our society. Mere lawful presence in the country creates an implied assurance of safe conduct and gives him certain rights; they become more extensive and secure when he makes preliminary declaration of intention to become a citizen, and they expand to those of full citizenship upon naturalization.

Huitron-Guizar, 678 F.3d at 1166 (quoting *Johnson v. Eisentrager*, 339 U.S. 763, 770 (1950)).

While all individuals in the United States have constitutional protections to a greater or lesser degree, it is undisputed that there is a hierarchy to the levels of protection and the rights accorded to individuals based on one's citizenship status.¹²⁰ *Verdugo-Urquidez* is but an example of this "ascending scale of rights" analysis.¹²¹ An immigrant who is outside of the borders of the United States, as opposed to an immigrant on American soil, is clearly outside of the realm of constitutional protections.¹²² An illegal immigrant present in the United States has fewer rights than a legally present immigrant.¹²³ A temporary resident immigrant has fewer rights than a permanent resident immigrant. A lawful permanent immigrant has fewer rights than an American citizen.¹²⁴ And lastly, a natural born citizen has the limited right of running for president.¹²⁵

The Tenth Circuit refused to infer a rule from *Heller* which categorically disallowed illegal immigrants from having Second Amendment rights.¹²⁶ It did, however, acknowledge that the fact Congress

120. *See Huitron-Guizar*, 678 F.3d at 1166.

121. *See United States v. Boffil-Rivera*, No. 08-20437-CR, 2008 U.S. Dist. LEXIS 84633, at *17–20 (S.D. Fla. Aug. 12, 2008) ("The recognition of certain rights to resident aliens, however, does not mean that 'all aliens are entitled to enjoy all the advantages of citizenship or, indeed, to the conclusion that all aliens must be placed in a single homogenous legal classification. For a host of constitutional and statutory provisions rest on the premise that a legitimate distinction between citizens and aliens may justify attributes and benefits for one class not accorded to the other" (quoting *Mathews v. Diaz*, 426 U.S. 67, 78 (1976))).

122. *Huitron-Guizar*, 678 F.3d at 1166–67 (citing *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953)).

123. *Id.* (citing *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 488 (1999)); *see also Reno v. Flores*, 507 U.S. 292, 306 (1993) (holding Congress's power includes its "authority to detain aliens suspected of entering the country illegally pending their deportation hearings").

124. *Huitron-Guizar*, 678 F.3d at 1166–67 (citing *Foley v. Connelie*, 435 U.S. 291, 297 (1978) (holding that although non-citizens are granted "the right to education and public welfare, along with the ability to earn a livelihood and engage in licensed professions, the right to govern is reserved to citizens")).

125. *Id.* at 1167 (citing U.S. CONST. art. II, § 1, cl. 5).

126. *See id.* at 1168–69 ("We think we can avoid the constitutional question by *assuming*, for purposes of this case, that the Second Amendment, as a 'right of the people,' could very well include, in the absence of a statute restricting such a right, at least some aliens unlawfully here—and still easily find § 922(g)(5) constitutional.").

saw it appropriate to exclude illegal immigrants from possessing firearms may very well indicate its belief that such a class of persons does not possess that constitutional right.¹²⁷ Even though the court decided not to take on the constitutional inquiry of whether illegal immigrants are included in “the people” of the Second Amendment, it did uphold the constitutionality of § 922(g)(5) by applying intermediate scrutiny.¹²⁸ In doing so, it determined that banning illegal immigrants from possessing firearms is “substantially related” to crime control and public safety which are “indisputably ‘important’ [government] interests.”¹²⁹

More recently, the Ninth Circuit agreed with the Tenth Circuit and refrained from deciding whether illegal immigrants fall within the scope of the Second Amendment.¹³⁰ The Ninth Circuit concluded that “the state of the law precludes us from reaching a definite answer on whether unlawful [immigrants] are included in the scope of the Second Amendment right. The Tenth Circuit correctly held that this question is ‘large and complicated.’”¹³¹

D. The Seventh Circuit (United States v. Meza-Rodriguez)

In 2015, the Seventh Circuit, departing from its sister circuits, concluded that illegal immigrants are part of “the people” under the Second Amendment.¹³² The defendant, Meza-Rodriguez, entered the

127. *See id.* at 1169.

128. *See id.* (“If the right didn’t apply at all, the case would be at an end. If the right *does* apply, even if in less robust dimensions than it does for citizens, the question is the level of scrutiny.”).

129. *Id.* at 1169–70.

130. *See United States v. Torres*, 911 F.3d 1253, 1261 (9th Cir. 2019).

131. *Id.* (quoting *United States v. Huitron-Guizar*, 678 F.3d 1164, 1169 (10th Cir. 2012)).

132. *See United States v. Meza-Rodriguez*, 798 F.3d 664, 669–72 (7th Cir. 2015). The lower court, the United States District Court for the Eastern District of Wisconsin, endorsed the findings of other appellate courts, in light of the fact the Seventh Circuit had not yet taken up the issue of the constitutionality of § 922(g)(5) in post-*Heller*. It held that the statute was constitutional and that defendant Meza-Rodriguez’s rights were not violated because he is not included in “the people” of the Second Amendment. *Id.* at 666–67.

United States at the age of four or five.¹³³ He resided here for twenty years, attended public school, and developed community ties.¹³⁴ On August 24, 2013, officers, responding to a report at a local bar, observed in a surveillance video a man pointing an object that seemed to be a firearm.¹³⁵ Shortly thereafter, Meza-Rodriguez, still armed, entered a neighboring bar and got into a fight.¹³⁶ Police later apprehended Meza-Rodriguez and discovered “a .22 caliber cartridge in his shorts pocket.”¹³⁷ After being charged, the defendant moved to dismiss the indictment, alleging that § 922(g)(5)(A) was unconstitutional.¹³⁸

Acknowledging that other circuits relied heavily on *Heller* to reach their conclusions, the Seventh Circuit seemed to shift its focus and instead place more weight on the Supreme Court’s earlier decision in *Verdugo-Urquidez*.¹³⁹ First, the court determined that the term “the people,” as it appears in the Bill of Rights, must be read consistently throughout, and thus, because immigrants receive Fourth Amendment protections when they voluntarily come within the territory of the United States and develop “sufficient connection” with the country, the same should go for the Second Amendment.¹⁴⁰ The court asserted that Meza-Rodriguez entered the country voluntarily, had extensive ties with the country, and even developed close relationships with family members and other acquaintances.¹⁴¹ Despite the fact that during that

133. *See id.* at 666.

134. *See id.* at 670–71.

135. *See id.* at 666.

136. *See id.*

137. *Id.* After being taken into custody and placed in the back of the police car, the defendant violently hit his head against the glass divider and threatened to kill the Sergeant and the Sergeant’s family. Brief for Plaintiff-Appellee at 4, *United States v. Meza-Rodriguez*, 798 F.3d 664 (7th Cir. 2015) (No. 14-3271), 2015 WL 2064443, at *4.

138. *See Meza-Rodriguez*, 798 F.3d at 667.

139. *See id.* at 669–72. The Seventh Circuit also noted that a reading of *Heller* could support exclusion of illegal immigrants in “the people.” *Id.* at 669. The only portion of *Heller* on which the Seventh Circuit really relied upon in reaching its holding was that, post-*Heller*, the “right to bear arms is no second-class entitlement.” *Id.* at 672. Therefore, illegal immigrants cannot be carved out of “the people” of the Second Amendment. *See id.*

140. *See id.* at 670.

141. *See id.* at 670–71.

time Meza-Rodriguez's "behavior left much to be desired," he adequately satisfied the "substantial connections" test and was part of "the people."¹⁴²

The government's argument in response was two-fold.¹⁴³ First, when applying this "sufficient connection" test, illegal immigrants "categorically have not accepted the basic obligations of membership" in society and thus cannot be part of "the people."¹⁴⁴ Second, Meza-Rodriguez's unsavory traits, including his criminal record and run-ins with the law, lack of a steady job, and failure to file tax returns, were evidence of conduct that is inherently not "law-abiding."¹⁴⁵ The court rejected the government's assertion that the defendant's unlawful behavior was any demonstration that he had not accepted the societal obligations of living in the United States.¹⁴⁶ It refused to inquire about such considerations, which it deemed irrelevant, because such a test would require a case-by-case examination of a defendant's previous criminal history whenever he or she wants to assert a constitutional right.¹⁴⁷

Despite making the determination that illegal immigrants are included in "the people," the Seventh Circuit simultaneously upheld the constitutionality of 18 U.S.C. § 922(g)(5) and concluded it did not impermissibly restrict Meza-Rodriguez's Second Amendment right.¹⁴⁸

142. *Id.* at 672.

143. *Id.* at 671.

144. *Id.* The government highlighted Defendant's continuous display of disregarding law enforcement authority as the hallmark of not accepting societal obligations. *Id.*

145. *See* Brief for Plaintiff-Appellee at 16, *United States v. Meza-Rodriguez*, 798 F.3d 664 (7th Cir. 2015) (No. 14-3271), 2015 WL 2064443, at *16. In addition to his domestic abuse restraining order, his criminal record included possession of an illegal substance and paraphernalia, operating a motor vehicle while intoxicated, disorderly conduct, resisting or obstructing an officer, stealing items from a vehicle, committing retail theft, and carrying a concealed weapon. *Id.* at *22.

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

147. *See id.* ("The Second Amendment is not limited to such an on-again, off-again protection."); *see also* Stracqualursi, *supra* note 58, at 1471 ("The court emphasized that only [Meza-Rodriguez]'s substantial connections, not the immorality of his behavior, were relevant to determining whether the constitutional protections applied.").

148. *See Meza-Rodriguez*, 798 F.3d at 673.

While the majority rejected the claim that illegal immigrants are more likely to commit gun-related crimes than American citizens, the court did agree that they pose a safety risk by being more difficult to trace and keep track of and by being able to easily evade law enforcement.¹⁴⁹ For that reason, the government had a strong enough interest to support the conclusion that § 922(g)(5) was constitutional.¹⁵⁰

IV. ANALYSIS

Applying the “sufficient connection” test to determine who is included in “the people” of the Second Amendment is problematic. Not only has it resulted in an inconsistent application across the country—as one circuit employs the test and others reject it—but when it is applied, it requires a court to do legal gymnastics to conclude that illegal immigrants have Second Amendment rights in light of the fact that § 922(g)(5) withstands constitutional scrutiny. More importantly, including illegal immigrants in “the people” of the Second Amendment goes completely against what the Framers intended and the type of person whom they envisioned being protected by it. Finally, it contradicts the language of the *Heller* Court, which is the starting point for any court’s analysis when an individual claims there has been an infringement of his or her right to bear arms.

A. Courts Should Not Apply a “Sufficient Connection” Test to Evaluate Second Amendment Rights

The Seventh Circuit and many legal scholars and commentators have mischaracterized the plurality opinion of *Verdugo-Urquidez*, thus frustrating the application of the Bill of Rights to immigrants. As previously stated, the major portion of the Seventh Circuit’s argument rests on the well-cited language from the Supreme Court in *United States v. Verdugo-Urquidez*:

While this textual exegesis is by no means conclusive, it suggests that “the people” protected by the Fourth

149. *Id.* (“Persons with a strong incentive to use false identification papers will be more difficult to keep tabs on than the general population.”).

150. *Id.*

Amendment, and by the First and Second Amendments . . . refers to a class of persons who are part of a national community or who have otherwise developed *sufficient connection* with this country to be considered part of that community.¹⁵¹

The *Verdugo-Urquidez* Court, however, was limited to answering the question of whether the Fourth Amendment applied to a non-citizen and resident of a foreign country whose presence in the United States was *not* illegal and where the place searched was *not* located inside the United States. When discussing whether the Fourth Amendment applied to a search outside the borders of the United States, one of the Court's main concerns was that situations may arise halfway across the globe that threaten important American interests.¹⁵² Those situations could require an armed response by American forces, and imposing too many restrictions on those searches and seizures would be problematic.¹⁵³ Thus, the Fourth Amendment could not and should not apply in such a case considering the geographical location of the particular search was Mexico.¹⁵⁴

The Supreme Court distinguished *Verdugo-Urquidez*'s situation from others given that he was a citizen of Mexico, had no voluntary attachment to the United States, and had not accepted any societal obligations.¹⁵⁵ Given the narrow facts in *Verdugo-Urquidez*, the Court's analysis suggests that the Fourth Amendment applies only when: (1) the search and seizure take place outside of the United States and (2) the immigrant is part of the "national community" or has "developed sufficient connection" to the United States.¹⁵⁶ The *Verdugo-Urquidez* Court even clarified that its holding had no bearing on whether the Fourth Amendment would be applicable to illegal immigrants in the

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

152. *See id.* at 275.

153. *See id.* ("If there are to be restrictions on searches and seizures which occur incident to such American action, they must be imposed by the political branches through diplomatic understanding, treaty, or legislation.").

154. *See id.* at 274–75.

155. *See id.* at 272–73.

156. *See id.* at 265–67.

United States.¹⁵⁷ And while it may be true that an illegal immigrant would have a stronger argument under the Fourth Amendment if he or she voluntarily entered the country and developed a sufficient connection to his or her community, the Court did not go so far as to say. Thus, it is a stretch for the Seventh Circuit to conclude that the *Verdugo-Urquidez* Court intended to outright include all illegal immigrants who are present in the United States with the right to bear arms, as such a situation was not squarely before it.

Additionally, the Seventh Circuit's conditioning of illegal immigrants' Second Amendment rights on a "sufficient connection" test while simultaneously upholding the constitutionality of § 922(g)(5) requires a court to employ contradictory reasoning. In *Meza-Rodriguez*, the government argued that those here illegally have "'show[n] a willingness to defy our law' to the conclusion that they are likely to abuse guns."¹⁵⁸ The Seventh Circuit rejected the government's assertion that illegal immigrants were more likely to commit gun-related crimes and thus were more dangerous than citizens.¹⁵⁹ The court did, however, accept the argument that illegal immigrants were harder to trace and were more dissociated from American society.¹⁶⁰ In applying an intermediate level of scrutiny to the statute, the court found that the federal government had an important interest in forbidding those who are difficult to track and who have an incentive to evade law enforcement from owning guns and that such an interest was strong enough to pass constitutional muster.¹⁶¹

By stating that illegal immigrants "often live 'largely outside the formal system of registration, employment, and identification, [and] are harder to trace and more likely to assume a false identity,'" the court determined that the government's interest was strong enough to support the conclusion that *Meza-Rodriguez*'s Second Amendment rights were

157. *See id.* at 272 ("Our statements . . . 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.").

158. *United States v. Meza-Rodriguez*, 798 F.3d 664, 673 (7th Cir. 2015).

159. *Id.*

160. *Id.*

161. *See id.* at 672.

not restricted by the statute.¹⁶² Yet the very basis on which the court deemed that Meza-Rodriguez and other illegal immigrants alike are included in “the people” of the Second Amendment was because they are part of a “national community;” they have accepted societal obligations; and they have made “sufficient connection” to the United States.¹⁶³ It is difficult to reconcile, however, that an illegal immigrant has developed a sufficient connection to the national community while also living outside the formal system, being hard to trace, and remaining disconnected from society. This rationale is contradicting and reveals why such a nebulous test like the sufficient connection one cannot work with Second Amendment rights.¹⁶⁴

Lastly, the test has not proven to be successful post-*Verdugo* for the Fourth Amendment, and adding its application to another constitutional amendment will likely lead to inconsistent application by the lower courts.¹⁶⁵ What exactly makes an illegal immigrant have substantial ties to the United States? How long does it take for one to get there? At what point have they accepted societal obligations? Is “sufficient” for purposes of the Fourth Amendment equivalent to “sufficient” for purposes of the Second Amendment? Can one go to bed at night within United States borders and wake up the next morning with a right to bear arms? These are only some of the questions that must

162. *Id.* at 673 (quoting *United States v. Huitron-Guizar*, 678 F.3d 1164, 1170 (10th Cir. 2012)).

163. *See id.* at 670–71.

164. In every case where an illegal immigrant is charged under 18 U.S.C. § 922(g)(5), a court could find that he or she is “difficult to track” and has an “interest in eluding law enforcement.” *Id.* at 673.

165. *See Douglas Koff, Post-Verdugo-Urquidez: The Sufficient Connection Test—Substantially Ambiguous, Substantially Unworkable*, 25 COLUM. HUM. RTS. L. REV. 435, 471 (1994) (“After exploring *Verdugo-Urquidez*’s holding and the cases which have relied on it, it is evident that the test outlined by the majority in *Verdugo-Urquidez* is too ambiguous to be workable in its present form. . . . By affording an alien Fourth Amendment rights only when the alien has developed a sufficient connection with the United States, the Court has created an expansive gray area. 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.”).

be answered if we are to adopt the “sufficient connection” test for purposes of the Second Amendment.

Justice Brennan, dissenting in *Verdugo-Urquidez* and seemingly frustrated by the uncertainty of the “sufficient connection” test, sought to apply the Fourth Amendment to all persons—citizens and non-citizens—so long as the United States laws apply to them.¹⁶⁶ He feared what type of application a test centered on “sufficient connection” would have on both immigrants and the courts.¹⁶⁷ It would also affect law enforcement and other governmental agents who will likely be unsure of what course of action to take when encountering a person with ambiguous citizenship status.¹⁶⁸ Additionally, Judge Flaum, concurring in the judgment of *Meza-Rodriguez*, stated “who is part of our ‘national community’ and whether (and how) an undocumented immigrant can establish a ‘sufficient connection’ under *Verdugo-Urquidez* remains unsettled. And *Heller* provides considerable reason to doubt that an undocumented immigrant can enjoy Second Amendment rights at all.”¹⁶⁹

166. See *United States v. Verdugo-Urquidez*, 494 U.S. 259, 282–83 (1990) (Brennan, J., dissenting) (“At one point the majority hints that aliens are protected by the Fourth Amendment only when they come within the United States and develop ‘substantial connections’ with our country. . . . At other junctures, the Court suggests that an alien’s presence in the United States must be voluntary and that the alien must have ‘accepted some societal obligations.’ . . . At yet other points, the majority implies that the respondent would be protected by the Fourth Amendment if the place searched were in the United States.”).

167. See *id.*; see also Matthew Blair, *Constitutional Cheap Shots: Targeting Undocumented Immigrants with the Second Amendment*, 9 SETON HALL CIR. REV. 159, 179 (2012) (“Indeed, only the most self-assured undocumented resident would feel safe under that test; all others would be left with the nagging suspicion that their connections to the community might be deemed insufficient. This uncertainty, of course, will not be confused only to those undocumented residents; law enforcement officers, for example, will also feel the pinch from this test.”).

168. See Justine Farris, *The Right of Non-Citizens To Bear Arms: Understanding “The People” of the Second Amendment*, 50 IND. L. REV. 943, 963 (2017) (explaining the difficulties of the “sufficient connection” test).

169. *United States v. Meza-Rodriguez*, 798 F.3d 664, 674 (7th Cir. 2015) (Flaum, J., concurring).

Thus, such an unclear test leaves illegal immigrants with uncertainty regarding their potential constitutional rights.¹⁷⁰ A bright, hardline rule categorically excluding illegal immigrants from “the people” of the Second Amendment benefits the general public and lessens the uncertainties that accompany the “sufficient connection” test. Furthermore, this hardline rule is likely to provide greater societal benefits for it is easier to administer, is more judicially efficient, and puts all potential defendants on proper notice.

B. The Correct Way to Interpret and Apply Heller

Heller is the controlling precedent for Second Amendment rights, and so it follows that the language and reasoning employed by the Court should be applied whenever a person asserts that his or her right to bear arms is being infringed. Although the question of whether an illegal immigrant has a right to bear arms was not a question before the *Heller* Court,¹⁷¹ the Second Amendment, according to the majority, protects at its core the “right of law-abiding, responsible citizens to use arms in defense of hearth and home.”¹⁷²

When the Court cited language from *Verdugo-Urquidez*,¹⁷³ it did so only to support its reasoning that the Second Amendment is an

170. *See id.*

171. The individual who brought the claim leading to the decision of *Heller* was a United States citizen. The Court did note that “since this case represents this Court’s first in-depth examination of the Second Amendment, one should not expect it to clarify the entire field.” *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008).

172. *Id.*

173. The portion of the *Verdugo-Urquidez* opinion cited in *Heller*, and quoted above, is the following:

“[T]he people’ seems to have been a term of art employed in select parts of the Constitution. . . . [Its uses] sugges[t] that ‘the people’ protected by the Fourth Amendment, and by the First and Second Amendments, and to whom rights and powers are reserved in the Ninth and Tenth Amendments, refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community.

Heller, 554 U.S. at 580 (quoting *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990)).

individual right and not a *collective* one.¹⁷⁴ Only once—in the “Operative Clause” section—in the 63-page majority opinion did the Court reiterate that the phrase “the people” was a “term of art” used in select parts of the Constitution.¹⁷⁵ Justice Scalia found it necessary to mention that the places in which the term “the people” is used in the Bill of Rights—the First, Second, Fourth, and Ninth Amendments—all “unambiguously refer to individual rights, not ‘collective’ rights, or rights that may be exercised only through participation in some corporate body.”¹⁷⁶ By analogizing, in this specific place of the opinion, to these amendments’ usage of “the people,” the Court was merely providing support for its argument that the Second Amendment confers an individual, rather than collective, right to keep and bear arms.¹⁷⁷

Furthermore, although the Second Amendment is phrased broadly to apply to “the people,” the majority went on to say that the Second Amendment protects the class of “law-abiding, responsible citizens”¹⁷⁸ and “unambiguously refers to all members of the *political* community, not an unspecified subset.”¹⁷⁹ Professor and scholar Akhil

174. That is precisely the question the Court was faced with answering.

175. *Id.* at 579–80 (“The first salient feature of the operative clause is that it codifies a ‘right of the people.’”).

176. *Id.* at 579. The Court subsequently mentioned the Tenth Amendment because although it “arguably refer[s] to ‘the people’ acting collectively,” it “deal[s] with the exercise or reservation of powers, not rights. Nowhere else in the Constitution does a ‘right’ attributed to ‘the people’ refer to anything other than an individual right.” *Id.* at 579–80.

177. Immediately after drawing a comparison between the amendments by quoting the language from *Verdugo-Urquidez*, the *Heller* Court asserted:

This contrasts markedly with the phrase ‘the militia’ in the prefatory clause. As we will describe below, the ‘militia’ in colonial America consisted of a subset of ‘the people’—those who were male, able bodied, and within a certain age range. Reading the Second Amendment as protecting only the right to “keep and bear Arms” in an organized militia therefore fits poorly with the operative clause’s description of the holder of that right as ‘the people.’

Id. at 580–81.

178. *Id.* at 635.

179. *Id.* at 580 (emphasis added). The Court has been criticized for changing the language from what was “national community” in *Verdugo-Urquidez* to “political community” in *Heller*. However, such a deliberate change in language cannot be ignored.

Amar has repeatedly emphasized that the Framers tied the right to bear arms with other political rights such as the right to vote, writing, “At the time of the Founding, the right of the people to keep and bear arms stood shoulder to shoulder with the right to vote; arms bearing in militias embodied a paradigmatic *political* right flanking the other main political rights of voting, office holding, and jury service.”¹⁸⁰ The deliberate usage of the terms “political,” “law-abiding,” and “citizen” is consistent with how the courts have historically interpreted the Second Amendment.¹⁸¹ The language also mirrors the presence of “longstanding prohibitions on the possession of firearms” by certain groups of people.¹⁸² The Court explained that these prohibitions are examples of “presumptively lawful regulatory measures” that limit the possession of firearms.¹⁸³

Heller recognized that the individual right secured by the Second Amendment was a pre-existing right under common law and frequently connected citizenship with the right to bear arms.¹⁸⁴ For instance, the Court’s analysis of “the right of the people” states, “We start . . . with a strong presumption that the Second Amendment right is exercised individually and belongs to all *Americans*.”¹⁸⁵ There is strong historical support for such a conclusion. The historical truth is that the Second Amendment was not understood as the creation of some revolutionary idea; rather, it merely codified a right directly “inherited from our English ancestors.”¹⁸⁶ Because the Second Amendment cod-

180. AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 258 (1998).

181. While the usage of such words is arguably dictum, Supreme Court dicta binds lower courts “almost as firmly as . . . the Court’s outright holdings,” particularly when it is recent and not contradicted by later statements. *United States v. McCane*, 573 F.3d 1037, 1047 (10th Cir. 2009) (Tymkovich, J., concurring) (quoting *Gaylor v. United States*, 74 F.3d 214, 217 (10th Cir. 1996)).

182. *Heller*, 554 U.S. at 626.

183. *Id.* at 627 n.26.

184. *See id.* at 591–92.

185. *Id.* at 581 (emphasis added).

186. *Robertson v. Baldwin*, 165 U.S. 275, 281 (1897). In the mid to late 1600s, Kings Charles II and James II—the Stuart kings—“succeeded in using select militias loyal to them to suppress political dissidents, in part by disarming their opponents.”

ifies “a *pre-existing* right,” the scope of the right to bear arms is informed by the historical background of the right.¹⁸⁷ The common law right secured by the Second Amendment was and is limited.¹⁸⁸ Courts and commentators have consistently explained that “[f]rom Blackstone through the 19th-century cases . . . the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose.”¹⁸⁹ At the time of the Founding, because the government viewed the right to bear arms as a “political right,” the government had the power to disarm those who were not part of the political community.¹⁹⁰ Moreover, some individuals were not entitled to its protection

Heller, 554 U.S. at 592. Charles II even ordered general disarmaments of the regions where his Protestant enemies resided. *See id.*

These experiences caused Englishmen to be extremely wary of concentrated military forces run by the state and to be jealous of their arms. They accordingly obtained an assurance from William and Mary, in the Declaration of Rights (which was codified as the English Bill of Rights), that Protestants would never be disarmed This right has long been understood to be the predecessor to our Second Amendment.

Id. at 593.

187. *Heller*, 554 U.S. at 592 (“The very text of the Second Amendment implicitly recognizes the pre-existence of the right and declares only that it ‘shall not be infringed.’”).

188. *See* David Yassky, *The Second Amendment: Structure, History, and Constitutional Change*, 99 MICH. L. REV. 588, 626–27 (2000) (explaining the ideology underlying the Second Amendment and stating that “[t]he average citizen whom the Founders wished to see armed was a man of republican virtue—a man shaped by his myriad ties to his community”).

189. *Heller*, 554 U.S. at 626; *see also* *United States v. Carpio-Leon*, 701 F.3d 974, 977 (4th Cir. 2012) (“[T]he Second Amendment does not guarantee the right to possess . . . every type of weapon, to possess at every place, or to possess by every person.”); *United States v. Carter*, 669 F.3d 411, 415 (4th Cir. 2012) (demonstrating that under *Heller*, “the right to keep and bear arms depends not only on the purpose for which it is exercised but also on the relevant characteristics of the person invoking the right”).

190. *See* AMAR, *supra* note 180, at 48 (“[C]onsider the key nineteenth-century distinction between political rights and civil rights. The former were rights of members of the polity—call them First-Class Citizens—whereas the latter belonged to all (free) members of the larger society. Alien men and single white women circa 1800 . . . typically could not vote, hold public office, or serve on juries. These last three

because they were thought to be disloyal or dangerous.¹⁹¹ Many Second Amendment scholars agree that the right to bear arms was tied to a concept of a “virtuous citizenry.”¹⁹² More specifically, some were excluded “because of perceived unfitness, untrustworthiness[,] or alienage.”¹⁹³ Early proposals of the Bill of Rights support such an understanding,¹⁹⁴ as do founding-era statutes.¹⁹⁵ For example, Samuel Adams encouraged the Massachusetts ratifying convention to recommend barring Congress from “prevent[ing] the people of the United States, who are peaceable citizens, from keeping their own arms.”¹⁹⁶

were political rights, reserved for First-Class Citizens. So too, the right to bear arms had long been viewed as a political right, a right of First-Class Citizens.”).

191. See *United States v. Boffil-Rivera*, No. 08-20437, 2008 U.S. Dist. LEXIS 84633, at *14 (S.D. Fla. Aug. 12, 2008) (“Just as felons and the mentally impaired were considered outside the scope of the Second Amendment’s protection, the Founders would have equally understood that persons present in the country illegally or without permanency could, consistent with the well-established limitations on the common law right, be barred from possessing arms.”).

192. See *Yassky*, *supra* note 188, at 626–27; see also *United States v. Vongxay*, 594 F.3d 1111, 1118 (9th Cir. 2010) (citing Glenn Harlan Reynolds, *A Critical Guide to the Second Amendment*, 62 TENN. L. REV. 461, 480 (1995)) (“One implication of this emphasis on the virtuous citizen is that the right to arms does not preclude laws disarming the unvirtuous (i.e. criminals) or those who, like children or the mentally unbalanced, are deemed incapable of virtue.”).

193. Don Kates, *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 204, 217 n.54 (1983) (“The Founders would not have understood the amendment as extending to felons, children or those so physically or mentally impaired as to preclude militia service.”).

194. See 2 BERNARD SCHWARTZ, *THE BILL OF RIGHTS: A DOCUMENTARY HISTORY* 674–75 (1971).

195. In dealing with the possible threat of those who remained loyal to Great Britain, states took the apparent precaution of disarming those persons. Thus, even within the boundaries of the pre-existing right to keep and bear arms, certain people were seen as falling outside the protection of that right, and laws that disarmed them were well-established at the time the Second Amendment was adopted. See Saul Cornell & Nathan DeDino, *A Well Regulated Right: The Early American Origins of Gun Control*, 73 FORDHAM L. REV. 487, 506 (2004) (“During the American Revolution, several states passed laws providing for the confiscation of weapons owned by persons refusing to swear an oath of allegiance to the state or the United States.”).

196. SCHWARTZ, *supra* note 194, at 681. The New Hampshire convention also recommended that “Congress shall never disarm any Citizen unless such as are or have been in Actual Rebellion.” *Id.* at 761. In each proposal, the right was given only to “peaceable” or lawful “Citizens.” See *id.*

Additionally, a number of founding-era state constitutions also confirm such a limitation by expressly limiting the right to bear arms to “citizens.”¹⁹⁷ While there was controversy and debate over many provisions of the Bill of Rights, one thing the Framers could agree on was their desire to allow *citizens* to arm themselves.¹⁹⁸

Finally, it is well-settled that the political branches have the power and responsibility to regulate immigration.¹⁹⁹ While resting on the “sovereign attribute” of regulating immigrants, the Supreme Court “has repeatedly emphasized that ‘over no conceivable subject is the legislative power of Congress more complete than it is over’ the admission of aliens.”²⁰⁰ Thus, § 922(g)(5)’s prohibition against firearm possession of aliens here illegally or unlawfully is merely Congress “functioning in a special area of law committed largely to the political branches” and to which the courts should defer.²⁰¹ Further, it is an example of a limitation that falls well-within the “presumptively lawful regulatory measures” on firearm possession that the *Heller* Court described.²⁰² Congress certainly has a strong interest in protecting society by ensuring public safety and suppressing armed violence. And while it is undoubtedly a generalization to suggest that illegal immigrants, as

197. See, e.g., CONN. CONST. art. I, § 17 (1818) (“Every *citizen* has a right to bear arms in defence of himself and the state.” (emphasis added)); KY. CONST. art. XII, § 23 (1792) (“That the right of the *citizens* to bear arms in defence of themselves and the State shall not be questioned.” (emphasis added)); ME. CONST. art. I, § 16 (1819) (“Every *citizen* has a right to keep and bear arms and this right shall never be questioned.”); MISS. CONST. art. III, § 12 (1890) (“The right of every *citizen* to keep and bear arms in defense of his home, person, or property, or in aid of the civil power when thereto legally summoned, shall not be called in question, but the legislature may regulate or forbid carrying concealed weapons.” (emphasis added)); PA. CONST. art. IX, § 21 (1790) (“The right of the *citizens* to bear arms in defense of themselves and the State shall not be questioned.” (emphasis added)).

198. See *Kates*, *supra* note 193, at 220–21.

199. See *Hampton v. Mow Sun Wong*, 426 U.S. 88, 101 n.21 (1976) (“[T]he power over aliens is of a political character and therefore subject only to narrow judicial review.”).

200. *Fiallo v. Bell*, 430 U.S. 787, 792 (1977) (quoting *Oceanic Navigation Co. v. Stranahan*, 214 U.S. 320, 339 (1909)); see, e.g., *Demore v. Kim*, 538 U.S. 510, 521–22 (2003); *Reno v. Flores*, 507 U.S. 292, 305–06 (1993); *Mathews v. Diaz*, 426 U.S. 67, 81 (1976).

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

202. *District of Columbia v. Heller*, 554 U.S. 570, 626–27 n.26 (2008).

a group, pose a greater threat to public safety than American citizens, it was the result of congressional findings and judgment.²⁰³ The judiciary “defer[s] to Congress as it lawfully exercises its constitutional power to distinguish between citizens and non-citizens, or between lawful and unlawful aliens, and to ensure safety and order.”²⁰⁴ Congress, therefore, will have to decide when and how a “law-abiding, responsible” *immigrant* can have a right to possess firearms, rather than making it a constitutional guarantee through the Second Amendment.²⁰⁵

The standard from *Heller* should be the starting point for any Second Amendment analysis. That standard is more limited in scope than the “sufficient connection” test for the phrases “political community” and “law-abiding, responsible citizen” replaced “national community.” The purposeful uses of such phrases, in conjunction with historical interpretations, result in exclusion of illegal immigrants from “the people” of the Second Amendment. Because illegal immigrants

203. Whether citizens or immigrants commit more crimes in the United States is widely debated. Although, according to new data from the U.S. Sentencing Commission from 2011–2016, 21.4% of those convicted of federal crimes, not including immigration-related crimes, were immigrants. Steven Camarota, *Non-Citizens Committed a Disproportionate Share of Federal Crimes, 2011–16*, CTR. FOR IMMIGR. STUD. (Jan. 10, 2018), <https://cis.org/Camarota/NonCitizens-Committed-Disproportionate-Share-Federal-Crimes-201116>. If including immigration-related crimes, then 44.2% were immigrants. *Id.* An estimated 8.4% of the adult population are immigrants, and of that about 4% are illegal immigrants. *Id.* While this data did not differentiate between those immigrants here illegally or legally, there were some areas where immigrants accounted for a much larger share of convictions than their 8.4% share of the adult population. *Id.* Those areas included drug convictions, kidnapping, money laundering, and economic crimes such as fraud, larceny, and embezzlement. *Id.* There were also areas in which immigrants account for a share of convictions roughly equal to citizens—of those included firearm-related crimes, homicides, and assaults. *Id.*

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

205. *See generally* Brief for Appellee at 3, *United States v. Guerrero-Leco*, 446 Fed. Appx. 610 (4th Cir. Sept. 13, 2011) (No. 09-4920) (“Congress appropriately recognized that individuals who refuse to abide by the laws of this country pose a greater risk of further unlawful conduct, and that firearm-possession ban set forth in § 922(g)(5) appropriately responds to this risk by, at least, ensuring that those individuals may not lawfully possess firearms until they, at a minimum, become law-abiding legal residents.”).

are not the type of individuals who would historically be included in “the people” of the Second Amendment and because the language of *Heller* limits the scope of the Second Amendment to “law-abiding, responsible citizens,” federal statutes like 18 U.S.C. § 922(g)(5) will continue to withstand constitutional scrutiny.

V. CONCLUSION

The Seventh Circuit’s decision to apply a “sufficient connection” test to illegal immigrants’ right to bear arms is troubling. Applying such an arbitrary and unreliable test is a poor choice because it conditions an immigrant’s constitutional right on subjective factors like acceptance of societal obligations and voluntary commitment to the country. Bestowing upon illegal immigrants the right to bear arms sets forth bad policy by granting such an illustrious right to a group whose sole presence in the United States contradicts the type of person the Framers intended to give these protections to.

As seen by the plethora of historical evidence, the Framers could not have intended for the Second Amendment to apply to those illegally residing in the country. While there are certainly an overwhelming number of illegal immigrants who are living peaceful lives in the United States or who were brought over at a young age with no real ability to comprehend the ramifications for such a move, the line must be drawn somewhere. This will hopefully suppress gun-related tragedies, such as the murder of corporal Ronil Singh. Categorically banning illegal immigrants from “the people” of the Second Amendment puts all potential suspects on notice and promotes judicial efficacy. Although it is clear that the Second Amendment is a fundamental right, it should be equally clear that this right is neither absolute nor are illegal immigrants necessarily entitled to its protection.