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**WON'T YOU BE MY NEIGHBOR: MEZA-RODRIGUEZ, THE  
SECOND AMENDMENT, AND THE CONSTITUTIONAL  
RIGHTS OF NONCITIZENS**

I.	INTRODUCTION.....	667
II.	BACKGROUND .....	670
	A. <i>Early Interpretation of “The People”: A Brief History         of the Supreme Court’s Immigration Precedent</i> .....	672
	B. <i>“The People” of the Fourth Amendment: Verdugo-         Urquidez</i> .....	674
	C. <i>“The People” of the Second Amendment: Heller and         McDonald</i> .....	675
	D. <i>The Circuit Courts of Appeals Decisions Prior to Meza-         Rodriguez</i> .....	678
	1. <i>The Fifth Circuit: United States v. Portillo-Munoz</i> .....	678
	2. <i>The Eighth Circuit: United States v. Flores</i> .....	679
	3. <i>The Tenth Circuit: United States v. Huitron-Guizar</i> .....	679
	4. <i>The Fourth Circuit: United States v. Carpio-Leon</i> .....	680
	E. <i>Seventh Circuit Shakeup: United States v. Meza-Rodriguez</i>	681
III.	ANALYSIS .....	683
	A. <i>The Seventh Circuit’s Interpretation of “The People”         Was Correct</i> .....	685
	B. <i>The Seventh Circuit’s Missteps</i> .....	686
	1. <i>The Problematic Use of Verdugo-Urquidez</i> .....	687
	2. <i>18 U.S.C. § 922(g)(5) is Unconstitutional</i> .....	688
	C. <i>The Complicated Relationship Between Noncitizens         and the Constitution</i> .....	689
	D. <i>How States Can Protect Noncitizens</i> .....	693
IV.	CONCLUSION .....	694

I. INTRODUCTION

Marcy Suarez immigrated to the United States from Honduras when she was seven years old.<sup>1</sup> After arriving in the United States in 2003, Suarez attended public school in New York, worked as a youth organizer during the 2016

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<sup>1</sup> Marcy Suarez, *How DACA Changed My Life: One Immigrant Girl’s Story*, TEEN VOGUE (Nov. 27, 2017, 12:00 PM), [https://www.teenvogue.com/story/how-daca-changed-my-life-one-immigrant-girls-story?mbid=social\\_twitter](https://www.teenvogue.com/story/how-daca-changed-my-life-one-immigrant-girls-story?mbid=social_twitter).

election, and is currently halfway through college.<sup>2</sup> Although she has lived in the United States for the majority of her life and has thrived, deportation is always on her mind.<sup>3</sup>

With the election of President Donald Trump in November 2016, national attention has been fixated on the rights of immigrants and noncitizens. Within the first few months of his presidency, President Trump tightened the United States' illegal immigration policies.<sup>4</sup> While President Barack Obama's administration had prioritized deporting unauthorized noncitizens<sup>5</sup> who were gang members, felons, or posed security threats, the Trump Administration requires no such prioritization.<sup>6</sup> Instead, immigration agents now have more discretion on whom to deport, regardless of whether the unauthorized noncitizen has a criminal record.<sup>7</sup>

President Trump's crackdown on the rights and protections of noncitizens, particularly unauthorized noncitizens, is especially troubling for those brought to the United States as children. The constitutional rights and protections afforded to noncitizens like Marcy Suarez, many of whom were brought to the United States as children and have never known another country, is a gray area. Noncitizens have some rights under the Constitution, but not all.<sup>8</sup> Depending on the constitutional right, federal courts disagree on whether the right applies to noncitizens at all. The Second Amendment right to bear arms is one such disputed right.

Arguably the most controversial amendment in the Bill of Rights, the Second Amendment reads that "[a] well regulated Militia, being necessary to the security of the free State, the right of the people to keep and bear Arms, shall not be infringed."<sup>9</sup> The Supreme Court determined in *District of Columbia v. Heller*<sup>10</sup> that the Second Amendment "confers an individual right to keep and bear arms."<sup>11</sup> But to whom does this individual right extend? Immigration law, as well as other laws that distinguish between citizens and noncitizens, divides

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<sup>2</sup> *Id.*

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

<sup>4</sup> Nicholas Kulish et al., *Trump's Immigration Policies Explained*, N.Y. TIMES (Feb. 21, 2017), <https://www.nytimes.com/2017/02/21/us/trump-immigration-policies-deportation.html>.

<sup>5</sup> This Note uses the term "unauthorized noncitizen" instead of "illegal immigrant" because of the negative association of the phrase "illegal immigrant" in the United States.

<sup>6</sup> Kulish et al., *supra* note 4.

<sup>7</sup> *Id.*

<sup>8</sup> See discussion *infra* Section II.A.

<sup>9</sup> U.S. CONST. amend. II.

<sup>10</sup> 554 U.S. 570 (2008).

<sup>11</sup> *Id.* at 622.

those who can claim full constitutional protections and those who cannot.<sup>12</sup> Herein lies the problem: the Constitution seemingly “aspires to provide due process and equal protection of the laws to all persons, regardless of citizenship.”<sup>13</sup> If noncitizens are included in the Constitution’s definition of “the people,” then noncitizens will receive the same protections of individual liberties as citizens.<sup>14</sup> Therefore, the question becomes to what extent should the Constitution protect noncitizens in the United States?

Currently under federal law 18 U.S.C. § 922(g)(5), two classes of noncitizens are banned from possessing firearms and ammunition.<sup>15</sup> Subsection (g)(5)(A) prohibits noncitizens who are “illegally or unlawfully” present in the United States,<sup>16</sup> while § (g)(5)(B) prohibits noncitizens who have “been admitted . . . under a nonimmigrant visa” and do not qualify for the exceptions listed in § 922(y)(2).<sup>17</sup> According to the Seventh Circuit Court of Appeals, Congress passed 18 U.S.C. § 922(g) “‘to keep guns out of the hands of presumptively risky people’ and to ‘suppress[] armed violence.’”<sup>18</sup> Section 922(g) restricts Second Amendment rights of certain categories of people: felons; fugitives; users of controlled substances; the mentally ill; members of the armed forces dishonorably discharged; persons convicted of domestic violence; persons subject to restraining orders; persons convicted of domestic violence; persons subject to restraining orders; persons who have renounced their United States citizenship; and both lawful and unlawful immigrants.<sup>19</sup>

Although this law has weathered numerous constitutional challenges, none have been so detrimental as the Seventh Circuit Court of Appeals ruling in *United States v. Meza-Rodriguez*.<sup>20</sup> In 2015, the Seventh Circuit held that although 18 U.S.C. § 922(g) is constitutional, the Second Amendment does provide some protections to unauthorized citizens.<sup>21</sup> Using the sufficient connections test from the Supreme Court’s opinion in *United States v. Verdugo-Urquidez*,<sup>22</sup> the court determined that Mariano Meza-Rodriguez, a Mexican

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<sup>12</sup> VICTOR C. ROMERO, *ALIENATED: IMMIGRANT RIGHTS, THE CONSTITUTION, AND EQUALITY IN AMERICA 1* (2005).

<sup>13</sup> *Id.*

<sup>14</sup> See Gerald L. Neuman, *Whose Constitution?*, 100 *YALE L.J.* 909, 910–12 (1991).

<sup>15</sup> See 18 U.S.C. § 922(g)(5) (2018).

<sup>16</sup> *Id.* § 922(g)(5)(A).

<sup>17</sup> *Id.* §§ 922(g)(5)(B), 922(y)(2).

<sup>18</sup> *United States v. Meza-Rodriguez*, 798 F.3d 664, 673 (7th Cir. 2015) (quoting *United States v. Yancey*, 621 F.3d 681, 683–84 (7th Cir. 2010)).

<sup>19</sup> § 922(g).

<sup>20</sup> 798 F.3d 664 (7th Cir. 2015).

<sup>21</sup> *Id.* at 672.

<sup>22</sup> 494 U.S. 259 (1990).

citizen who was brought to the United States as a child, did have a sufficient connection to the United States.<sup>23</sup> Because Meza-Rodriguez had established sufficient connections to the United States, the Seventh Circuit found that he was entitled to some Second Amendment protections.<sup>24</sup> Although Meza-Rodriguez was entitled to Second Amendment protections, the court upheld § 922(g)(5) because Congress's interest in prohibiting unauthorized noncitizens—people who are difficult to track and who have an interest in evading law enforcement—from owning and possessing firearms was sufficiently compelling to justify the infringement on noncitizens' Second Amendment rights.<sup>25</sup>

This Note argues that the Seventh Circuit's approach is indicative of a larger problem in the United States: who is entitled to constitutional protections? This Note argues that although the Seventh Circuit correctly determined that unauthorized noncitizens are included in "the people" of the Second Amendment, the use of the sufficient connections test from the Supreme Court's *Verdugo-Urquidez* opinion does not do enough to protect the rights of noncitizens. Rather, the Seventh Circuit, and courts moving forward, should look to Justice Brennan's dissent in *Verdugo-Urquidez* for guidance on this matter. As long as noncitizens are within the borders of the United States and subject to United States' laws, then noncitizens should be afforded constitutional protections.<sup>26</sup>

Part II of this Note will provide an examination of the Supreme Court precedent on extending constitutional rights to noncitizens. Part II also explores the various ways that the circuit courts have addressed the constitutionality of 18 U.S.C. § 922(g)(5). Part III argues that even though the Seventh Circuit correctly determined that noncitizens are included within the meaning of "the people" of the Second Amendment, the court did not go to the extent necessary to protect the correct rights of noncitizens. Finally, this Note explores how *Meza-Rodriguez* is actually indicative of a larger immigration problem in the United States because the opinion demonstrates how courts grant noncitizens "watered-down" rights instead of full constitutional protections.

## II. BACKGROUND

The phrase "the people" appears five times in the Bill of Rights.<sup>27</sup> The First Amendment guarantees that "the right of the people peaceably to assemble, and to petition the Government for a redress of grievances" shall not be

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<sup>23</sup> *Meza-Rodriguez*, 798 F.3d at 670–71.

<sup>24</sup> *Id.* at 671.

<sup>25</sup> *Id.* at 673.

<sup>26</sup> *Verdugo-Urquidez*, 494 U.S. at 280–82 (Brennan, J., dissenting).

<sup>27</sup> See U.S. CONST. amend. I, II, IV, IX, and X.

abridged.<sup>28</sup> The Second Amendment provides that “the right of the people to keep and bear Arms, shall not be infringed.”<sup>29</sup> The Fourth Amendment protects “[t]he right of the people to be secure . . . against unreasonable searches and seizures.”<sup>30</sup> The Ninth Amendment specifies that the “enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”<sup>31</sup> Finally, the Tenth Amendment ensures that the “powers not delegated to the United States by the Constitution . . . are reserved to the states respectively, or to the people.”<sup>32</sup>

The debate over who is included within the scope of “the people” protected by the Bill of Rights has raged on since the founding of the United States.<sup>33</sup> If the Declaration of Independence begins with an acknowledgement of universal human rights—the right of all persons to life, liberty, and the pursuit of happiness—the Constitution circumscribes who actually is entitled to rights within the territory of the United States.<sup>34</sup> The relationship between the United States and the noncitizens within its borders has often been one of contention. The Supreme Court has provided some, but not enough, guidance in this area. The Supreme Court has only firmly addressed the meaning and scope of “the people” within the Fourth Amendment.<sup>35</sup> Although the Supreme Court has not ruled on the meaning of “the people” in the Second Amendment, the Court’s analysis in its previous ruling provides guidance on how lower courts should interpret the question of when the Constitution protects noncitizens’ rights.

This Part examines Supreme Court precedent on extending constitutional protections to unauthorized noncitizens. Section II.A briefly discusses the history of immigration in the United States and what rights the Supreme Court has extended to noncitizens before deciding the landmark case of *Verdugo-Urquidez*. Section II.B details the Supreme Court’s decision in *Verdugo-Urquidez* and how the Court reached the decision to extend Fourth Amendment protections to unauthorized noncitizens. Section II.C examines the Supreme Court’s ambiguous language in the *Heller* and *McDonald v. City of Chicago*<sup>36</sup> opinions. Section II.D discusses how other circuit courts have addressed the constitutionality of 18 U.S.C. § 922(g)(5). Section II.E then

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<sup>28</sup> U.S. CONST. amend. I.

<sup>29</sup> *Id.* amend. II.

<sup>30</sup> *Id.* amend. IV.

<sup>31</sup> *Id.* amend. IX.

<sup>32</sup> *Id.* amend. X.

<sup>33</sup> Geoffrey Heeren, *Persons Who Are Not People: The Changing Rights of Immigrants in the United States*, 44 COLUM. HUM. RTS. L. REV. 367, 377 (2013).

<sup>34</sup> *Id.* at 376.

<sup>35</sup> See *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990).

<sup>36</sup> 561 U.S. 742 (2010).

analyzes how the Seventh Circuit departed from its sister circuits by determining that unauthorized noncitizens do have Second Amendment protections.

A. *Early Interpretation of “The People”: A Brief History of the Supreme Court’s Immigration Precedent*

The debate over whether noncitizens were part of “the people” began with Federalists and the Jeffersonian Republicans.<sup>37</sup> Concerned about the dangerous ideals stemming from the French Revolution, Congress passed a series of anti-immigrant laws known today as the “Alien Acts.”<sup>38</sup> The first of these acts was the Alien and Sedition Act of 1798, which gave the president the authority to deport aliens whom he deemed hostile to the peace and safety of the United States.<sup>39</sup> Jeffersonian Republicans railed against the acts, arguing that the Constitution referred to “persons,” not citizens, and claimed that all persons were entitled to constitutional protections.<sup>40</sup> The Federalists countered that the Constitution was a “compact between citizens” and, therefore, “only citizens could assert rights” under the Constitution.<sup>41</sup>

These two viewpoints have largely carried over into the modern-day views on immigration.<sup>42</sup> Although neither Congress nor the Supreme Court has been able to resolve this ongoing dispute, the Supreme Court has applied some Amendments in the Bill of Rights to noncitizens.<sup>43</sup> The Supreme Court first determined the rights of noncitizens during the anti-Chinese movement on the West Coast in the late 1800s.<sup>44</sup> In *Yick Wo v. Hopkins*,<sup>45</sup> the Supreme Court unequivocally declared that noncitizens were entitled to rights afforded in general terms by the Constitution:

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<sup>37</sup> Heeren, *supra* note 33, at 377.

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

<sup>39</sup> James F. Smith, *A Nation That Welcomes Immigrants? An Historical Examination of the United States Immigration Policy*, 1 U.C. DAVIS J. INT’L L. & POL’Y 227, 228 (1995).

<sup>40</sup> Heeren, *supra* note 33 at 377.

<sup>41</sup> *Id.*

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

<sup>43</sup> See generally *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990); *Plyler v. Doe*, 457 U.S. 202 (1982); *Bridges v. Wixon*, 326 U.S. 135, 147–48 (1945); *Wong Wing v. United States*, 163 U.S. 228 (1896); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

<sup>44</sup> Neuman, *supra* note 14, at 941.

<sup>45</sup> 118 U.S. 356 (1886).

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The fourteenth amendment to the [C]onstitution is not confined to the protection of citizens. It says: "Nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." These provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws.<sup>46</sup>

After the Supreme Court determined that noncitizens were granted Fourteenth Amendment due process protections, the Court next addressed in the same year whether noncitizens were afforded Fifth and Sixth Amendment protections in *Wong Wing v. United States*.<sup>47</sup> In *Wong Wing*, the Supreme Court held that a Chinese citizen could not be sentenced to one year of hard labor for being in the United States illegally.<sup>48</sup> The Supreme Court determined that "all persons within the territory of the United States are entitled to the protection guaranteed [sic] by [the Fifth and Sixth Amendments], and that even aliens shall not be held to answer for a capital or other infamous crime . . . without due process of law."<sup>49</sup>

In later Supreme Court cases, the Supreme Court extended First Amendment and Fourteenth Amendment Equal Protection Clause protections to noncitizens. In *Bridges v. Wixon*,<sup>50</sup> the Court held that "[f]reedom of speech and of press is accorded [to] aliens residing in this country" when the Court protected the First Amendment rights of a former communist affiliate of the Australian labor organization.<sup>51</sup> Nearly 40 years later, the Supreme Court in *Plyler v. Doe*<sup>52</sup> took up the issue of whether the Equal Protection Clause of the Fourteenth Amendment applied to noncitizens, at least in the context of whether children who are unauthorized noncitizens are entitled to education.<sup>53</sup> In *Plyler v. Doe*, the Supreme Court struck down a Texas law that cut off education for children who were unauthorized noncitizens.<sup>54</sup>

This discussion reveals that noncitizens have been afforded some constitutional protections since the days of Federalists and Jeffersonian Republicans, but the guarantee of these rights has never been clear. Although the

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<sup>46</sup> *Id.* at 369.

<sup>47</sup> 163 U.S. 228 (1896).

<sup>48</sup> *Id.* at 237.

<sup>49</sup> *Id.* at 238.

<sup>50</sup> 326 U.S. 135 (1945).

<sup>51</sup> *Id.* at 148.

<sup>52</sup> 457 U.S. 202 (1982).

<sup>53</sup> *Id.* at 205.

<sup>54</sup> *Id.* at 223–24.

language of *Yick Wo* and *Wong Wing* appears unequivocal, the greater question whether noncitizens are afforded rights depends on what right is at issue.<sup>55</sup> Although the cases discussed in this Section show that noncitizens are not without protections in the United States, the Supreme Court did not define “the people” of the Bill of Rights in any of these cases. In fact, the Supreme Court has only defined “the people” within the context of the Fourth Amendment.

B. “The People” of the Fourth Amendment: *Verdugo-Urquidez*

In 1990, in *United States v. Verdugo-Urquidez*,<sup>56</sup> the Supreme Court laid the foundation for how to determine who counts as a “person” for the purpose of constitutional protections.<sup>57</sup> Rene Martin Verdugo-Urquidez, a citizen and resident of Mexico, was suspected of being a leader of a large and violent drug organization in Mexico that smuggled narcotics into the United States.<sup>58</sup> Verdugo-Urquidez was arrested in Mexico and transported to the United States to await trial.<sup>59</sup> While Verdugo-Urquidez was incarcerated, a Drug Enforcement Agency (DEA) agent sought authorization to search his residences in Mexico for evidence of narcotics trafficking.<sup>60</sup> The DEA agents did not obtain a search warrant from a United States magistrate.<sup>61</sup> Verdugo-Urquidez moved to suppress the evidence on the ground that the search violated the Fourth Amendment.<sup>62</sup> The district court granted his motion to suppress the evidence, and the Ninth Circuit affirmed.<sup>63</sup>

The question before the Supreme Court was whether nonresidential noncitizens, like Verdugo-Urquidez, are entitled to Fourth Amendment protections against unreasonable searches and seizures.<sup>64</sup> The Supreme Court began its analysis with the language of the Fourth Amendment; specifically, the Court looked to the meaning of “the people” within the framework of the Constitution.<sup>65</sup> Although the Court found evidence that the phrase “the people” could simply be a term of art used by the Framers of the Constitution, the Court concluded:

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<sup>55</sup> See Heeren, *supra* note 33, at 392.

<sup>56</sup> 494 U.S. 259 (1990).

<sup>57</sup> *Id.* at 265.

<sup>58</sup> *Id.* at 262.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at 263.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 264.

<sup>65</sup> *Id.* at 264–65.

“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.<sup>66</sup>

Ultimately, the Court rejected *Verdugo-Urquidez*'s claim because, at the time of the search, he was a citizen and resident of Mexico with no actual attachments to the United States.<sup>67</sup> Therefore, the purpose of the Fourth Amendment is not to restrain the government's actions “against aliens outside of the United States.”<sup>68</sup>

Although Chief Justice Rehnquist received five votes, the fifth vote was cast by Justice Kennedy who disagreed with the majority's view of “the people” in his concurrence.<sup>69</sup> Kennedy wrote, “I cannot place any weight on the reference to ‘the people’ in the Fourth Amendment as a source of restricting its protections.”<sup>70</sup> Kennedy argued that if the search had taken place in the United States, the full protections of the Fourth Amendment would apply.<sup>71</sup> Kennedy's concurrence leaves the status of the sufficient connections test ambiguous, especially given the shakeup of the Supreme Court since 1990.<sup>72</sup> However, because the Supreme Court has not taken up the issue since, the *Verdugo-Urquidez* test is still the controlling precedent.

### C. “The People” of the Second Amendment: *Heller* and *McDonald*

In 2008, the Supreme Court in *District of Columbia v. Heller*<sup>73</sup> addressed the ambiguity surrounding the Second Amendment's right to keep and bear arms.<sup>74</sup> The District of Columbia had enacted laws restricting the possession of

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<sup>66</sup> *Id.* at 265.

<sup>67</sup> *Id.* at 274.

<sup>68</sup> *Id.* at 266.

<sup>69</sup> *Id.* at 276 (Kennedy, J., concurring).

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at 278.

<sup>72</sup> Six Justices signed onto various parts of the majority opinion in *Verdugo-Urquidez*: Chief Justice William Rehnquist, Justice Byron White, Justice Sandra Day O'Connor, Justice John Paul Stevens, Justice Antonin Scalia, and Justice Anthony Kennedy. With Justice Kennedy announcing his retirement from the Supreme Court in June 2018, none of these Justices remain on the Court. Further, none of the dissenting Justices—Justice William Brennan, Justice Thurgood Marshall, and Justice Harry Blackmun—remain on the Court. Because the Supreme Court has not taken up the issue since, it is unknown how the current Supreme Court would rule on this issue.

<sup>73</sup> 554 U.S. 570 (2008).

<sup>74</sup> *Id.* at 595.

handguns.<sup>75</sup> In order to reach the issue of whether the laws violated the Second Amendment, the Supreme Court had to interpret the actual scope of the Second Amendment, something it had not done since the enactment of the Bill of Rights.<sup>76</sup> Thus, the issue before the Court was whether the Second Amendment provides an individual right to keep and bear arms.<sup>77</sup> The Supreme Court found that the Second Amendment did provide for such a right, and the Court struck down the District of Columbia laws: “There seems to us no doubt, on the basis of both text and history, that the Second Amendment conferred an individual right to keep and bear arms.”<sup>78</sup>

To reach its conclusion, the Supreme Court determined that the right of “the people” to keep and bear arms cannot be confined to the purely militia context.<sup>79</sup> The Court looked to the First and Fourth Amendments’ identical “right of the people” language and found that language to “unambiguously refer to individual rights, not ‘collective’ rights, or rights that may be exercised only through participation in some corporate body.”<sup>80</sup> This reasoning furthers the proposition that the meaning of “the people” in the Bill of Rights should be read consistently.

However, the Supreme Court complicated the meaning of “the people” when it did not fully adopt the *Verdugo-Urquidez* definition.<sup>81</sup> The *Heller* Court determined that “the people” in the Second Amendment “unambiguously refers to all members of the political community, not an unspecified subset.”<sup>82</sup> The Supreme Court seemed to narrow the meaning of “the people” in the Second Amendment by stating that to count as a “person” someone must be part of the political community as well as a “law-abiding citizen.”<sup>83</sup>

The Supreme Court failed to specify the meaning of being a part of the political community. Political community could mean: “(1) registered voters; (2) eligible voters (irrespective of whether they are registered); (3) all citizens; (4) those who are, or expect to become, eligible to vote; (5) those who are legally entitled to contribute to political campaigns; and (6) those who are participating in U.S. government or politics.”<sup>84</sup>

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<sup>75</sup> *Id.* at 574–75.

<sup>76</sup> *Id.* at 577.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* at 595.

<sup>79</sup> *Id.* at 579.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at 580.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* at 625.

<sup>84</sup> *The Meaning(s) of “The People” in the Constitution*, 126 HARV. L. REV. 1078, 1087 (2013).

*Heller* also reaffirmed that Second Amendment rights are not without limitations; laws that prohibit felons and the mentally ill from possessing guns are not unconstitutional.<sup>85</sup> Not only did *Heller* not explicitly resolve whether “the people” in the Second Amendment includes noncitizens who may meet the *Verdugo-Urquidez* sufficient connections test or what it means to be part of the political community, but the Court also did not specify what level of scrutiny should apply when evaluating Second Amendment claims.<sup>86</sup>

The Supreme Court did little to clarify the ambiguities surrounding the Second Amendment two years later in *McDonald v. City of Chicago*.<sup>87</sup> In *McDonald*, the Supreme Court ruled that the right to keep and bear arms is incorporated against the states through the Fourteenth Amendment.<sup>88</sup> What is interesting about the *McDonald* decision is which part of the Fourteenth Amendment was used to incorporate the Second Amendment. Four Justices incorporated the Second Amendment through the Due Process Clause, but Justice Clarence Thomas, the crucial fifth vote, incorporated through the amendment’s Privileges and Immunities Clause.<sup>89</sup>

The distinction between incorporating through the Due Process Clause and the Privileges and Immunities Clause is important for noncitizens. The Due Process Clause specifies “persons,”<sup>90</sup> whereas the Privileges and Immunities Clause uses the word “citizens.”<sup>91</sup> If Justice Thomas’s interpretation had been accepted, then constitutional rights and protections could be limited to only citizens.<sup>92</sup> Based upon the plurality opinion, the use of “persons” language could include both citizens and noncitizens.<sup>93</sup> Although Justice Alito’s plurality opinion rejects the Privileges and Immunities Clause approach, the lack of a majority to incorporate the Second Amendment through the Due Process Clause and Justice Thomas’s opinion leaves room for the argument that Second Amendment rights only apply to citizens.<sup>94</sup>

Without clear direction from the Supreme Court, the question of noncitizen’s Second Amendment rights and protections remains unanswered.

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<sup>85</sup> *Heller*, 554 U.S. at 626.

<sup>86</sup> *Id.* at 626–27.

<sup>87</sup> 561 U.S. 742 (2010).

<sup>88</sup> *Id.* at 750.

<sup>89</sup> *Id.* at 806 (Thomas, J., concurring).

<sup>90</sup> U.S. CONST. amend. XIV, § 1. “No state shall . . . deny to any person within its jurisdiction the equal protection of the laws.” *Id.*

<sup>91</sup> *Id.* “No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.” *Id.*

<sup>92</sup> Pratheepan Gulasekaram, “*The People*” of the Second Amendment: Citizenship and the Right to Bear Arms, 85 N.Y.U. L. REV. 1521, 1541 (2010).

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

Until the Seventh Circuit's decision in *United States v. Meza-Rodriguez*,<sup>95</sup> no Circuit Court of Appeals had extended Second Amendment protections to noncitizens.

*D. The Circuit Courts of Appeals Decisions Prior to Meza-Rodriguez*

Four other Circuit Courts of Appeals have addressed the issue of whether Second Amendment protections extend to noncitizens. Chronologically, the Fifth, Eighth, Tenth, and Fourth Circuits have addressed the issue of whether Second Amendment protections extend to noncitizens. All of these circuit courts found that “the people” of the Second Amendment do not include noncitizens, and, therefore, all upheld the constitutionality of 18 U.S.C. § 922(g)(5).

1. The Fifth Circuit: *United States v. Portillo-Munoz*

In 2011, the Fifth Circuit became the first federal court of appeals to address whether 18 U.S.C. § 922(g) unconstitutionality restricts unauthorized noncitizens from owning or possessing firearms.<sup>96</sup> Armando Portillo-Munoz, a Mexican native who had resided in the United States for one year and six months, was arrested for carrying a handgun.<sup>97</sup> Prior to his indictment, Portillo-Munoz had no record of criminal history, arrests, or encounters with law enforcement.<sup>98</sup>

Portillo-Munoz argued that 18 U.S.C. § 922(g)(5) was unconstitutional because it denied him his Second Amendment right to keep and bear arms.<sup>99</sup> Relying on the *Verdugo-Urquidez* sufficient connections test, Portillo-Munoz claimed that he qualified as part of “the people” of the Second Amendment.<sup>100</sup> He argued that because he qualified as part of “the people” encompassed in the Second Amendment, the law violated his constitutionally protected rights.

The Fifth Circuit held that the law did not violate Portillo-Munoz's Second Amendment rights for four reasons.<sup>101</sup> First, the court found that *Heller*'s definition of “the people” as “all members of the political community” does not include unauthorized noncitizens.<sup>102</sup> Second, the court rejected the *Verdugo-Urquidez* definition of “the people” that includes noncitizens.<sup>103</sup> Third, the court

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<sup>95</sup> See 798 F.3d 664, 673 (7th Cir. 2015).

<sup>96</sup> *United States v. Portillo-Munoz*, 643 F.3d 437, 440 (5th Cir. 2011).

<sup>97</sup> *Id.* at 439.

<sup>98</sup> *Id.*

<sup>99</sup> Appellant's Initial Brief at 10, *United States v. Portillo-Munoz*, 643 F.3d 437 (5th Cir. 2011) (No. 11-10086), 2011 WL 2115675.

<sup>100</sup> *Portillo-Munoz*, 643 F.3d at 440.

<sup>101</sup> *Id.* at 440–42.

<sup>102</sup> *Id.* at 440.

<sup>103</sup> *Id.*

reasoned that even if Portillo-Munoz satisfied the *Verdugo-Urquidez* sufficient connections test, that would not be enough to challenge the law because “the people” carries different meanings in the Second and Fourth Amendments.<sup>104</sup> Finally, the court concluded that the law was constitutional because Congress has the authority to distinguish between citizens and noncitizens.<sup>105</sup>

## 2. The Eighth Circuit: *United States v. Flores*

After the Fifth Circuit’s decision in *United States v. Portillo-Munoz*, the Eighth Circuit took up the issue in *United States v. Flores*.<sup>106</sup> Issuing a *per curiam* decision, the Eighth Circuit did not address the merits of Joaquin Flores’s claim.<sup>107</sup> Instead, the court “[a]gree[d] with the Fifth Circuit that the protections of the Second Amendment do not extend to aliens illegally present in this country.”<sup>108</sup> Therefore, the Eighth Circuit grounded its decision in *Portillo-Munoz* and ruled that the Second Amendment does not extend to unauthorized noncitizens present in the United States.<sup>109</sup>

## 3. The Tenth Circuit: *United States v. Huitron-Guizar*

Nearly a year after the Fifth and Eighth Circuits decisions, the Tenth Circuit was faced with the same issue in *United States v. Huitron-Guizar*.<sup>110</sup> Huitron-Guizar was arrested and indicted after police found three firearms when executing a search warrant.<sup>111</sup> On appeal, the Tenth Circuit upheld Huitron-Guizar’s conviction but skirted the Second Amendment constitutional question.<sup>112</sup> The Tenth Circuit rejected the Fifth Circuit’s expanded scope of *Heller*.<sup>113</sup> The circuit court noted that noncitizens were not the focus of the *Heller* decision; further, the *Heller* opinion never mentions “aliens,” “immigrants,” or “non-citizens.”<sup>114</sup>

Because of the ambiguities surrounding *Heller* and *McDonald*, the Tenth Circuit refused to infer that the Supreme Court had already excluded noncitizens

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<sup>104</sup> *Id.* at 440–41.

<sup>105</sup> *Id.* at 441–42.

<sup>106</sup> 663 F.3d 1022 (8th Cir. 2011).

<sup>107</sup> *Id.* at 1023.

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

<sup>109</sup> *Id.*

<sup>110</sup> 678 F.3d 1164 (10th Cir. 2012).

<sup>111</sup> *Id.* at 1165.

<sup>112</sup> *Id.* at 1169.

<sup>113</sup> *Id.* at 1168.

<sup>114</sup> *Id.*

from being a part of “the people” of the Second Amendment.<sup>115</sup> The Tenth Circuit was especially hesitant to adopt the Fifth Circuit’s interpretation that “the people” of the Second and Fourth Amendment have different meanings.<sup>116</sup> To only rely on the use of “citizen” to deny noncitizens Second Amendment rights would require the Tenth Circuit “to hold that the same ‘people’ who receive Fourth Amendment protections are denied Second Amendment protections, even though both rights seem at root concerned with guarding the sanctity of the home against invasion.”<sup>117</sup>

The Tenth Circuit upheld Huitron-Guizar’s conviction by applying intermediate scrutiny to 18 U.S.C. § 922(g)(5) and concluded that “courts must defer to Congress as it lawfully exercises its constitutional power . . . to ensure safety and order.”<sup>118</sup> Even though the Tenth Circuit evaded the constitutional question, it still upheld the constitutionality of § 922(g)(5) as a lawful exercise of Congress’s power.<sup>119</sup>

#### 4. The Fourth Circuit: *United States v. Carpio-Leon*

The Fourth Circuit was the last circuit to take up the issue prior to the Seventh Circuit’s decision in *Meza-Rodriguez*. In *United States v. Carpio-Leon*,<sup>120</sup> Nicolas Carpio-Leon, a Mexican citizen, was arrested for possessing firearms and ammunition following a consensual search.<sup>121</sup> Prior to his arrest, Carpio-Leon had lived in the United States for 13 years with his three children, all of whom were born in the United States.<sup>122</sup> Carpio-Leon challenged his conviction and moved to dismiss his indictment as a violation of his Second Amendment right to keep and bear arms.<sup>123</sup>

The Fourth Circuit, like the Fifth and Eighth Circuits, held that the Second Amendment does not grant protections to noncitizens.<sup>124</sup> Citing the *Heller* decision, the Fourth Circuit determined that “illegal aliens do not fall in the class of persons who are classified as law-abiding members of the political community for the purpose of defining the Second Amendment’s scope.”<sup>125</sup>

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<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Id.* at 1170.

<sup>119</sup> *Id.*

<sup>120</sup> 701 F.3d 974 (4th Cir. 2012).

<sup>121</sup> *Id.* at 975.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *Id.* at 981.

According to the court, because unauthorized noncitizens are in the country illegally, such noncitizens cannot have a law-abiding relationship with the United States: “the crime of illegal entry inherently carries this additional aspect that leaves an illegal alien’s status substantially unprotected by the Constitution . . . .”<sup>126</sup> Therefore, because unauthorized noncitizens are in the country illegally, by the Fourth Circuit’s logic, such persons are not entitled to Second Amendment rights.<sup>127</sup>

*E. Seventh Circuit Shakeup: United States v. Meza-Rodriguez*

Mariano Meza-Rodriguez is a Mexican citizen who has lived in the United States since he was a small child.<sup>128</sup> Throughout his 20-plus years in the United States, Meza-Rodriguez grew up in Milwaukee where he attended public school, worked various jobs, and developed relationships with family and friends—all without legal immigration status.<sup>129</sup> On August 24, 2013, Meza-Rodriguez was arrested after surveillance video showed him pointing an object resembling a firearm in a bar.<sup>130</sup> When officers apprehended Meza-Rodriguez, he had a .22 caliber cartridge in his shorts pocket.<sup>131</sup> He was indicted for illegal possession of ammunition in violation of 18 U.S.C. § 922(g)(5) and tried in the U.S. District Court for the Eastern District of Wisconsin.<sup>132</sup> Meza-Rodriguez moved to dismiss the indictment on the basis that § 922(g)(5) violated his Second Amendment rights.<sup>133</sup>

Ultimately, Meza-Rodriguez pleaded guilty in the district court as part of a plea agreement that resulted in his deportation and a permanent ban on reentry into the United States.<sup>134</sup> However, he preserved the Second Amendment issue for appeal and it is that issue that went before the Seventh Circuit.<sup>135</sup> Specifically, the question before the court was whether the Second Amendment protects unauthorized noncitizens within the borders of the United States.<sup>136</sup>

In evaluating this constitutional challenge, the Seventh Circuit started with the Supreme Court’s recognition of Second Amendment rights in *Heller*:

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<sup>126</sup> *Id.*

<sup>127</sup> *Id.* at 976.

<sup>128</sup> *United States v. Meza-Rodriguez*, 798 F.3d 664, 666 (7th Cir. 2015).

<sup>129</sup> *Id.* at 671.

<sup>130</sup> *Id.* at 666.

<sup>131</sup> *Id.*

<sup>132</sup> *Id.* at 664, 666.

<sup>133</sup> *Id.* at 667.

<sup>134</sup> *Id.*

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

<sup>136</sup> *Id.* at 669.

“the right of the people to keep and bear Arms’ . . . confers an ‘individual right to possess and carry weapons.’”<sup>137</sup> From this proposition, the question then becomes “whether unauthorized noncitizens (or noncitizens at all) are among ‘the people’ on whom the [Second] Amendment bestows this individual right.”<sup>138</sup>

Although the Seventh Circuit acknowledged that other circuit courts had found that the Second Amendment did not protect unauthorized noncitizens, the Seventh Circuit chose to rely on its own analysis from *Friedman v. City of Highland Park*.<sup>139</sup> In the *Friedman* opinion, the Seventh Circuit found that *Heller* does not define the full scope of the Second Amendment.<sup>140</sup> Because *Heller* is not the final word on the Second Amendment and does not outright preclude an inquiry into whether noncitizens are part of “the people” of the Second Amendment, the court went on to examine the use of “citizen” in the Constitution and found that the terms “the people” and “citizen” are not necessarily synonymous.<sup>141</sup>

Citing both *Heller* and *Verdugo-Urquidez*, the Seventh Circuit held that the phrase “the people” means the same thing when used in the Second Amendment as it does when used in “other amendments passed as part of the Bill of Rights [which] has the advantage of treating identical phrasing in the same way and respecting the fact that the first ten amendments were adopted as a package.”<sup>142</sup> Having determined this, the court adopted the *Verdugo-Urquidez* sufficient connections test for governing who is a part of “the people.”<sup>143</sup> The Seventh Circuit found this language particularly persuasive: “[A]liens receive constitutional protections when they have come within the territory of the United States and developed substantial connections with this country.”<sup>144</sup>

The court found that Meza-Rodriguez did have sufficient connections to the United States because he lived in Milwaukee for 20-plus years, attended public school, has family connections, and was employed.<sup>145</sup> The government tried to counter this point by arguing that Meza-Rodriguez’s criminal history, including being in the country illegally, precluded him from claiming constitutional protection because it demonstrated that he had “not accepted the basic obligations of membership in U.S. society.”<sup>146</sup> The Seventh Circuit found

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<sup>137</sup> *Id.* (quoting *District of Columbia v. Heller*, 554 U.S. 570, 592 (2008)).

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

<sup>139</sup> *Id.*

<sup>140</sup> *Id.* (citing *Friedman v. City of Highland Park*, 784 F.3d 406, 410 (7th Cir. 2015)).

<sup>141</sup> *Id.*

<sup>142</sup> *Id.* at 670.

<sup>143</sup> *Id.*

<sup>144</sup> *Id.* (quoting *United States v. Verdugo-Urquidez*, 494 U.S. 259, 271 (1990)).

<sup>145</sup> *Id.* at 670–71.

<sup>146</sup> *Id.* at 671.

this unpersuasive and held that “[t]he Second Amendment is not limited to such on-again, off-again protection.”<sup>147</sup> The court went on to emphasize that the only question that mattered is whether Meza-Rodriguez had developed sufficient connections as a resident in the United States.<sup>148</sup>

The Seventh Circuit concluded its Second Amendment analysis by holding that because the Second Amendment is not a “second-class entitlement,” noncitizens cannot be excluded from its protections when there is no language in the Second Amendment that would support such an exclusion.<sup>149</sup> However, holding that Meza-Rodriguez was entitled to Second Amendment protections did not solve all the issues presented in this case. The court next turned to the issue of whether § 922(g)(5) violated Meza-Rodriguez’s Second Amendment rights.<sup>150</sup> In making its determination, the Seventh Circuit adopted something “akin to intermediate scrutiny.”<sup>151</sup> The court held that “Congress’s interest in prohibiting persons who are difficult to track and who have an interest in eluding law enforcement is strong enough” to satisfy a heightened level of scrutiny.<sup>152</sup>

Judge Flaum concurred in the judgment.<sup>153</sup> Flaum argued that the Tenth Circuit’s approach in *United States v. Huitron-Guizar* was the correct one, and he would not have touched the issue of whether noncitizens have Second Amendment rights because “regardless of the answer 18 U.S.C. § 922(g)(5) satisfies intermediate scrutiny and thus passes constitutional muster.”<sup>154</sup> Even though Meza-Rodriguez had developed enough sufficient connections to the United States to count as part of “the people” of the Second Amendment, the Seventh Circuit determined that § 922(g)(5) is a permissible restriction on his Second Amendment rights.

### III. ANALYSIS

Whether noncitizens are encompassed within “the people” of the Second Amendment, and the Bill of Rights in general, is an important question that the Supreme Court desperately needs to resolve. During a politically divisive time, the lack of Supreme Court direction is alarming because the stakes are so high. In 2015, the number of unauthorized noncitizens living in the United States was

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<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> *Id.* at 672.

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> *Id.* at 673.

<sup>153</sup> *Id.* (Flaum, J., concurring).

<sup>154</sup> *Id.* at 674.

approximately 11 million.<sup>155</sup> This amount correlates to 3.4% of the total United States population.<sup>156</sup> The number of unauthorized noncitizens peaked in 2007 at 12.2 million people, which would correlate to 4% of the population.<sup>157</sup> Significantly, a rising share of unauthorized noncitizens have lived in the United States for at least a decade.<sup>158</sup> In 2014, about two-thirds of the adult unauthorized citizen population had been living in the United States for at least a decade.<sup>159</sup> Further, approximately 1.76 million unauthorized noncitizens were brought to the United States as children.<sup>160</sup>

The number of noncitizens living in the United States is significant. Not only will the definition of “the people” affect a large number of people, but the meaning of “the people” will have lasting effects on constitutional jurisprudence. This Note argues that the meaning of “the people” in the First, Second, Fourth, Ninth, and Tenth Amendments should be read consistently because the interpretation of “the people” in one Amendment affects the interpretation of “the people” in other Amendments.<sup>161</sup> Narrowly interpreting the meaning of “the people” in the Second Amendment would jeopardize the Supreme Court’s established precedent on the meaning of “the people” in other Amendments, such as the Fourth Amendment.<sup>162</sup>

This Part argues that “the people” of the Bill of Rights must be read consistently in order to protect the rights of noncitizens in the United States. Section III.A explains why the Seventh Circuit was correct in determining that “the people” of the Second Amendment included unauthorized noncitizens. Section III.B explains where the Seventh Circuit went wrong in its opinion. Specifically, Section III.B addresses how the sufficient connections test from *Verdugo-Urquidez* is not an appropriate test for determining constitutional rights, and it also explains why the court should have ruled 18 U.S.C. § 922(g)(5) unconstitutional. Section III.C demonstrates how the issue of whether noncitizens have Second Amendment rights is indicative of a larger immigration

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<sup>155</sup> Jens Manuel Krogstad, Jeffrey S. Passel & D’vera Cohn, *5 Facts About Illegal Immigration in the U.S.*, PEW RESEARCH CTR. (Nov 28, 2018), <http://www.pewresearch.org/fact-tank/2018/11/28/5-facts-about-illegal-immigration-in-the-u-s/>.

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> Thomas P. Miller & Edyta Salata, *DACA (Deferred Action for Childhood Arrivals)—Making a Dream a Little More Attainable*, 27 DCBA BRIEF 30 (2015).

<sup>161</sup> Olesya A. Salnikova, Comment, “*The People*” of *Heller* and *Their Politics: Whether Illegal Aliens Should Have the Right to Bear Arms After United States v. Portillo-Munoz*, 103 J. CRIM. L. & CRIMINOLOGY 625, 627 (2013); see also D. McNair Nicholas, Jr., *Guns and Alienage: Correcting a Dangerous Contradiction*, 73 WASH. & LEE L. REV. 2089, 2122 (2016).

<sup>162</sup> Nicholas, *supra* note 161, at 2122.

problem in the United States. Finally, Section III.D explains how states are leading the charge on protecting the rights of noncitizens in the United States.

A. *The Seventh Circuit's Interpretation of "The People" Was Correct*

The phrase "the people" is not defined anywhere in the Constitution, and the Second Amendment itself does not include any language limiting the right to bear arms to just citizens.<sup>163</sup> Although the Constitution makes several references to "citizen" or "citizens," nowhere in the Bill of the Rights is such language mentioned.<sup>164</sup> This lack of "citizen" language could indicate that the proper reading of the Bill of Rights includes both citizens and noncitizens.<sup>165</sup> Because the Framers consciously chose to use "people" instead of "citizens," and "citizen" is used in other constitutional provisions, this could demonstrate a conscious choice by the Framers to include protections for noncitizens in the Bill of Rights.<sup>166</sup>

Further, the inclusion of noncitizens as members of "the people" entitled to Second Amendment protections is consistent with historical views on the importance of the Bill of Rights. In 1800, James Madison wrote,

[I]t does not follow, because aliens are not parties to the Constitution, as citizens are parties to it, that whilst they actually conform to it, they have no right to its protection. Aliens are not more parties to the laws than they are parties to the Constitution; yet it will not be disputed, that as they owe, on one hand, a temporary obedience, they are entitled, in return, to their protection and advantage.<sup>167</sup>

By adopting the *Verdugo-Urquidez* definition of "the people," the Seventh Circuit correctly interpreted the meaning of "the people" to be read consistently throughout the Bill of Rights. Although *Verdugo-Urquidez* specifically addressed "the people" of the Fourth Amendment, the Supreme Court implicated its applicability to other Amendments, including the Second Amendment, when the Court suggested the uniformity of the phrase "the people" in the First,

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<sup>163</sup> Gulasekaram, *supra* note 92, at 1532.

<sup>164</sup> The Honorable Karen Nelson Moore, *Aliens and the Constitution*, 88 N.Y.U. L. REV. 801, 806–07 (2013).

<sup>165</sup> *Id.* at 807 ("The argument maintains that conscious avoidance of the word 'citizen' conveys the drafters' intention that the rights defined in the Bill of Rights extend beyond those with citizen status.").

<sup>166</sup> *Id.*

<sup>167</sup> David Cole, *Are Foreign Nationals Entitled to the Same Constitutional Rights as Citizens?*, 25 T. JEFFERSON L. REV. 367, 371 (2003) (quoting 4 JONATHON ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 556 (1827)).

Second, Fourth, Ninth, and Tenth Amendments.<sup>168</sup> The Supreme Court reiterated this uniform understanding of “the people” in *Heller*: “[I]t has always been widely understood that the Second Amendment, like the First and Fourth Amendments, codified a *pre-existing* right.”<sup>169</sup> Therefore, the Seventh Circuit was correct in determining that the *Verdugo-Urquidez* definition of “the people” is applicable when determining the meaning of “the people” in the Second Amendment.

Further, the Seventh Circuit’s choice to not fully rely on the Supreme Court’s decision in *Heller* is also important. Although the Fifth, Eighth, Fourth, and Tenth Circuits heavily relied on *Heller*’s language when determining that noncitizens are not included in “the people” of the Second Amendment, *Heller* is not applicable in determining the Second Amendment’s meaning of this phrase. *Heller* was not concerned with the rights of noncitizens; instead, the opinion was focused on whether the Second Amendment provided an individual or collective right.<sup>170</sup> The other circuits fixated on *Heller*’s language that “the people” “refers to all members of the political community.”<sup>171</sup> However, the Supreme Court did not definitively resolve the issue of who is encompassed in “the people” of the Second Amendment. The Supreme Court itself in *Heller* stated that “this case represents this Court’s first in-depth examination of the Second Amendment, [and] one should not expect it to clarify the entire field.”<sup>172</sup> By using *Heller* as the definitive authority on whether “the people” of the Second Amendment encompasses noncitizens is to go beyond the scope of *Heller*.

### B. *The Seventh Circuit’s Missteps*

The Seventh Circuit correctly held that constitutional protections should extend to noncitizens within the United States’ borders. However, the court erred on two points. First, the court’s reliance on the *Verdugo-Urquidez* analysis is problematic because the ruling does not go far enough to protect noncitizens in the United States. Second, the court also erred when it upheld the constitutionality of 18 U.S.C. § 922(g)(5).

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<sup>168</sup> United States v. Verdugo-Urquidez, 494 U.S. 259, 265 (1990).

While this textual exegesis is by no means conclusive, it suggests that “the people” protected by the Fourth Amendment, and by the First and Second Amendments, and to whom rights and powers are reserved in the Ninth and Tenth Amendments, refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community.

*Id.*

<sup>169</sup> District of Columbia v. Heller, 554 U.S. 570, 592 (2008).

<sup>170</sup> *Id.* at 595.

<sup>171</sup> *Id.* at 580.

<sup>172</sup> *Id.* at 635.

### 1. The Problematic Use of *Verdugo-Urquidez*

The sufficient connections test of the *Verdugo-Urquidez* opinion is an example of line-drawing between noncitizens who are worthy of constitutional protections and those who are not. To read the phrase “the people” consistently throughout the Bill of Rights is correct; however, to only grant rights and protections to citizens who have developed sufficient connections is problematic and impractical.

A sufficient connections test will likely prove nearly impossible to implement. As Justice Brennan pointed out in his dissent in *Verdugo-Urquidez*, the sufficient connections test is not clear.<sup>173</sup> The majority does not clarify at what point a noncitizen has developed enough connections with the United States to make such connections “sufficient.” Does the noncitizen have to reside in the United States for a certain period of time? If so, how much time? Further, what actions, if any, does a noncitizen need to take in order to establish sufficient connections? This fluid and ambiguous test does little to give lower courts guidance on when a noncitizen is entitled to Second Amendment protections.<sup>174</sup>

Instead of fully relying on the sufficient connections test, a better approach to solving this issue would be to adopt Justice Brennan’s dissenting opinion. Justice Brennan wrote in his dissent in *Verdugo-Urquidez* that constitutional protections should extend to everyone in the United States and those subject to its laws.<sup>175</sup> Brennan approached the issue from a fundamental fairness perspective

[b]y concluding that respondent is not one of “the people” protected by the Fourth Amendment, the majority disregards basic notions of mutuality. If we expect aliens to obey our laws, aliens should be able to expect that we will obey our Constitution when we investigate, prosecute, and punish them . . . . Mutuality is essential to ensure the fundamental fairness that underlies our Bill of Rights.<sup>176</sup>

It goes against the United States’ “constitutional conscience” to enforce all laws against noncitizens while at the same time exclude some noncitizens from the protections and rights that are afforded to other noncitizens.<sup>177</sup> The dissenters also appeal to history by arguing that a right so fundamental to the founding of the country should not be read so narrowly as to categorize certain subsets of

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<sup>173</sup> *Verdugo-Urquidez*, 494 U.S. at 282 (Brennan, J., dissenting).

<sup>174</sup> Justine Farris, *The Right of Non-Citizens to Bear Arms: Understanding “the People” of the Second Amendment*, 50 IND. L. REV. 943, 963 (2017).

<sup>175</sup> *Verdugo-Urquidez*, 494 U.S. at 284 (Brennan, J., dissenting).

<sup>176</sup> *Id.* (Brennan, J., dissenting).

<sup>177</sup> *Id.* at 286 (Brennan, J., dissenting).

people.<sup>178</sup> All noncitizens in the United States are subject to the laws of the United States; therefore, as Justice Brennan argues, it makes no sense to provide some constitutional protections to some noncitizens while excluding other noncitizens.<sup>179</sup>

## 2. 18 U.S.C. § 922(g)(5) is Unconstitutional

Even if the Second Amendment is interpreted to extend rights to noncitizens, that does not mean that it is lawful for noncitizens to possess firearms.<sup>180</sup> As the Supreme Court noted in *Heller*, the rights protected by the Second Amendment are not without their limits.<sup>181</sup> Congress has the ability to limit constitutional rights through permissible restrictions. If the Supreme Court had granted certiorari for *Meza-Rodriguez*, it would have been a perfect time to resolve what is the appropriate standard of review for Second Amendment claims. Alas, the Court denied certiorari and the lower courts are still without proper guidance.<sup>182</sup> Although the lower courts have not consistently settled on a standard of review, the emerging trend is toward intermediate scrutiny.<sup>183</sup>

Under intermediate scrutiny, laws will be upheld if the law furthers an important government interest, and the means chosen are substantially related to that interest.<sup>184</sup> Congress's objective in passing § 922(g)(5) was "to keep guns out of the hands of presumptively risky people" and to "suppress . . . armed violence."<sup>185</sup> Applying this objective to § 922(g)(5), Congress assumed that undocumented noncitizens are presumptively risky or dangerous people. The government in *Meza-Rodriguez* offered no evidence to support its assertion that undocumented noncitizens are more likely to engage in risky behaviors or commit more crimes than citizens.<sup>186</sup> Noncitizens are no more likely to commit violent crimes than people who are legally in the United States.<sup>187</sup>

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<sup>178</sup> *Id.* at 287–88 (Brennan, J., dissenting).

<sup>179</sup> *Id.* (Brennan, J., dissenting).

<sup>180</sup> Farris, *supra* note 174, at 964.

<sup>181</sup> *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008).

<sup>182</sup> *United States v. Meza-Rodriguez*, 798 F.3d 664 (7th Cir. 2015), *cert. denied*, 136 S. Ct. 1655 (2016).

<sup>183</sup> Farris, *supra* note 174, at 965.

<sup>184</sup> *Craig v. Boren*, 429 U.S. 190, 197 (1976).

<sup>185</sup> *United States v. Meza-Rodriguez*, 798 F.3d 664, 673 (7th Cir. 2015) (quoting *United States v. Yancey*, 621 F.3d 681, 683–84 (7th Cir. 2010)).

<sup>186</sup> *Id.* at 683.

<sup>187</sup> See generally RUBEN G. RUMBAUT & WALTER A. EWING, IMMIGR. POL'Y CTR., THE MYTH OF IMMIGRANT CRIMINALITY AND THE PARADOX OF ASSIMILATION: INCARCERATION RATES AMONG NATIVE AND FOREIGN-BORN MEN (2007),

The government in *Meza-Rodriguez* argued that undocumented noncitizens are risky because they are difficult to track, have an interest in evading law enforcement, and have already broken the law just by being in the United States at all.<sup>188</sup> However, this argument is flawed because § 922(g)(5) also applies to noncitizens who are legally in the United States.<sup>189</sup> Further, it cannot be argued that individuals like Meza-Rodriguez—who were brought to the United States as children—intended to break the law when they came into the United States. Finally, § 922(g)(5) fails to pass intermediate scrutiny because the means chosen—a complete exclusion of Second Amendment rights for all noncitizens in the United States—is extreme when the government is not able to show a connection between noncitizens and an increased propensity to commit crimes.<sup>190</sup> Because the government failed to demonstrate any connection between noncitizens and the danger they supposedly create, the Seventh Circuit should have ruled § 922(g)(5) unconstitutional.

C. *The Complicated Relationship Between Noncitizens and the Constitution*

The United States is a nation founded by immigrants. But every wave of immigration has faced fear and hostility, especially during times of economic hardship, and the present times are no exception.<sup>191</sup> Immigration issues have long been politically divisive in the United States and pose difficult questions for lawmakers.<sup>192</sup> Despite the consistent presence of noncitizens living in the United States, the rights of noncitizens remain largely unresolved.

The Supreme Court has recognized the First, Fourth, Fifth, Sixth, and Fourteenth Amendment rights of noncitizens.<sup>193</sup> “However, these rights are

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<https://www.americanimmigrationcouncil.org/research/myth-immigrant-criminality-and-paradox-assimilation>.

<sup>188</sup> *Meza-Rodriguez*, 798 F.3d at 673.

<sup>189</sup> 18 U.S.C. § 922(g)(5)(B) (2018).

<sup>190</sup> Farris, *supra* note 174, at 966.

<sup>191</sup> See Tal Kopan, *Trump Fully Embraces Far Right Immigration Playbook*, CNN (Dec. 18, 2017, 6:26 PM), <http://www.cnn.com/2017/12/18/politics/trump-administration-immigration-hardline/index.html>.

<sup>192</sup> See Jeffrey C. Isaac, *Editor's Introduction: Immigration Politics*, 9 PERSP. ON POL. 501, 501 (2011) (describing immigration as “one of the most ethically challenging and politically compelling” conflicts amongst Americans and “a major topic of controversy”).

<sup>193</sup> See Jennifer Paulson, *We the People: Analyzing the 7th Circuit's Decision in United States v. Meza-Rodriguez*, 789 F.3d 664 (7th Cir. 2015), 41 S. ILL. U. L. J. 163, 167 (2016); see, e.g., *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990); *Plyler v. Doe*, 457 U.S. 202, 210 (1982) (stating that all individuals within the United States are entitled to due process under the Fifth and Fourteenth Amendments and are covered by the Equal Protection Clause of the Fourteenth Amendment); *Bridges v. Wixon*, 326 U.S. 135, 161 (1945) (finding that First Amendment protections apply to noncitizens residing in the United States); *Wong Wing v. United*

considerably limited by federal and state legislation that target noncitizens based on their undocumented status.”<sup>194</sup> The Constitution gives Congress the explicit power to “establish a uniform Rule of Naturalization” and to “regulate Commerce with foreign Nations.”<sup>195</sup> For much of the United States’ history, the Supreme Court interpreted these provisions to mean that the “[p]ower to regulate immigration is unquestionably exclusively a federal power.”<sup>196</sup> The Supreme Court is hesitant to interfere with federal immigration policy because of Congress’s plenary power over immigration.<sup>197</sup>

The problem with the Supreme Court’s hands-off approach is that the immigration problem is not going away. Supporters of unauthorized noncitizens see them as friends, coworkers, fellow students, and community leaders; they are productive members of society who work hard, pay taxes, and raise families.<sup>198</sup> The opponents of unauthorized noncitizens see them as dangerous criminals bent on exploiting American generosity; opponents believe unauthorized citizens lead to increased crime and take away jobs from natural born citizens.<sup>199</sup>

The issue with opponent’s viewpoint is that most of the concerns surrounding unauthorized noncitizens are not justified. There is virtually no research that supports the assumption that increases in immigration leads to

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States, 163 U.S. 228, 238 (1896) (holding that all individuals physically within the United States are protected by the Fifth and Sixth Amendments); *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886) (writing that all individuals within the United States are “persons” within the meaning of the Fourteenth Amendment’s “universal” provisions); *see also* discussion, *supra* Section II.A.

<sup>194</sup> Paulson, *supra* note 193, at 167–68.

<sup>195</sup> U.S. CONST. art. I, § 8, cl. 4, 3.

<sup>196</sup> *DeCanas v. Bica*, 424 U.S. 351, 354 (1976), *superseded by statute*, Immigration Reform and Control Act, Pub. L. No. 99-608, 100 Stat. 3359, *as recognized in* *Chamber of Commerce of U.S. v. Whiting*, 563 U.S. 582; *see also* *Toll v. Moreno*, 458 U.S. 1, 10 (1982) (“Our cases have long recognized the preeminent role of the Federal Government with respect to the regulation of aliens within our borders.”), *superseded by statute*, Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009, *as recognized in* *Day v. Sebelius*, 376 F. Supp. 2d 1022 (D. Kan. 2005).

<sup>197</sup> *See Plyler*, 457 U.S. at 225 (“The obvious need for delicate policy judgments has counseled the Judicial Branch to avoid intrusion into this field.”), *superseded by statute*, Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105, *as recognized in* *Day v. Sebelius*, 376 F. Supp. 2d 1022 (D. Kan. 2005); *see also* discussion, *supra* Section II.A.

<sup>198</sup> *See generally* Vivian Yee et al., *Here’s the Reality About Illegal Immigrants in the United States*, N.Y. TIMES (Mar. 6, 2017), <https://www.nytimes.com/interactive/2017/03/06/us/politics/undocumented-illegal-immigrants.html>.

<sup>199</sup> *Id.*

increases in crime.<sup>200</sup> “[M]ost of the undocumented [noncitizens] held in federal prisons and pretrial detention are facing prosecution for crossing the border illegally rather than any violent crime.”<sup>201</sup> Research suggests that noncitizens commit fewer crimes, on average, than native-born Americans.<sup>202</sup> According to one study that investigated the relationship between immigration and crime, the research found that as immigration increased, crime, on average, decreased in metropolitan areas.<sup>203</sup> Although there are some individual studies that found that there was a correlation between increased immigration and increased crime, there are 2.5 times as many studies that show immigration correlated to less crime, or that immigration had no impact on crime.<sup>204</sup>

As unauthorized noncitizens become more integrated into American society, the line between citizen and noncitizen becomes harder to establish. Not only are the lines continually blurred, but noncitizens significantly contribute to society. Although opponents to unauthorized noncitizens believe that noncitizens take jobs away from American workers, noncitizens significantly contribute to the economy and pay taxes.

According to the Small Business Administration, noncitizens were 30% more likely to start a business in the United States than citizens; further, 18% of all small business owners in the United States were noncitizens.<sup>205</sup> Not only do noncitizens start businesses and create jobs, but they make up a significant portion of the United States’ engineers, scientists, and innovators.<sup>206</sup> According to the Census Bureau, noncitizens represent 30% of engineers; 27% of mathematicians, statisticians, and computer scientists; and 24% of physical scientists.<sup>207</sup>

One of the biggest concerns about unauthorized noncitizens living in the United States is the belief that unauthorized noncitizens take away jobs from U.S.-born workers. Although noncitizens are more likely to be employed in

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<sup>200</sup> Charis Kubrin et al., *Fact Check: Immigration Doesn't Bring Crime Into U.S., Data Say*, PBS NEWS HOUR (Feb. 3, 2017, 1:43 PM), <https://www.pbs.org/newshour/nation/fact-check-immigration-doesnt-bring-crime-u-s-data-say>.

<sup>201</sup> Elise Foley & Roque Planas, *Trump ICE Chief Wants to Prosecute Politicians Who Won't Lock up More Immigrants*, HUFFPOST: POLITICS (Jan. 3, 2018, 9:36 PM), [https://www.huffingtonpost.com/entry/immigration-ice-sanctuary-policies\\_us\\_5a4d6610e4b06d1621bd0682?ncid=tweetInkushpmsg00000067](https://www.huffingtonpost.com/entry/immigration-ice-sanctuary-policies_us_5a4d6610e4b06d1621bd0682?ncid=tweetInkushpmsg00000067).

<sup>202</sup> Kubrin et al., *supra* note 200.

<sup>203</sup> *Id.*

<sup>204</sup> *Id.*

<sup>205</sup> Jason Furman & Danielle Gray, *Ten Ways Immigrants Help Build and Strengthen Our Economy*, OBAMA WHITE HOUSE (July 12, 2012, 10:09 AM), <https://obamawhitehouse.archives.gov/blog/2012/07/12/ten-ways-immigrants-help-build-and-strengthen-our-economy>.

<sup>206</sup> *Id.*

<sup>207</sup> *Id.*

specific jobs like sewing machine operators, plasterers, stucco masons, and manicurists, there are no major United States industries in which noncitizens outnumber citizen workers.<sup>208</sup> Currently, unauthorized noncitizens make up about 5% of the United States' workforce.<sup>209</sup> Although many believe that unauthorized noncitizens are a drain to taxpayer, unauthorized noncitizens actually pay taxes.<sup>210</sup> Unauthorized noncitizens collectively contribute an estimated \$11.74 billion to state and local economies each year through a combination of sales and excise, personal income, and property taxes.<sup>211</sup>

Not only do noncitizens contribute economically to the United States, noncitizens have long served in the military, protecting the rights of American citizens that they themselves are often denied.<sup>212</sup> For example, during the Civil War, nearly 25% of all soldiers were foreign-born.<sup>213</sup> After the Civil War, soldiers were entitled to military pension benefits, including noncitizen soldiers.<sup>214</sup> However, noncitizens actually had less access to the pension benefits than citizens and were often rewarded less.<sup>215</sup> To this day, unauthorized noncitizens are still required to register for the selective service.<sup>216</sup>

The contribution noncitizens make to the United States is in tension with how noncitizens are treated in this country. The Seventh Circuit's decision in *Meza-Rodriguez* highlights this tension. On the one hand, the court recognized that a person brought to the United States as a child who had lived, studied, and worked in the United States for 20-plus years deserved constitutional protections;<sup>217</sup> however, when push came to shove, the court ultimately denied Meza-Rodriguez his due rights.<sup>218</sup>

To protect the rights of noncitizens, courts must be consistent in their application of constitutional rights and apply constitutional protections to all persons, not just citizens. The current political climate in the United States teaches that majoritarian policies will always pose a threat to the rights of noncitizens. Although the Constitution does not give noncitizens the right to

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<sup>208</sup> DREW DESILVER, PEW RESEARCH CTR., IMMIGRANTS DON'T MAKE UP A MAJORITY OF WORKERS IN ANY U.S. INDUSTRY (2017), <http://www.pewresearch.org/fact-tank/2017/03/16/immigrants-dont-make-up-a-majority-of-workers-in-any-u-s-industry/>.

<sup>209</sup> *Id.*

<sup>210</sup> *Undocumented Immigrants' State & Local Tax Contributions*, INST. ON TAX'N & ECON. POL'Y (Mar. 2, 2017), <https://itep.org/immigration/>.

<sup>211</sup> *Id.*

<sup>212</sup> *See Heeren, supra* note 33, at 380.

<sup>213</sup> *Id.*

<sup>214</sup> *Id.*

<sup>215</sup> *Id.*

<sup>216</sup> *Id.* at 381.

<sup>217</sup> *United States v. Meza-Rodriguez*, 798 F.3d 664, 670–71 (7th Cir. 2015).

<sup>218</sup> *Id.* at 673.

enter the United States, once they are in the United States, the Supreme Court has found that noncitizens are afforded constitutional protections.<sup>219</sup> To only apply constitutional protections only after an in-depth fact-finding scenario as the sufficient connections test demands, flies in the face of fundamental fairness held so sacred in the Bill of Rights.<sup>220</sup> Denying noncitizens protections under the Second Amendment while simultaneously affording them protections under other constitutional Amendments does not make sense. People, regardless of their citizenship status, should not be subjected to on-again, off-again protections.

#### D. How States Can Protect Noncitizens

As the Seventh Circuit demonstrated in *Meza-Rodriguez*, sometimes courts fail to uphold the constitutional protections of noncitizens.<sup>221</sup> With the Trump Administration's efforts to crackdown on unauthorized noncitizens,<sup>222</sup> states are taking up the charge to protect the constitutional rights of noncitizens. For example, in 2017, California passed a "sanctuary state" law, which protects undocumented noncitizens by limiting state and local law enforcement communication with federal immigration authorities.<sup>223</sup> The law also prevents officers from questioning and holding people on immigration violations.<sup>224</sup>

California is not the only state that has taken steps to protect the rights of noncitizens. Massachusetts, Vermont, and Hawaii have also pushed for various measures to prevent state and local resources from being used to enforce federal immigration laws.<sup>225</sup> The governor of Washington directed state agencies to not collect information on noncitizens beyond what is necessary to perform agency duties; further, the collected information will not be used to apprehend noncitizens who are in the country illegally.<sup>226</sup>

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<sup>219</sup> See *id.* (Flaum, J., concurring). See generally *Plyler v. Doe*, 457 U.S. 202 (1982), *superseded by statute*, Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105, *as recognized in* *Day v. Sebelius*, 376 F. Supp. 2d 1022 (D. Kan. 2005).

<sup>220</sup> *United States v. Verdugo-Urquidez*, 494 U.S. 259, 284 (1990) (Brennan, J., dissenting).

<sup>221</sup> *Meza-Rodriguez*, 798 F.3d at 673 (7th Cir. 2015).

<sup>222</sup> See Kulish et al., *supra* note 4.

<sup>223</sup> Jazmine Ulloa, *California Lawmakers Approve Landmark 'Sanctuary State' Bill to Expand Protections for Immigrants*, L.A. TIMES (Sept. 16, 2017, 1:55 PM), <http://www.latimes.com/politics/la-pol-ca-california-sanctuary-state-bill-20170916-story.html>.

<sup>224</sup> *Id.*

<sup>225</sup> Jen Fifield, *Cities, States Try to Protect Immigrants' Data from Federal Officials*, PBS NEWS HOUR (April 20, 2017, 11:56 AM), <https://www.pbs.org/newshour/nation/cities-states-try-protect-immigrants-data-federal-officials>.

<sup>226</sup> *Id.*

States afford other rights to noncitizens beyond protection from deportation. Federal law prohibits most noncitizens from enrolling in public benefit programs; however, some states offer noncitizens healthcare benefits, such as prenatal care.<sup>227</sup> Some states allow noncitizens who are residents to pay in-state tuition rates for public colleges and universities.<sup>228</sup> Roughly a dozen states now have programs that help noncitizens obtain special driver's licenses, and some cities have programs that help noncitizens open bank accounts.<sup>229</sup>

Although the Supreme Court has failed to give a definite answer as to whom is considered a person in the Bill of Rights, states have been able to step-in and protect noncitizens within their borders through the power of federalism. Until the Supreme Court answers this crucial question, the states must continue to protect the rights of noncitizens.

#### IV. CONCLUSION

The Seventh Circuit's ruling in *United States v. Meza-Rodriguez* demonstrates a larger problem the United States has with immigration; although noncitizens contribute to the United States, noncitizens are often met with unfair treatment and denied constitutional protections. The Seventh Circuit became the first circuit court of appeals to hold that noncitizens are part of "the people" of the Second Amendment.<sup>230</sup> Because the phrase "the people" is included throughout the Bill of Rights, such a holding could have lasting implications for the rights of noncitizens in the United States. Courts faced with the issue of whether to extend Second Amendment rights to noncitizens in the United States should hold that noncitizens are members of "the people" of the Second Amendment. This conclusion is supported by precedent, historical perspective on the rights of noncitizens, and the purpose of the Second Amendment as declared in *District of Columbia v. Heller*: to protect an individual's right to keep and bear arms.<sup>231</sup>

Although the Seventh Circuit correctly adopted *Verdugo-Urquidez's* consistent reading of "the people" throughout the Bill of Rights, its reliance on the sufficient connections test is problematic because it yields inconsistent results and conflicts with the United States' notion of fundamental fairness. Further, the Seventh Circuit incorrectly upheld the constitutionality of 18 U.S.C. § 922(g)(5). Until the Supreme Court decides the appropriate standard of review for Second Amendment claims, lower courts should continue to use intermediate scrutiny. When intermediate scrutiny is applied to 18 U.S.C. § 922(g)(5), the law fails

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<sup>227</sup> *Id.*

<sup>228</sup> *Id.*

<sup>229</sup> *Id.*

<sup>230</sup> *United States v. Meza-Rodriguez*, 789 F.3d 664, 671 (7th Cir. 2015).

<sup>231</sup> *District of Columbia v. Heller*, 554 U.S. 570, 595 (2008).

because there is no nexus between limiting noncitizens' firearm rights and crime prevention.

Finally, as long as courts continue to draw arbitrary lines between which constitutional rights apply to noncitizens, the greater risk that noncitizens' rights will be put in jeopardy. As long as noncitizens are within the borders of the United States and subject to the United States' laws, then noncitizens should be afforded full constitutional protections.

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