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“THE PEOPLE” OF *HELLER* AND THEIR POLITICS: WHETHER ILLEGAL ALIENS SHOULD HAVE THE RIGHT TO BEAR ARMS AFTER *UNITED STATES V. PORTILLO-MUNOZ*

Olesya A. Salnikova *

I. INTRODUCTION

In 2008, the U.S. Supreme Court decided in *District of Columbia v. Heller* that the Second Amendment endows individuals, regardless of whether they are part of a militia, with the right to bear arms.¹ Although illegal aliens are theoretically precluded from possessing firearms under 18 U.S.C. § 922(g)(5),² *Heller*, on its face, seemed to question the validity of this law as an outdated abridgement of an individual’s right to own a gun. As a result, illegal aliens attempted to assert their Second Amendment right in federal courts by challenging their convictions under § 922(g)(5) as unlawful after *Heller*.³

* J.D., Northwestern University School of Law, 2013; B.A., Pepperdine University, 2008. The author thanks her family—her grandparents, parents, Katya, and Sean—for their love and endless support during these last three years. As E.B. White once said, “The best writing is rewriting.” The author accordingly appreciates the work and talents of the *Journal*’s editorial team, particularly Nicholas G. Whitfield, Eliza Kostinskaya, Jessica Notebaert, Max Tanner, and Megan Lawson, for their help in editing and rewriting this Comment to make it the best it can possibly be.

¹ 554 U.S. 570, 584 (2008).

² See 18 U.S.C. § 922(g)(5) (2006), which provides, in relevant part:

It shall be unlawful for any person . . . who, being an alien . . . 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.

³ See, e.g., *United States v. Portillo-Munoz*, 643 F.3d 437, 439 (5th Cir. 2011), *cert. denied*, 132 S. Ct. 1969, 1969 (2012); *United States v. Martinez-Guillen*, No. 2:10cr192-MEF, 2011 WL 588350, at *1 (M.D. Ala. Jan. 12, 2011); *United States v. Adame-Najera*, No. 2:10-CR-10-01-RWS-SSC, 2010 WL 6529643, at *2 (N.D. Ga. Nov. 24, 2010); *United States v. Flores*, Crim. No. 10-178 (JNE/JSM), 2010 WL 4720223, at *1 (D. Minn. Nov. 15, 2010); *United States v. Luviano-Vega*, No. 5:10-CR-184-BO, 2010 WL 3732137, at *2 (E.D.N.C. Sept. 20, 2010); *United States v. Yanez-Vasquez*, No. 09-40056-01-SAC, 2010

However, there is one important caveat: *Heller*'s somewhat amorphous definition of "the people" of the Second Amendment. The Court defined "the people" as "all members of the political community" who are "law-abiding, responsible citizens."⁴ The terms "political," "law-abiding," and "citizens" seem to exclude deliberately those who broke the law or those who are non-American citizens (or both, when it comes to illegal aliens, because they illegally enter the United States). Indeed, that is exactly how federal courts have treated "the people" since *Heller*, as evidenced by these courts' hesitation to extend the protections afforded by the Second Amendment to illegal aliens.⁵ While *Heller* seemed to expand the right of individuals to bear arms, it actually constrained the Second Amendment with respect to noncitizens.

The first federal court of appeals addressed this issue in the summer of 2011 and followed in the footsteps of the district courts.⁶ In *United States v. Portillo-Munoz*, a divided Fifth Circuit panel held that the Second Amendment does not extend to aliens illegally present in the United States and, therefore, that it does not guarantee them any individual right to possess firearms.⁷

Portillo-Munoz may have serious constitutional consequences for illegal aliens.⁸ Because the phrase "the people" is mentioned throughout the Bill of Rights, particularly in the First, Second, Fourth, and Ninth Amendments,⁹ *Portillo-Munoz*'s holding that illegal aliens are not included in "the people" of the Second Amendment may signify that they are also excluded from other Bill of Rights guarantees. This is especially true since *Heller* extended its definition of "the people" to *all* other provisions of the Constitution that mention this phrase.¹⁰

This could mean that millions of United States residents are "non-persons who have no rights to be free from unjustified searches of their

WL 411112, at *3 (D. Kan. Jan. 28, 2010); *United States v. Solis-Gonzalez*, No. 3:08-CR-145-MR-DCK-1, 2008 WL 4539663, at *1, *3 (W.D.N.C. Sept. 26, 2008). *But see* *United States v. Guerrero-Leco*, No. 3:08cr118, 2008 WL 4534226, at *1 (W.D.N.C. Oct. 6, 2008), *vacated*, 446 F. App'x 610, 610 (4th Cir. Sept. 13, 2011) (vacating district court's decision to deny illegal alien Second Amendment right).

⁴ *Heller*, 554 U.S. at 580, 635, 652.

⁵ *See, e.g., Portillo-Munoz*, 643 F.3d at 439, 442; *Martinez-Guillen*, 2011 WL 588350, at *3; *Adame-Najera*, 2010 WL 6529643, at *2; *Flores*, 2010 WL 4720223, at *1; *Luviano-Vega*, 2010 WL 3732137, at *2; *Yanez-Vasquez*, 2010 WL 411112, at *3; *Guerrero-Leco*, 2008 WL 4534226, at *1; *Solis-Gonzalez*, 2008 WL 4539663, at *1, *3.

⁶ *See Portillo-Munoz*, 643 F.3d at 439, 442.

⁷ *Id.* at 442.

⁸ *See id.* at 442–48 (Dennis, J., concurring in part and dissenting in part).

⁹ U.S. CONST. amends. I, II, IV, IX.

¹⁰ *District of Columbia v. Heller*, 554 U.S. 570, 580 (2008).

homes and bodies and other abuses, nor to peaceably assemble or petition the government.”¹¹ Whether illegal aliens belong to “the people” of the Second Amendment is critical to determine after *Portillo-Munoz* not only in the context of the right to bear arms, but also in the context of other constitutionally protected rights.

This Comment argues that illegal aliens are not members of “the people” of the Second Amendment and thus, they lack the constitutional right to bear arms. In the alternative, even if illegal aliens are part of “the people,” the government can discriminate against them—by restricting their right to bear arms—on the ground that illegal aliens are not a suspect class under the Equal Protection Clause.

The decision of the *Portillo-Munoz* court to exclude illegal aliens from “the people” of the Second Amendment is therefore correct. *Heller* has reformulated “the people” from those individuals who are part of a “national community” to those who are part of a “political” one.¹² *Portillo-Munoz*’s refusal to extend *Heller*’s definition of “the people” to other constitutional amendments, however, is misplaced. *Heller* explicitly extended its reading of “the people” to the other amendments, thereby excluding illegal aliens from membership in “the people” across the Bill of Rights.¹³ This restriction highlights the limitation on illegal aliens’ constitutional rights even before *Portillo-Munoz*. The reality is that these rights have never been automatically accorded to illegal aliens. Illegal aliens are not part of “the people” for the purposes of the Second Amendment specifically—and other Bill of Rights guarantees generally—and thus, lack the constitutional right to bear arms.

Even if the phrase “the people” does not exclude illegal aliens based on *Heller*’s definition, illegal aliens may nevertheless be discriminated against since they are not a “suspect class” under the Equal Protection Clause.¹⁴ Because illegal aliens are not a suspect class, the right concerned is only subject to rational basis review.¹⁵ Under this standard, in order for an individual to make an Equal Protection challenge, the right must either be fundamental or the restriction on the right must impose “a lifetime hardship.”¹⁶

¹¹ *Portillo-Munoz*, 643 F.3d at 443 (Dennis, J., concurring in part and dissenting in part) (internal quotations omitted).

¹² See *Heller*, 554 U.S. at 580. This Comment does not take a position on whether “the people” should include persons that are part of a political or national community. I do not advocate for any particular interpretation of this term.

¹³ *Id.* at 580.

¹⁴ See *Plyler v. Doe*, 457 U.S. 202, 216, 223 (1982).

¹⁵ See *id.* at 216.

¹⁶ See *id.* at 223.

If the Second Amendment confers a fundamental right, it is unclear whether illegal aliens would be included in the group of people who hold that right. The Court has been inconsistent with which fundamental rights apply equally to illegal aliens. It has also accorded illegal aliens less protection under the Constitution than U.S. citizens, particularly under the First, Fourth, and Fourteenth Amendments.

If the Second Amendment does not otherwise apply to the illegal alien, the legislative restrictions on the right then need to impose “a lifetime hardship” on the individual.¹⁷ Because illegal aliens who assert Second Amendment rights are fully consenting adults who voluntarily broke the law by illegally crossing the border of the United States, and because their status of illegality is subject to change, the Second Amendment likely does not pose “a lifetime hardship” on them. As a result, illegal aliens may be excluded from the Second Amendment’s protections.

Part II provides the background for this Comment, beginning in Part II.A with a description of the *Portillo-Munoz* decision. Part II.B provides an overview of the aftermath of *Portillo-Munoz*. Part II.C goes back to the initial debate surrounding the Second Amendment before *Heller* and how courts interpreted “the people” of the Second Amendment. Part III explores the *Heller* decision and its influence on whether illegal aliens have the right to bear arms under the Second Amendment. This section provides support for the argument that the Fifth Circuit’s ultimate decision in *Portillo-Munoz* to exclude illegal aliens from the Second Amendment is consistent with U.S. Supreme Court precedent. Part IV provides the Comment’s conclusion.

II. BACKGROUND

A. UNITED STATES V. PORTILLO-MUNOZ

In July 2010, Armando Portillo-Munoz, a citizen and native of Mexico illegally present in the United States, was arrested in the state of Texas for possessing a .22-caliber handgun.¹⁸ He was indicted about a month and a half later for being an “Alien, illegally and unlawfully present in the United States, in Possession of a Firearm under 18 U.S.C. § 922(g)(5).”¹⁹ Portillo contended that the conviction under the statute violated his Second Amendment right to bear arms.²⁰

Portillo had been living in the United States since 2009, or for a year

¹⁷ *See id.*

¹⁸ *United States v. Portillo-Munoz*, 643 F.3d 437, 438–39 (5th Cir. 2011).

¹⁹ *Id.* at 439; *see also* 18 U.S.C. § 922(g)(5) (2006).

²⁰ *Portillo-Munoz*, 643 F.3d at 439.

and a half, before he was arrested.²¹ He worked for a dairy farm and then as a ranch hand and kept a gun for protection from coyotes.²² Prior to his arrest, Portillo did not have any criminal history or arrests.²³ In fact, Portillo “took on societal obligations like caring for his employer’s animals, paying rent, and helping to financially support his girlfriend and her daughter.”²⁴

Nevertheless, the district court sentenced Portillo to ten months imprisonment followed by three years of supervised release.²⁵ Portillo appealed and, in the summer of 2011, the Fifth Circuit became the first federal court of appeals to confront the issue of whether an illegal alien has the constitutional right to bear arms under the Second Amendment.²⁶

In *United States v. Portillo-Munoz*, the majority of the Fifth Circuit held, as a matter of first impression, that the Second Amendment did not extend to aliens illegally present in the United States and that therefore, the Second Amendment does not guarantee to illegal aliens the right to possess firearms.²⁷ Judge Dennis dissented from the majority’s dismissal of the Second Amendment claim, arguing instead that Portillo had an individual right to bear arms under the Second Amendment.²⁸

1. *The Portillo-Munoz Majority*

The majority of the *Portillo-Munoz* court, in an opinion written by Judge Garwood, first established that Portillo violated 18 U.S.C. § 922(g)(5).²⁹ The court then analyzed whether Portillo’s conviction under the statute violated the U.S. Constitution.³⁰ Citing the Supreme Court’s landmark decision in *District of Columbia v. Heller*, the majority admitted that the Second Amendment guarantees an individual right to possess and carry a firearm.³¹ However, the court hedged this guarantee by noting that *Heller* did not attempt to “clarify the entire field” of Second Amendment jurisprudence.³²

²¹ *Id.*; see also Appellant’s Initial Brief at 6, *Portillo-Munoz*, 643 F.3d 437 (5th Cir. 2011) (No. 11-10086).

²² Appellant’s Initial Brief, *supra* note 21, at 6.

²³ *Id.*

²⁴ *Id.* at 8.

²⁵ *Id.* at 6–7.

²⁶ See *Portillo-Munoz*, 643 F.3d at 439.

²⁷ *Id.* at 442.

²⁸ *Id.* at 448 (Dennis, J., concurring in part and dissenting in part).

²⁹ *Id.* at 439 (majority opinion).

³⁰ *Id.*

³¹ *Id.* (citing *District of Columbia v. Heller*, 554 U.S. 570 (2008)).

³² *Id.* at 440 (quoting *Heller*, 554 U.S. at 635).

The majority of the Fifth Circuit primarily focused on *Heller*'s interpretation of the term "the people" in the Second Amendment.³³ It cited *Heller*'s holding that the Second Amendment applies to people who are "law-abiding, responsible citizens" who are part of a "political community."³⁴ The majority explained that such language "invalidates" Portillo's attempt to extend the protections of the Second Amendment to illegal aliens because they are not "citizens" or "members of the political community."³⁵ Since aliens enter and remain in this country illegally, they "are not Americans as that word is commonly understood."³⁶

The court reasoned that 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.³⁷ It distinguished the two amendments based on the difference between an "affirmative" right in the Second Amendment and a "protective" right against abuses by the government in the Fourth.³⁸

The majority then emphasized that the Supreme Court has long held that Congress has the authority to make laws governing the conduct of aliens that would be unconstitutional if applied to citizens.³⁹ The court explained that since the Constitution does not prohibit Congress from making laws that distinguish between citizens and aliens or between lawful and illegal aliens, the same analysis should apply in the interpretation of the Second Amendment text.⁴⁰

The majority concluded that the phrase "the people" in the Second Amendment does not include aliens illegally in the United States, such as Portillo, and that § 922(g)(5) is constitutional under the Second Amendment.⁴¹ The court hedged its decision by excluding "the constitutional trial, personal bodily integrity, privacy or speech rights of illegal aliens."⁴²

³³ *See id.*

³⁴ *Id.* (quoting *Heller*, 554 U.S. at 580, 635).

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.* at 441.

³⁹ *Id.* (citing *Mathews v. Diaz*, 426 U.S. 67, 84, 87 (1976) (holding as constitutional under the Due Process Clause a federal law limiting eligibility for Medicare Part B to aliens admitted for permanent residence and residing in the U.S. for at least five years)).

⁴⁰ *Id.* at 442.

⁴¹ *Id.*

⁴² *Id.* at 442 n.3 ("[W]e speak only to whether the Second Amendment precludes Congress from limiting the actual, affirmative conduct of aliens while they are illegally present in this country. This is a pure question of law which the district court has correctly answered.").

2. *The Portillo-Munoz Dissent*

Judge Dennis dissented from the decision of the majority to dismiss Portillo's Second Amendment claim.⁴³

First, he reasoned that Supreme Court precedent recognizes that the phrase "the people" has the same meaning in the First, Second, and Fourth Amendments.⁴⁴ Dennis disagreed with the majority's distinction between the Second Amendment as an "affirmative" right and the Fourth Amendment as a "protective" right.⁴⁵ He explained that both of these amendments refer to a "right of the people" to be free from "unwarranted government intrusion."⁴⁶

Second, Dennis disagreed with the majority's "categorical" conclusion that persons like Portillo are not part of "the people" because, he argued, this interpretation is contrary to the Supreme Court's holding in *Plyler v. Doe*.⁴⁷ The Court in *Plyler* recognized that illegal aliens are "person[s]" in the constitutional sense.⁴⁸ Because people is merely the plural of person, the judge concluded that this reasoning applied to the Second Amendment as well.⁴⁹

Third, Dennis noted that the rationale of the majority is contrary to Supreme Court precedent in *Heller* and *Verdugo-Urquidez*.⁵⁰ In both of these cases, the Supreme Court indicated that "the people" includes those who have developed "sufficient connection" with the United States.⁵¹ Citing *Verdugo-Urquidez*, the judge maintained that an alien establishes "sufficient" connections with this country when he or she (1) is "voluntarily" present in the United States, and (2) "accept[s] some societal obligations."⁵²

⁴³ *Id.* at 442 (Dennis, J., concurring in part and dissenting in part).

⁴⁴ *Id.* at 443.

⁴⁵ *Id.* at 444.

⁴⁶ *Id.*

⁴⁷ *Id.* at 445.

⁴⁸ *Id.* (citing *Plyler v. Doe*, 457 U.S. 202, 223 (1982) (holding that although undocumented resident aliens cannot be treated as a "suspect class," and although education is not a "fundamental right," a Texas statute depriving a "discrete class of children" from their right to public education imposes a "lifetime hardship" on them)).

⁴⁹ *Id.*

⁵⁰ *Id.* at 446.

⁵¹ *Id.* (citing *District of Columbia v. Heller*, 554 U.S. 570, 580 (2008); *United States v. Verdugo-Urquidez*, 494 U.S. 259, 271 (1990)). In *Verdugo-Urquidez*, the Court held that while the Fourth Amendment did not apply to the search by American authorities of the Mexican residence of a Mexican citizen and resident with no voluntary attachment to the United States, it may apply to illegal aliens who are "voluntarily" present in the United States and who have accepted "some societal obligations." 494 U.S. at 273, 275.

⁵² *Portillo-Munoz*, 643 F.3d at 446 (Dennis, J., concurring in part and dissenting in part).

Dennis concluded that Portillo had sufficient connections with this country.⁵³ Unlike the alien in *Verdugo-Urquidez*, Portillo came to the United States of his own volition.⁵⁴ Also unlike the alien in *Verdugo-Urquidez*, Portillo accepted several societal obligations and did not have any criminal record or history of arrests.⁵⁵ Even though *Verdugo-Urquidez* did not extend Fourth Amendment protection to an alien who did not have substantial connections with the United States, Dennis reasoned that the Court still assumed “for the sake of argument” that aliens *could* be protected by the Fourth Amendment, which makes it possible that an illegal alien with sufficient connections may seek such protection in the future.⁵⁶

Judge Dennis therefore disagreed with the majority on the question of whether aliens such as Portillo are part of “the people,” and have any rights under the First, Second, and Fourth Amendments.⁵⁷ In his view, all these Amendments refer to the same people. Since Portillo had substantial connections with this country and because “the majority’s holding effectively nullifies the rights of countless others like him,” the judge dissented.⁵⁸

B. THE HAZY AFTERMATH OF *PORTILLO-MUNOZ*

Four federal courts have already accepted the reasoning of the *Portillo-Munoz* majority opinion by explicitly citing the decision that illegal aliens do not have the right to bear arms under the Second Amendment.

In *United States v. Flores-Higuera*, the U.S. District Court for the Northern District of Georgia held that 18 U.S.C. § 922(g)(5)’s prohibition on illegal aliens possessing firearms does not violate the Second Amendment.⁵⁹ The court reasoned that while *Heller* gave individuals the right to possess a gun in self-defense, this right “is not unlimited.”⁶⁰ It referred to courts like *Portillo-Munoz* that have held § 922 to be “‘a presumptively lawful long-standing prohibition’ on the possession of firearms.”⁶¹ Citing *Portillo-Munoz*, among other federal court decisions,

⁵³ *Id.* at 447.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.* (citing *Verdugo-Urquidez*, 494 U.S. at 272–73 (declining to decide the issue because “such a claim [was not] squarely before [the Court],” but “assuming such [illegal] aliens would be entitled to Fourth Amendment protections,” they would have to be “in the United States voluntarily and presumably [] accepted some societal obligations”).

⁵⁷ *Id.* at 448.

⁵⁸ *Id.*

⁵⁹ No. 1:11-CR-182-TCB-CCH, 2011 WL 3329286, at *3 (N.D. Ga. July 6, 2011).

⁶⁰ *Id.* at *2 (citing *District of Columbia v. Heller*, 554 U.S. 570, 626–27 (2008)).

⁶¹ *Id.* (citing *United States v. White*, 593 F.3d 1199, 1205–06 (11th Cir. 2010)).

the *Flores-Higuera* court held not only that § 922 “disqualified” illegal aliens from Second Amendment rights, but also that illegal aliens never had these rights in the first place because they are not among “the people” contemplated by the Second Amendment.⁶²

Similarly, in *United States v. Mirza*, the Fifth Circuit affirmed *Portillo-Munoz* by rejecting the defendant’s Second Amendment challenge to his convictions under § 922(g)(5).⁶³ In this case, a citizen of Pakistan was convicted of “various counts of possessing weapons and ammunition while being unlawfully in the United States.”⁶⁴ The court cited its reasoning in *Portillo-Munoz* and held that the phrase “the people” in the Second Amendment does not include aliens illegally present in the United States.⁶⁵ It concluded that since the rights “conferred by the Second Amendment do not extend to individuals like Mirza who are unlawfully present in the United States,” he was foreclosed from arguing that his weapons and ammunition convictions violate his Second Amendment rights.⁶⁶

The Eighth Circuit affirmed *Portillo-Munoz* in *United States v. Flores*.⁶⁷ In *Flores*, the defendant “was indicted on a charge of being an illegal alien in possession of a firearm, in violation of 18 U.S.C. §§ 922(g)(5)(A) and 924(a)(2).”⁶⁸ The defendant “moved to dismiss the indictment, arguing that § 922(g)(5)(A) was facially unconstitutional in light of [*Heller*].”⁶⁹ The defendant appealed after the district court denied the motion.⁷⁰ In a brief per curiam decision, the Eighth Circuit agreed with the Fifth Circuit “that the protections of the Second Amendment do not extend to aliens illegally present in this country,” as per *Portillo-Munoz*.⁷¹

Most recently, the Fourth Circuit has held that the Second Amendment right to bear arms does not extend to illegal aliens in *United States v. Carpio-Leon*.⁷² The defendant, a citizen of Mexico who was “indicted for possessing firearms while being illegally or unlawfully in the United States in violation of 18 U.S.C. § 922(g)(5),” contended that “§ 922(g)(5) violated his rights under the Second and Fifth Amendments.”⁷³ Citing *Heller*, the

⁶² *Id.*

⁶³ *United States v. Mirza*, No. 10-20725, 454 F. App’x 249, 258 (5th Cir. 2011).

⁶⁴ *Id.* at 251.

⁶⁵ *Id.* at 257.

⁶⁶ *Id.*

⁶⁷ 663 F.3d 1022, 1022–23 (8th Cir. 2011) (per curiam).

⁶⁸ *Id.*

⁶⁹ *Id.* at 1023.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² 701 F.3d 974, 982 (4th Cir. 2012).

⁷³ *Id.* at 975 (quoting 18 U.S.C. § 922(g)(5) (2006)).

Carpio-Leon court concluded “that illegal aliens do not belong to the class of law-abiding members of the political community to whom the protection of the Second Amendment is given.”⁷⁴

Significantly, the court referenced *Portillo-Munoz* and limited its decision to *illegal aliens*.⁷⁵ It reasoned that 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.”⁷⁶ Therefore, “when Congress regulates illegal aliens by prohibiting them from possessing firearms, *see* 18 U.S.C. § 922(g)(5), it is functioning in a special area of law committed largely to the political branches.”⁷⁷

Despite these decisions, *Portillo-Munoz* has not been accepted in every context. The Fourth Circuit vacated and remanded the judgment of the U.S. District Court for the Western District of North Carolina in *United States v. Guerrero-Leco*.⁷⁸ In *Guerrero-Leco*, the defendant was an alien illegally in the United States who pleaded guilty to possessing a firearm in violation of 18 U.S.C. § 922(g)(5).⁷⁹ Guerrero-Leco’s argument was premised on *Heller*’s holding conferring a right to bear arms to individuals.⁸⁰

The Fourth Circuit noted that it formulated in *United States v. Chester* a two-prong analysis “to determine whether a statute or regulation violates a defendant’s Second Amendment right to bear firearms.”⁸¹ In vacating and remanding the district court’s decision, the *Guerrero-Leco* court cited its own holding from *Chester*:

The first question 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. 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.⁸²

Portillo-Munoz has also not been extended to legal, *permanent* aliens, even though these individuals are technically not citizens of the United

⁷⁴ *Id.* at 981.

⁷⁵ *Id.*

⁷⁶ *Id.* (alterations in original) (citation omitted) (internal quotation marks omitted).

⁷⁷ *Id.* at 982.

⁷⁸ 446 F. App’x 610, 610 (4th Cir. 2011) (per curiam).

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.* (citing *United States v. Chester*, 628 F.3d 673 (4th Cir. 2010)).

⁸² *Id.* (quoting *Chester*, 628 F.3d at 680 (citations omitted)).

States.⁸³ The U.S. District Court for the District of Massachusetts in *Fletcher v. Haas* concluded that lawful, permanent resident aliens are among "the people" for whom the Second Amendment provides a right to bear arms.⁸⁴ The court, citing *United States v. Verdugo-Urquidez*, reasoned that lawful, permanent resident aliens have "necessarily 'developed sufficient connection with this country to be considered part of [the] community'" because they have accepted societal obligations.⁸⁵ They resided and worked lawfully in the United States, and one alien was even married to a U.S. citizen.⁸⁶ The citizenship requirement of Massachusetts firearm regulations accordingly violated the Second Amendment as it applied to *legal* alien defendants.⁸⁷

The *Fletcher* court distinguished *Portillo-Munoz* by noting that "[in] cases where state laws restricting the rights of aliens have been struck down, the Supreme Court has emphasized 'the rights thus protected were those of aliens who were *lawfully* inhabitants of the states in question.'"⁸⁸ The court emphasized that federal decisions like *Portillo-Munoz* do not apply in this context because they are only limited to illegal aliens.⁸⁹

⁸³ See *Fletcher v. Haas*, 851 F. Supp. 2d 287, 288 (D. Mass. 2012). *But see* *United States v. Alkhaldi*, No. 4:12CR00001-01 JLH, 2012 WL 5415787, at *4 (E.D. Ark. Sept. 17, 2012), *adopted by* No. 4:12CR00001-01 JLH, 2012 WL 541579, at *5 (E.D. Ark. Nov. 6, 2012).

Alkhaldi was an alien present in the United States on a student visa, i.e., a "non-immigrant 'F Visa.'" *Alkhaldi*, 2012 WL 5415787, at *1. The court, citing *Verdugo-Urquidez* and *Fletcher*, found that Alkhaldi was "not in the class of persons who are part of the national community or who have otherwise developed sufficient connection with this country to be considered part of that community for purposes of the Second Amendment." *Id.* at *4. The court reasoned that the defendant "did not come to the United States with the intention of gaining citizenship and, thus, is not firmly on the path toward that goal"; there was no evidence of him intending to "abandon his foreign resident [sic]"; and he was merely temporarily in this country "to pursue educational opportunities." *Id.* Because Alkhaldi was not part of "the people" of the Second Amendment, the court denied his 18 U.S.C. § 922(g)(5) challenge. *Id.* The *Alkhaldi* court noted that the district court in *Fletcher* specifically hedged that it was not deciding whether the Second Amendment was enjoyed by "all lawfully admitted aliens." *Id.* at *2 (quoting *Fletcher*, 851 F. Supp. 2d at 301).

⁸⁴ *Fletcher*, 851 F. Supp. 2d at 288.

⁸⁵ *Id.* at 301 (quoting *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990)).

⁸⁶ *Id.* at 301.

⁸⁷ See *id.* at 302–03.

⁸⁸ *Id.* at 299 (quoting *United States v. Portillo-Munoz*, 643 F.3d 437, 441 (5th Cir. 2011)). The *Fletcher* court also mentioned two cases that distinguished between legal and illegal aliens in constitutional rights: *Kwong Hai Chew v. Colding*, 344 U.S. 590, 596 (1953) (holding that an alien is entitled to Fifth Amendment protection to the extent that he "is a lawful permanent resident of the United States and remains physically present there"), and *Truax v. Raich*, 239 U.S. 33, 39 (1915) (holding that "the complainant is entitled under the Fourteenth Amendment to the equal protection of its laws" because he is "lawfully an inhabitant of Arizona"). *Fletcher*, 851 F. Supp. 2d at 299.

⁸⁹ *Fletcher*, 851 F. Supp. 2d at 300.

There has also been some criticism of *Portillo-Munoz* by legal scholars. Critics have questioned the majority's distinction between an "affirmative" right in the Second Amendment and a "protective" right in the Fourth Amendment, labeling it as "unpersuasive."⁹⁰ Such a distinction, they argue, contradicts *Heller* itself, where the Supreme Court explicitly said, "[I]t has always been widely understood that the Second Amendment, like the First and Fourth Amendments, codified a pre-existing right."⁹¹ As a result, "[b]oth the Second and Fourth Amendments plainly refer to the right of 'the people' to be free from unwarranted governmental intrusion."⁹² If this reasoning is applied, then either "[i]t may be that illegal aliens should get no protection from the Bill of Rights or less than what those who are lawfully here get."⁹³

Some critics have even characterized such a distinction as "troubling."⁹⁴ Adam Winkler, a professor at UCLA School of Law, explained that the "implications of the court's reasoning are troubling" because "'the people' recognized by the Second Amendment are the same 'people' recognized in the First and Fourth Amendments."⁹⁵ Professor Winkler further posed: "If undocumented aliens aren't part of 'the people' for Second Amendment purposes, then can the police invade their homes without probable cause? Can the government stop them from peaceably assembling? If accepted, this logic could expand government authority and make illegal aliens further strangers to American law."⁹⁶ Professor Winkler's concerns highlight the serious impact that the Fifth Circuit's parsing of "the people" could have not only on the Second Amendment, but also on other Bill of Rights guarantees.

Critics have additionally questioned *Portillo-Munoz's* ultimate

⁹⁰ Eugene Volokh, *The Constitutional Rights of Illegal Aliens, Under the First, Second, and Fourth Amendments*, VOLOKH CONSPIRACY (June 13, 2011, 6:01 PM), <http://www.volokh.com/2011/06/13/the-constitutional-rights-of-illegal-aliens-under-the-first-second-and-fourth-amendments/> (quoting *Portillo-Munoz*, 643 F.3d at 444 (Dennis, J., concurring in part and dissenting in part)); see also Gerard N. Magliocca, *The Bill of Rights and Illegal Immigrants*, BALKINIZATION (June 16, 2011, 9:04 AM), <http://balkin.blogspot.com/2011/06/bill-of-rights-and-illegal-immigrants.html>.

⁹¹ Volokh, *supra* note 90 (quoting *District of Columbia v. Heller*, 554 U.S. 570, 592 (2008)).

⁹² *Id.*

⁹³ Magliocca, *supra* note 90 ("I am unpersuaded by the Fifth Circuit's argument that 'people' can mean different things in different parts of the Constitution. . . . I don't see any support for the proposition that illegal aliens would, for example, get Fourth Amendment rights but no First or Second Amendment rights.").

⁹⁴ Alisa A. Johnson & Thomas D. Edmondson, *Fifth Circuit Declares that Illegal Aliens Lack Second Amendment Right to Bear Arms*, 80 U.S. L.WK. 8 (2011).

⁹⁵ *Id.*

⁹⁶ *Id.*

conclusion that illegal aliens are not part of "the people" of the Second Amendment because the sole basis for this conclusion is that Portillo was unlawfully present in the United States.⁹⁷ Critics argue that such a rationale is "wholly unsupported by the applicable precedents."⁹⁸ In both *Heller* and *Verdugo-Urquidez*, they contend, "[T]he Supreme Court indicated that 'the people' includes people who have developed 'sufficient connection' with the United States Nothing in *Verdugo-Urquidez* requires that the alien must be lawfully present in the United States in order to establish substantial connections"⁹⁹

The aftermath of *Portillo-Munoz* has been nothing short of confounding, with some courts and thinkers accepting the decision without question as an accurate application of *Heller*, and others limiting its reach or entirely questioning its reasoning and/or ultimate conclusion. As a result, to make sense of *Portillo-Munoz*, it is first necessary to go back to the time before *Heller* to see how courts have interpreted "the people" of the Second Amendment.

C. THE SECOND AMENDMENT BEFORE *HELLER*: COURTS' INTERPRETATIONS OF "THE PEOPLE"

"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."¹⁰⁰

Even before the Supreme Court's much-anticipated decision in *District of Columbia v. Heller*, the Second Amendment, consisting of only one seemingly simple sentence, has puzzled and aggravated scholars to the point of division, hurling America into a highly charged debate about how the Second Amendment should be interpreted. Two models of interpretation emerged: the "individual right model" and the "collective right model."¹⁰¹ Those adhering to the individual right model argue that "the Second Amendment protects a right of individuals to possess arms for private use," while advocates of the collective right model insist that the "Amendment protects only a right of the various state governments to preserve and arm their militias."¹⁰²

⁹⁷ Volokh, *supra* note 90.

⁹⁸ *Id.* (quoting *United States v. Portillo-Munoz*, 643 F.3d 437, 445 (5th Cir. 2011) (Dennis, J., concurring in part and dissenting in part)).

⁹⁹ *Id.* (quoting *Portillo-Munoz*, 643 F.3d at 445–46 (Dennis, J., concurring in part and dissenting in part)).

¹⁰⁰ U.S. CONST. amend. II.

¹⁰¹ Kevin Jones, Note, *Reframing the Second Amendment Debate: Drawing Cultural Theory from the Holster*, 77 UMKC L. REV. 487, 490 (2008).

¹⁰² *Parker v. District of Columbia*, 478 F.3d 370, 379 (D.C. Cir. 2007).

Until 2001, every federal circuit court of appeals that ruled on the issue had adopted the collective right approach.¹⁰³ The Fifth Circuit was the first to adopt the individual right model in *United States v. Emerson*.¹⁰⁴ The Ninth Circuit subsequently reaffirmed the collective right approach in *Silveira v. Lockyer*.¹⁰⁵ This divisiveness culminated in the decision of the D.C. Circuit in *Parker v. District of Columbia*, which articulated an individual right to bear arms approach contrary to that of *Silveira*.¹⁰⁶

Not surprisingly, both models of interpretation differ in their conception of the Second Amendment text—and, specifically, in their interpretation of who should be included in the phrase “the people.” In order to understand fully what this phrase means, this Comment examines both models and their interpretations of “the people.”

1. *Individual Right Approach*

Under the individual right model, the Second Amendment “protects the right of the individual, including those not then actually a member of any militia or engaged in active military service or training, to privately possess and bear their own firearms.”¹⁰⁷ Individualists minimize the weight of the preamble.¹⁰⁸ They maintain that the Second Amendment’s placement in the Bill of Rights reinforces its emphasis on individual rights—the first

¹⁰³ See *id.* at 380; *Silveira v. Lockyer*, 312 F.3d 1052, 1063 (9th Cir. 2002).

¹⁰⁴ 270 F.3d 203, 260 (5th Cir. 2001). In *Emerson*, the defendant was indicted for possessing a firearm while he was subject to a court order prohibiting the use, attempted use, or threatened use of physical force. *Id.* at 211–12. The defendant moved to dismiss the indictment by arguing that it violated his Second Amendment right. *Id.* at 212. The Fifth Circuit held that the Second Amendment protects the right of individuals to privately keep and bear their own firearms “that are suitable as individual, personal weapons . . . regardless of whether the particular individual is then actually a member of a militia.” *Id.* at 264. However, the court denied the defendant the right to the Second Amendment because he posed a credible threat to the physical safety of his wife and child. *Id.* at 260–65.

¹⁰⁵ 312 F.3d at 1087. In *Silveira*, plaintiffs challenged the constitutionality of amendments to the California Assault Weapons Control Act (AWCA), which strengthened restrictions on possession, use, and transfer of assault weapons. George A. Mocsary, Note, *Explaining Away the Obvious: The Infeasibility of Characterizing the Second Amendment as a Nonindividual Right*, 76 *FORDHAM L. REV.* 2113, 2147 (2008). The Ninth Circuit held that the Second Amendment grants a collective, as opposed to an individual, right to bear arms. *Silveira*, 312 F.3d at 1092–93.

¹⁰⁶ *Parker*, 478 F.3d at 395. In *Parker*, private citizens not associated with a militia brought a Second Amendment challenge against two District of Columbia statutes, including prohibitions against registration of handguns and the carrying of firearms without a license. *Id.* at 373. Following *Emerson*’s analysis, the *Parker* court similarly held that the Second Amendment granted an individual right to bear arms, subject to reasonable restrictions. *Id.* at 381–401; see also Mocsary, *supra* note 105, at 2134–35.

¹⁰⁷ *Emerson*, 270 F.3d at 260.

¹⁰⁸ Jones, *supra* note 101, at 493.

eight amendments are generally seen as protections of "rights enjoyed by citizens in their individual capacity."¹⁰⁹ As a result, the right to bear arms is seen as a "personal" rather than a "collective" right.¹¹⁰ The *Emerson* court even went as far as to profess that "the people," as used in the Constitution, including the Second Amendment, "refers to *individual* Americans."¹¹¹

Individualists do not require "any special or unique meaning" to be attributed to the word "people" in the Second Amendment.¹¹² This interpretation gives the same meaning to the words "the people" as in the First and Fourth Amendments, as well as in the Ninth and Tenth Amendments.¹¹³ Both the *Parker* and the *Emerson* courts declined to interpret "the people" of the Second Amendment to mean a "subset" of individuals, such as "the organized militia," because of the uniform construction of other Bill of Rights provisions.¹¹⁴

2. Collective Right Approach

Under the collective right model, the Second Amendment right to bear arms guarantees the right of the people "to maintain effective state militias, but does not provide any type of individual right to own or possess weapons."¹¹⁵ According to this interpretation, "federal and state governments have the full authority to enact prohibitions and restrictions on the use and possession of firearms, subject only to generally applicable constitutional constraints."¹¹⁶

Collectivists focus on the prefatory language "[a] well regulated Militia" so as to limit the application of the operative clause 'the right of the people to keep and bear Arms' to the right of the state to arm its militia."¹¹⁷ Those who subscribe to the collective right theory thus interpret "the people" as some subset of individuals, such as "the organized militia," "the people who are engaged in militia service," or maybe not any individuals at

¹⁰⁹ *Parker*, 478 F.3d at 383; *see also* Jones, *supra* note 101, at 493.

¹¹⁰ *Emerson*, 270 F.3d at 228–29 (citing *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992); *Moore v. City of East Cleveland*, 431 U.S. 494 (1977)).

¹¹¹ *Id.* at 229 (emphasis added).

¹¹² *Id.* at 227. In other words, individualists do not interpret "the people" in the Second Amendment to mean some subset of individuals such as "the organized militia." *Id.*; *Parker*, 478 F.3d at 381.

¹¹³ *Parker*, 478 F.3d at 381; *Emerson*, 270 F.3d at 227.

¹¹⁴ *Parker*, 478 F.3d at 381–82; *see also Emerson*, 270 F.3d at 227–28.

¹¹⁵ *Silveira v. Lockyer*, 312 F.3d 1052, 1060 (9th Cir. 2002).

¹¹⁶ *Id.*

¹¹⁷ Jones, *supra* note 101, at 490.

all, but rather as “the states.”¹¹⁸

Pre-*Heller* law demonstrates the conflict between these two Second Amendment theories. While individualists interpreted the Amendment as an individual right because of the use of the term “people” and its placement within the Bill of Rights, collectivists saw the Second Amendment right as “collective” in nature and one that restricts the right to bear arms to the people of the states or the states themselves. *Heller* resolved this debate by siding with the individualists in deciding that the Second Amendment right to bear arms belongs to “the people” as individuals.¹¹⁹

III. DISCUSSION

This Comment argues that illegal aliens do not have the right to bear arms because they are not members of “the people” of the Second Amendment. Even if illegal aliens are part of this group, they can be discriminated against since they are not a suspect class under the Equal Protection Clause.

The decision of the *Portillo-Munoz* court to exclude illegal aliens from “the people” of the Second Amendment is correct largely due to *Heller*’s interpretation of the phrase as persons part of a “political” community rather than a “national” one. *Portillo-Munoz* was incorrect in assuming that “the people” has a different meaning from amendment to amendment, however. *Heller* extended its interpretation of “the people” to other constitutional amendments, which serves to exclude illegal aliens from membership in this group.

Even if illegal aliens are not excluded from “the people,” they are not a suspect class under the Equal Protection Clause. Therefore, restrictions on their rights are accorded only rational basis review, which requires either that the right be fundamental or that the restriction on the right impose “a lifetime hardship.” Although the right to bear arms is fundamental, that categorization is of little consequence because constitutional rights are not accorded automatically to illegal aliens. Restrictions on the right to bear arms also do not pose “a lifetime hardship” on illegal aliens. As a result, illegal aliens have no equal protection claim to the Second Amendment and therefore, they may be excluded from enjoying the protections that it affords.

¹¹⁸ *Parker*, 478 F.3d at 381; *Emerson*, 270 F.3d at 227.

¹¹⁹ See *District of Columbia v. Heller*, 554 U.S. 570, 584–85 (2008).

A. *HELLER* RESTRICTED “THE PEOPLE” TO “LAW-ABIDING” CITIZENS WHO ARE MEMBERS OF A “POLITICAL COMMUNITY”

The Supreme Court finally decided who belongs in “the people” of the Second Amendment in *District of Columbia v. Heller*.¹²⁰ In *Heller*, Dick Anthony Heller challenged the District of Columbia’s gun-ban statutes.¹²¹ Heller was a D.C. special police officer who was authorized to carry a handgun while on duty.¹²² He applied for a registration certificate for a handgun he wished to keep at home, but the District refused.¹²³ The law prohibited handguns and required that lawfully possessed firearms be kept unloaded and disassembled.¹²⁴ Justice Scalia ruled, on behalf of a 5–4 majority, that the right to bear arms is protected by the Second Amendment and belongs to “the people” as individuals regardless of whether they act as part of a militia or in a military capacity.¹²⁵

Most relevant to this analysis, the majority of the Court held that “the people” includes persons who are part of a “political community” and who are “law-abiding” citizens.¹²⁶ The Court noted that the right to bear arms belongs to “all members of the political community.”¹²⁷ It limited the “right of the people” by holding that the Second Amendment “elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home.”¹²⁸

Moreover, *Heller* extended its definition of “the people” to other Bill of Rights provisions that use this phrase. It acknowledged that the Bill of Rights uses “right of the people” two other times: in the First Amendment’s Assembly-and-Petition Clause¹²⁹ and in the Fourth Amendment’s Search-and-Seizure Clause.¹³⁰ Additionally, the Ninth Amendment¹³¹ “uses very

¹²⁰ See *id.* at 581. It has been nearly seventy years since the U.S. Supreme Court ruled on the Second Amendment in *United States v. Miller*, 307 U.S. 174 (1939).

¹²¹ *Heller*, 554 U.S. at 575–76. Heller originally challenged the constitutionality of D.C.’s gun-ban statutes in *Parker*, 478 F.3d at 379.

¹²² *Heller*, 554 U.S. at 575.

¹²³ *Id.*

¹²⁴ *Id.* at 570.

¹²⁵ *Id.* at 584.

¹²⁶ *Id.* at 579–81, 635.

¹²⁷ *Id.* at 579–81.

¹²⁸ *Id.* at 580, 635.

¹²⁹ “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or *the right of the people* peaceably to assemble, and to petition the Government for a redress of grievances.” U.S. CONST. amend. I (emphasis added).

¹³⁰ *Heller*, 554 U.S. at 580, 635. The Fourth Amendment states:

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

similar terminology.”¹³² The Court explained that these *all* refer to the “political community”: “[I]n all six other provisions of the Constitution that mention ‘the people,’ the term unambiguously refers to *all members of the political community*.”¹³³

The Court also cautioned that, like other constitutional rights, the Second Amendment right to bear arms is not absolute.¹³⁴ It pointed to a number of presumptively constitutional restrictions on firearm possession:

Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, nothing 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, or laws imposing conditions and qualifications on the commercial sale of arms.¹³⁵

Even though the Court did not mention the possession of firearms by aliens—illegal or otherwise—in its list of restrictions, it maintained that the list “does not purport to be exhaustive.”¹³⁶

Heller held that the Second Amendment confers an individual right to bear arms, but it constrained this right to people who are “members of the political community” and “law-abiding, responsible citizens.”¹³⁷ The Court also restricted the Second Amendment by reinforcing a nonexclusive list of pre-*Heller* restrictions on who may own and carry firearms.¹³⁸ This limits the Second Amendment right to bear arms to American citizens, thereby theoretically excluding noncitizens.

B. HELLER’S INTERPRETATION OF “THE PEOPLE” HAS ALTERED THE LANDSCAPE OF SECOND AMENDMENT LAW FOR ILLEGAL ALIENS.

1. *Heller Paved the Way for McDonald v. City of Chicago*

The Supreme Court returned to the Second Amendment in *McDonald*

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 (emphasis added).

¹³¹ “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by *the people*.” U.S. CONST. amend. IX (emphasis added).

¹³² *Heller*, 554 U.S. at 579–81.

¹³³ *Id.* at 580 (emphasis added).

¹³⁴ *Id.* at 626.

¹³⁵ *Id.* at 626–27.

¹³⁶ *Id.* at 627 n.26.

¹³⁷ *Id.* at 580, 635.

¹³⁸ *Id.* at 626–27.

v. City of Chicago.¹³⁹ In this case, petitioners alleged that Chicago’s handgun ban left them vulnerable to criminals.¹⁴⁰ They sought a declaration that the ban and several related city ordinances violated the Second and Fourteenth Amendments.¹⁴¹

The Court, in a plurality decision, ruled that the Second Amendment right to keep and bear arms is incorporated into the concept of due process.¹⁴² It reiterated *Heller*’s premise that individual self-defense is “the central component” of the Second Amendment.¹⁴³ “Self-defense is a basic right,” the Court reasoned, which is “fundamental to our scheme of ordered liberty” because it is “deeply rooted in this Nation’s history and tradition.”¹⁴⁴

As a result, *McDonald* extended *Heller*’s interpretation of the Second Amendment to the states.¹⁴⁵ It also expanded *Heller* in holding that the Second Amendment is a fundamental right. This potentially broadens *Heller*’s interpretation of “the people” to include not only persons within the “political community” but also “persons” in the broader, due process sense, which includes both citizens and noncitizens alike.¹⁴⁶

2. *Heller Influenced Lower Federal Courts to Deny Illegal Aliens’ Claims Under the Second Amendment*

Whether or not *McDonald* will make a difference in the analysis of alien gun rights, *Heller*’s reformulation of “the people” has already had a significant impact on federal courts confronted with this issue. *Heller*’s holding that the right to bear arms is an individual—and not merely a collective—right has enabled aliens to bring claims in court by arguing that they are entitled to the constitutional right to bear arms under the Second Amendment.¹⁴⁷

Federal district courts that have confronted this issue have upheld laws banning or restricting the possession of firearms by illegal aliens based on Scalia’s reasoning in *Heller*.¹⁴⁸ These courts have held that defendant

¹³⁹ 130 S. Ct. 3020 (2010).

¹⁴⁰ *Id.* at 3021.

¹⁴¹ *Id.*

¹⁴² *Id.* at 3042.

¹⁴³ *Id.* at 3036 (quoting *Heller*, 554 U.S. at 599).

¹⁴⁴ *Id.* (emphasis omitted) (quoting *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)).

¹⁴⁵ Pratheepan Gulasekaram, “*The People*” of the Second Amendment: Citizenship and the Right to Bear Arms, 85 N.Y.U. L. REV. 1521, 1539 (2010).

¹⁴⁶ See *infra* Part III.C for a discussion on “persons” of the Fourteenth Amendment.

¹⁴⁷ See, e.g., *United States v. Portillo-Munoz*, 643 F.3d 437, 439 (5th Cir. 2011).

¹⁴⁸ See, e.g., *United States v. Martinez-Guillen*, No. 2:10cr192-MEF, 2011 WL 588350,

aliens are not able to show that they have any Second Amendment rights because they are not among “the people” contemplated by the Second Amendment.¹⁴⁹ The reason for this exclusion is that illegal aliens are not “law-abiding, responsible *citizens*,” as the phrase is interpreted in *Heller*.¹⁵⁰ As a result, federal district courts have concluded that the Second Amendment right to bear arms “was intended . . . and was guaranteed . . . to be exercised and enjoyed by the citizen.”¹⁵¹

These courts have also reasoned that *Heller* limited the Second Amendment by foreclosing it to those who were already subject to “long-standing prohibitions”¹⁵² on the possession of firearms.¹⁵³ Although *Heller* did not mention aliens specifically in its list of prohibitions, federal district courts have interpreted this section of *Heller* broadly by holding that § 922(g)(5), the illegal alien category of the federal statute, is included in what the courts interpreted as the Supreme Court’s *nonexclusive* list.¹⁵⁴

It is evident from the multiplicity of lower federal court decisions that *Heller* influenced aliens to assert their individual Second Amendment right to bear arms or, at a bare minimum, popularized a new legal argument for aliens seeking to assert their Second Amendment rights. On the other hand, *Heller* has also influenced lower federal courts to deny such claims not only based on its definition of “the people” as “law-abiding . . . citizens,” but also because it affirmed long-standing firearm prohibitions under 18 U.S.C. § 922(g). Lower federal courts have interpreted *Heller*’s list of prohibitions as nonexclusive, thereby preventing defendant aliens from asserting that their Second Amendment rights are violated by § 922(g)(5).

at *3 (M.D. Ala. Jan. 12, 2011); *United States v. Adame-Najera*, No. 2:10-CR-10-01-RWS-SSC, 2010 WL 6529643, at *2 (N.D. Ga. Nov. 24, 2010); *United States v. Flores*, Crim. No. 10-178 (JNE/JSM), 2010 WL 4720223, at *1 (D. Minn. Nov. 15, 2010); *United States v. Luviano-Vega*, No. 5:10-CR-184-BO, 2010 WL 3732137, at *2 (E.D.N.C. Sept. 20, 2010); *United States v. Yanez-Vasquez*, No. 09-40056-01-SAC, 2010 WL 411112, at *3 (D. Kan. Jan. 28, 2010); *United States v. Guerrero-Leco*, No. 3:08cr118, 2008 WL 4534226, at *1 (W.D.N.C. Oct. 6, 2008); *United States v. Solis-Gonzalez*, No. 3:08-CR-145-MR-DCK-1, 2008 WL 4539663, at *1, *3 (W.D.N.C. Sept. 26, 2008).

¹⁴⁹ *Yanez-Vasquez*, 2010 WL 411112, at *2.

¹⁵⁰ *Id.*; *Adame-Najera*, 2010 WL 6529643, at *3.

¹⁵¹ *Yanez-Vasquez*, 2010 WL 411112, at *2.

¹⁵² See *supra* Part III.A for a discussion of the Supreme Court’s long-standing prohibitions.

¹⁵³ *Yanez-Vasquez*, 2010 WL 411112, at *2; see also *Heller v. District of Columbia*, 554 U.S. 570, 626–27 (2008); *Guerrero-Leco*, 2008 WL 4534226, at *1; *Solis-Gonzalez*, 2008 WL 4539663, at *3 (“[D]ecisions by this Court as well as other district courts across the country consistently hold that *Heller* does not undermine the constitutionality of prohibitions under 18 U.S.C. § 922(g).”).

¹⁵⁴ *Yanez-Vasquez*, 2010 WL 411112, at *4.

C. ILLEGAL ALIENS ARE ACCORDED INCONSISTENT PROTECTION
UNDER THE U.S. CONSTITUTION

The U.S. Supreme Court has recognized that noncitizens, whether legal or illegal, are entitled to some rights under the U.S. Constitution. The Due Process and Equal Protection Clauses of the Fourteenth Amendment have historically protected aliens as "persons" under the Constitution.¹⁵⁵ Because aliens are "persons" within the meaning of the Fourteenth Amendment, they are also accorded rights under the Fifth and Sixth Amendments.¹⁵⁶ Additionally, there is a possibility that the Fourth Amendment may be able to protect those illegal aliens who are part of a "national community" or who "have developed sufficient connection with this country."¹⁵⁷ Finally, the Supreme Court has previously recognized that aliens have certain rights under the First Amendment.¹⁵⁸

1. "Persons" of the Fourteenth, Fifth, and Sixth Amendments

As early as the 1890s, the U.S. Supreme Court, in *United States v. Wong Wing*, recognized that the Due Process and Equal Protection Clauses of the Fourteenth Amendment, as well as the Fifth and Sixth Amendments, apply to noncitizens living in the United States.

Chinese persons who were illegally present in the United States were unlawfully detained in *Wong Wing*.¹⁵⁹ The Court held that the Fourteenth Amendment is not "confined to the protection of citizens."¹⁶⁰ The provisions of the Fourteenth Amendment, the Court explained, are "universal in their application to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or [of] nationality."¹⁶¹ Moreover, the equal protection of the laws "is a pledge of the protection of *equal laws*."¹⁶² The *Wong Wing* Court thereby accorded both Due Process and Equal Protection rights to aliens living in the U.S.

The Court then applied this reasoning to the Fifth and Sixth Amendments. It explained that "all persons within the territory of the United States are entitled to the protection guaranteed by those

¹⁵⁵ See *Plyler v. Doe*, 457 U.S. 202, 202 (1982); *United States v. Wong Wing*, 163 U.S. 228, 242–43 (1896).

¹⁵⁶ See *Wong Wing*, 163 U.S. at 242–43.

¹⁵⁷ *United States v. Verdugo-Urquidez*, 494 U.S. 259, 264–66 (1990).

¹⁵⁸ See *Bridges v. Wixon*, 326 U.S. 135, 148 (1945); *Bridges v. California*, 314 U.S. 252, 282 (1941).

¹⁵⁹ 163 U.S. at 229.

¹⁶⁰ *Id.* at 238 (citing *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886)).

¹⁶¹ *Id.*

¹⁶² *Id.* (emphasis added).

amendments.”¹⁶³ Because these provisions refer to “persons,” the Court extended their protection to any person living in the United States and not just to American citizens.¹⁶⁴ It further noted, “[E]ven aliens shall not be held to answer for a capital or other infamous crime . . . nor be deprived of life, liberty, or property without due process of law.”¹⁶⁵ The *Wong Wing* Court thus set a precedent for the protection of illegal aliens under the Fourteenth, Fifth, and Sixth Amendments.

In the 1982 decision of *Plyler v. Doe*, the Supreme Court reaffirmed that noncitizens are entitled to Due Process and Equal Protection rights because they are “persons” under the Fourteenth and Fifth Amendments.¹⁶⁶ In *Plyler*, Mexican children who had entered the United States illegally and resided in Texas sought injunctive and declaratory relief against exclusion from public schools pursuant to a Texas statute.¹⁶⁷ The Court held that the Equal Protection Clause applied because the undocumented status of the children did not establish a sufficient rational basis for denying the benefits that the state afforded other residents.¹⁶⁸

The *Plyler* Court, similar to *Heller* and pre-*Heller* decisions, analyzed the meaning of the constitutional term “persons.”¹⁶⁹ As the *Wong Wing* Court did long ago, the *Plyler* Court held that undocumented aliens, regardless of their immigration status, are persons in the constitutional sense: “[W]hatever his status under the immigration laws, an alien is surely a ‘person’ in any ordinary sense of that term.”¹⁷⁰ The Court explained that the Fourteenth Amendment¹⁷¹ extends to “[e]very citizen or subject of another country” within U.S. jurisdiction.¹⁷² Similar to *Wong Wing*, *Plyler* concluded that the Equal Protection Clause covers the same class of persons as the Due Process Clause.¹⁷³ The decision affirmed that aliens, even unlawful aliens, have long been recognized as “persons” guaranteed due process of the law under the Fifth and Fourteenth Amendments, as well as the Sixth Amendment.¹⁷⁴ The Court additionally affirmed its holding that

¹⁶³ *Id.*

¹⁶⁴ *See id.*

¹⁶⁵ *Id.*

¹⁶⁶ *See* 457 U.S. 220, 230 (1982).

¹⁶⁷ *Id.* at 205–08.

¹⁶⁸ *Id.* at 202.

¹⁶⁹ *See id.* at 210–13.

¹⁷⁰ *Id.* at 210.

¹⁷¹ The Fourteenth Amendment provides that “[a]ll persons born or naturalized in the United States, and *subject to the jurisdiction thereof*, are citizens of the United States.” U.S. CONST. amend. XIV, § 1 (emphasis added).

¹⁷² *Plyler*, 457 U.S. at 211 n.10.

¹⁷³ *See id.* at 211.

¹⁷⁴ *See id.* at 210; *see also* *Kwong Hai Chew v. Colding*, 344 U.S. 590, 596 (1953)

"the Fifth Amendment protects aliens whose presence in this country is unlawful from invidious discrimination by the Federal Government."¹⁷⁵

However, the Court in *Plyler* limited aliens' access to Fourteenth Amendment rights by utilizing only rational basis review.¹⁷⁶ This means that for an illegal alien to benefit from the equal protection of the laws, either the right concerned has to be fundamental or the regulation of the right must impose "a lifetime hardship" on the class of illegal aliens.¹⁷⁷

The Court did not consider education a fundamental right because public education is not a right granted to individuals by the Constitution.¹⁷⁸ The statute, however, still imposed "a lifetime hardship on a discrete class of children not accountable for their disabling status."¹⁷⁹ The basis for this decision was that the alien children were involuntarily in the U.S. because their parents brought them into the country.¹⁸⁰ The deprivation of education also has a lifelong social, economic, intellectual, and psychological effect on the well-being of the individual, thereby posing "an obstacle to individual achievement."¹⁸¹

The Supreme Court decisions discussed illustrate that aliens, illegal or not, are entitled to the due process and equal protection rights explicitly provided for in the Fourteenth Amendment, as well as those in the Fifth and Sixth Amendments. These privileges, however, are not absolute. Restrictions on illegal aliens made on the basis of their alien status are subject only to rational basis review under the Equal Protection Clause. This requires that the right concerned be either fundamental or that the government's restrictions on the right impose "a lifetime hardship" on the

(holding that a resident alien is a "person" within the meaning of the Fifth Amendment); *United States v. Wong Kim Ark*, 169 U.S. 649, 693 (1898) (holding that all persons within the territory of the United States, including aliens unlawfully present, may invoke the Fifth and Sixth Amendments to challenge actions of the federal government); *United States v. Wong Wing*, 163 U.S. 228, 242–43 (1896) (holding that resident aliens are entitled to Fifth and Sixth Amendment rights).

¹⁷⁵ *Plyler*, 457 U.S. at 210 (citing *Mathews v. Diaz*, 426 U.S. 67, 77 (1976)).

¹⁷⁶ *See id.* at 202 ("[T]he discrimination in [the Texas statute] can hardly be considered rational unless it furthers some substantial goal of the State.").

¹⁷⁷ *See id.* The *Plyler* Court concluded that undocumented aliens cannot be treated as a "suspect class" because their class status is a result of "voluntary action," the entry into which is a crime itself. *Id.* at 218–19. On the other hand, a suspect class of individuals is one on which legislation imposes "special disabilities . . . by virtue of circumstances beyond their control." *Id.* at 217 n.14. As a result, illegal aliens are not a suspect class and are therefore subject to rational basis review. *Id.* at 223. As a note, the equal protection analysis developed in this Comment is based on the implicit analysis utilized by the *Plyler* Court.

¹⁷⁸ *Id.* at 221.

¹⁷⁹ *Id.* at 202, 221.

¹⁸⁰ *Id.* at 221.

¹⁸¹ *Id.* at 203.

class of alien individuals if applied unequally.¹⁸²

2. “The People” of the Fourth Amendment

While the Court in *United States v. Verdugo-Urquidez* did not find the Fourth Amendment applicable to an alien who never lived in the United States, it recognized the possibility that aliens who are part of a “national community” or who “have otherwise developed sufficient connection with this country” may be able to assert such rights.¹⁸³ The Court ruled that the Fourth Amendment did not apply to the search by American authorities of the Mexican residence of a Mexican citizen and resident who had no voluntary attachment to the United States.¹⁸⁴

In its analysis of the Fourth Amendment, the Court reasoned that “the people” protected by the First, Second, and Fourth Amendments, as well as to whom the 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.”¹⁸⁵

Even though the Court did not explicitly define what it meant by “sufficient connection,” it unambiguously decided that a noncitizen, who was arrested in a foreign country, transported to the United States, and present in the United States for several days during which time his house was searched, had not established a “sufficient” connection.¹⁸⁶ A noncitizen seeking admission to the United States for the first time would accordingly make a “futile” attempt if he or she should seek protection under the Bill of Rights.¹⁸⁷

The claim of an illegal alien is presumably stronger if he or she not only “enter[s]” the country, but also “reside[s]” here.¹⁸⁸ Although the Court did not rule “squarely” on whether the Fourth Amendment protects aliens, it hinted that a noncitizen might have a more legitimate claim if he or she were in the United States voluntarily and if he or she accepted “some societal obligations.”¹⁸⁹

Verdugo-Urquidez tempered this seemingly alien-friendly approach with the caveat that constitutional provisions apply differently to citizens

¹⁸² *Id.* at 202.

¹⁸³ 494 U.S. 259, 265 (1990).

¹⁸⁴ *Id.* at 274–75.

¹⁸⁵ *Id.* at 265.

¹⁸⁶ *Id.* at 271.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* at 273.

and aliens.¹⁹⁰ Citing *Mathews v. Diaz*, the Court held that Supreme Court decisions have accorded "differing protection to aliens than to citizens, based on [the Court's] conclusion that the particular provisions in question were not intended to extend to aliens in the same degree as to citizens."¹⁹¹

Therefore, while *Verdugo-Urquidez* held that the Fourth Amendment did not apply to an alien with insufficient connections to the United States, it left the door open to at least some Fourth Amendment protection for those aliens who are part of a "national community" or who "have developed sufficient connection with this country," based on a voluntary presence in the United States and an acceptance of "some societal obligations."¹⁹²

3. "The People" of the First Amendment

The Supreme Court has previously recognized that aliens have First Amendment rights. In the 1940s, the Court in *Bridges v. Wixon* held that "[f]reedom of speech and press is accorded to aliens residing in this country."¹⁹³ The Court additionally noted in *Bridges v. State of California* that the assurance of First Amendment rights is "everyone's concern."¹⁹⁴

The Supreme Court has thereby concluded that the First Amendment is incorporated into the Due Process Clause because it is "implicit in the concept of ordered liberty" and therefore protected by the liberty guaranteed by the Fourteenth Amendment.¹⁹⁵ Because the Due Process Clause has been held to apply to noncitizens, the Court held that the First Amendment is applicable to them by virtue of the Fourteenth Amendment.¹⁹⁶

However, more recent Supreme Court decisions seem to limit illegal aliens' First Amendment rights, at a minimum, to resident aliens.¹⁹⁷ For example, in 1999, the Supreme Court in *Reno v. American-Arab Anti-Discrimination Committee* rejected illegal aliens' First Amendment claims because "[w]hen an alien's continuing presence in this country is in violation of the immigration laws, the Government does not offend the

¹⁹⁰ *Id.*

¹⁹¹ *Id.* (citing *Mathews v. Diaz*, 426 U.S. 67, 79–80 (1976)).

¹⁹² *Id.* at 265, 273–75.

¹⁹³ *Bridges v. Wixon*, 326 U.S. 135, 148 (1945).

¹⁹⁴ *Bridges v. California*, 314 U.S. 252, 282 (1941).

¹⁹⁵ *Id.* at 281 (citation omitted).

¹⁹⁶ *See id.*; *see also* Maryam Kamali Miyamoto, *The First Amendment After Reno v. American-Arab Anti-Discrimination Committee: A Different Bill of Rights for Aliens?*, 35 HARV. C.R.-C.L. L. REV. 183, 186 (2000) (arguing that although the Supreme Court has given deference to Congress's broad power over immigration matters, in many instances, the Court has not distinguished between aliens and citizens for the purpose of resolving First Amendment issues, even in cases where free speech and association were linked with the deportation of aliens).

¹⁹⁷ *See Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 491–92 (1999).

Constitution by deporting him for the additional reason that it believes him to be a member of an organization that supports terrorist activity.”¹⁹⁸

Some scholars believe that this decision is momentous for aliens’ rights under the First Amendment because “[b]y rejecting a valid constitutional defense of selective enforcement in this context, [the Court] implied that aliens who were unlawfully present in the United States did not enjoy the protection of the First Amendment.”¹⁹⁹

Although the Supreme Court has previously recognized illegal aliens’ right to protection under the First Amendment, its more recent decisions have thus called the extent of this protection into question.

It is clear from Supreme Court precedent that illegal aliens are indeed accorded certain rights under the U.S. Constitution. Because they are considered “persons” in the constitutional sense, the Court has generally protected illegal aliens under the Fifth, Sixth, and Fourteenth Amendments. However, the Court has also restricted some rights. Although it has historically accorded illegal aliens protection under the First Amendment, the Court has recently limited this privilege. Similarly, while it has left the door open to at least some Fourth Amendment protection, the Court has never actually ruled on this issue. The Supreme Court has therefore not been consistent in its accordance of constitutional rights to illegal aliens.

D. *PORTILLO-MUNOZ* WAS CORRECT IN DENYING ILLEGAL ALIENS SECOND AMENDMENT RIGHTS

Portillo-Munoz’s ultimate decision to exclude illegal aliens from the protections of the Second Amendment is correct, although the court was incorrect in holding that “the people” has different meanings within the Bill of Rights. *Heller* has reformulated “the people” from those individuals who were part of a “national community” to those who are now part of a “political” one. In contravention of the *Portillo-Munoz* reasoning, *Heller* extended its interpretation of “the people” to other constitutional amendments,²⁰⁰ which serves to exclude illegal aliens from this group not only in the Second Amendment, but also across the other Bill of Rights guarantees.

Even if illegal aliens are part of “the people,” the Second Amendment may be restricted to U.S. citizens because illegal aliens are not a “suspect class” under the Equal Protection Clause.²⁰¹ Because the right concerned is only subject to rational basis review, to prevail on an Equal Protection

¹⁹⁸ *Id.*

¹⁹⁹ Miyamoto, *supra* note 196, at 205.

²⁰⁰ See *District of Columbia v. Heller*, 554 U.S. 570, 580, 635 (2008).

²⁰¹ See *Plyler v. Doe*, 457 U.S. 202, 202 (1982).

challenge, the right must either be fundamental or the restriction on the right must impose "a lifetime hardship."²⁰²

While the right to bear arms is considered fundamental after *McDonald v. City of Chicago*,²⁰³ it is nevertheless unclear whether illegal aliens are entitled to its protection. Ultimately, this issue is of little consequence, especially since the Supreme Court has been inconsistent in according fundamental rights equally to illegal aliens. Illegal aliens may also be excluded from the Second Amendment based on the long-standing prohibition on the possession of firearms by illegal aliens under 18 U.S.C. § 922(g)(5).

Additionally, the restriction on the right to bear arms does not impose a "lifetime hardship" on illegal aliens because the individuals who assert Second Amendment rights are fully consenting adults who voluntarily broke the law and because their status of illegality is subject to change. As a result, illegal aliens may be excluded from the Second Amendment.

1. *Heller Has Excluded Illegal Aliens from "the People" of the Bill of Rights*

By changing who belongs in "the people" from a "national" to a "political" group, and then extending this reasoning to other Bill of Rights amendments with this phrase, *Heller* has excluded illegal aliens from "the people." The reasoning of the *Portillo-Munoz* majority that "the people" in the Second and Fourth Amendments refer to different groups of people is erroneous.²⁰⁴ In his *Portillo-Munoz* dissent, Judge Dennis argued that Supreme Court precedent recognizes that the phrase "the people" has the same meaning in the First, Second, and Fourth Amendments.²⁰⁵ Similar reasoning pervades pre-*Heller* precedent. The *Parker* and *Emerson* courts also interpreted "the people" to have the same meaning in the First, Second, Fourth, Ninth, and Tenth Amendments.²⁰⁶ Both courts declined to argue that "the people" under the Second Amendment is limited to a "subset" of individuals because of the uniform construction of other Bill of Rights provisions.²⁰⁷

The Supreme Court has likewise endorsed a "uniform" reading of the phrase "the people" in the U.S. Constitution. In *Verdugo-Urquidez*, the

²⁰² See *id.* at 216.

²⁰³ See *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3026 (2010).

²⁰⁴ See *United States v. Portillo-Munoz*, 643 F.3d 437, 440 (5th Cir. 2011).

²⁰⁵ *Id.* at 443.

²⁰⁶ *Parker v. District of Columbia*, 478 F.3d 370, 381 (D.C. Cir. 2007); *United States v. Emerson*, 270 F.3d 203, 227 (5th Cir. 2001).

²⁰⁷ *Parker*, 478 F.3d at 381; *Emerson*, 270 F.3d at 227.

Court, in discussing the Framers' placement of the words "the people," held that "the people protected by the Fourth Amendment, and by the First and Second Amendments," refers to one "class" of persons.²⁰⁸ In *Heller*, the Court explained how there are three other instances of "the people" in the Bill of Rights, including the First, Fourth, and Ninth Amendments, and concluding that all three provisions "unambiguously refer to individual rights."²⁰⁹ Based on this precedent, "the people" should be interpreted uniformly throughout the Bill of Rights.

While this interpretation makes it seem that *Heller* expanded the group of individuals who may be included in "the people," it actually limited the scope of this group from individuals who were part of a "national community," used in *Verdugo-Urquidez*, to "law-abiding, responsible citizens," i.e., part of a newly minted "political community."²¹⁰ A "national" community is theoretically broader than a "political" one because a "political" community includes only citizens.²¹¹ A "political" reformulation implies the inclusion only of those who already possess rights of a "political" nature—e.g., voting, holding public office—while a "national" formulation of "the people" is more "malleable, potentially including all who believe in the ideals of, and are connected to, the nation."²¹²

Thus, although *Verdugo-Urquidez* seems to have left open "the possibility" that classes of noncitizens, even undocumented immigrants, could be included in "the people," the *Heller* Court silently shifted the focus on membership in "the people" to a "political" rather than a "national" lens.²¹³ The shift is a subtle one because even though the *Heller* majority quoted the *Verdugo-Urquidez* Court's reference to a "national community," it did not acknowledge the fact that it replaced the word "national" with "political."²¹⁴

Heller extended this new interpretation to other constitutional amendments under the guise of uniformity, thereby excluding illegal aliens from membership in "the people." The Court held that "the term unambiguously refers to *all members of the political community* . . . in all six other provisions of the Constitution."²¹⁵ This extension is consistent with its emphasis on a uniform reading of "the people" in the Bill of

²⁰⁸ 494 U.S. 259, 265 (1990).

²⁰⁹ *District of Columbia v. Heller*, 554 U.S. 570, 579 (2008).

²¹⁰ *Id.* at 635; *Verdugo-Urquidez*, 494 U.S. at 265.

²¹¹ *Gulasekaram*, *supra* note 145, at 1536.

²¹² *Id.*

²¹³ *Id.*

²¹⁴ *See id.*

²¹⁵ *Heller*, 554 U.S. at 580 (emphasis added).

Rights.²¹⁶ It is also consistent with pre-*Heller* precedent like *Emerson*, which concluded that “the people,” as used in the Second Amendment, “refers to individual *Americans*.”²¹⁷ *Heller* therefore served to limit the scope of “the people” in the Bill of Rights.

As a result of the Supreme Court’s recent reformulation of “the people” and its extension of this interpretation to other constitutional amendments, Judge Dennis’s argument that Portillo should be included in the definition of “the people” because he has “sufficient connections” with the United States is misguided.²¹⁸ Before *Heller*, an illegal alien could become part of a “national community” by developing a “sufficient connection” with the United States.²¹⁹ *Heller*, however, changed this analysis by replacing what used to be a “national” community with a “political” one.²²⁰ Since the term “political” connotes “core political rights” that cannot be exercised by noncitizens,²²¹ *Heller*’s reformulation theoretically requires courts to include only citizens in their definition of “the people,” as many lower federal courts like *Portillo-Munoz* have done in their Second Amendment jurisprudence.²²²

2. Constitutional Rights Are Not Accorded Automatically to Illegal Aliens

The *Portillo-Munoz* majority was correct in excluding illegal aliens from the Second Amendment²²³ because, even if the phrase “the people” does not exclude illegal aliens based on *Heller*’s definition, it is consistent with U.S. Supreme Court precedent that accords illegal aliens less protection under the Constitution than U.S. citizens.

The Court concluded in *Verdugo-Urquidez* that aliens and citizens are accorded different protection under the U.S. Constitution, based on its decision in *Mathews v. Diaz*.²²⁴ In *Mathews*, the Court held that “[i]n the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens.”²²⁵

²¹⁶ See *id.* at 579–81; *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990).

²¹⁷ *United States v. Emerson*, 270 F.3d 203, 229 (5th Cir. 2001) (emphasis added).

²¹⁸ *United States v. Portillo-Munoz*, 643 F.3d 437, 445–48 (5th Cir. 2011) (Dennis, J., concurring in part and dissenting in part) (relying on the *Verdugo-Urquidez* requirements).

²¹⁹ *Verdugo-Urquidez*, 494 U.S. at 265.

²²⁰ *Heller*, 554 U.S. at 580.

²²¹ Gulasekaram, *supra* note 145, at 1537.

²²² See, e.g., *Portillo-Munoz*, 643 F.3d at 440.

²²³ *Id.* at 441.

²²⁴ See *Verdugo-Urquidez*, 494 U.S. at 273.

²²⁵ 426 U.S. 67, 79–80 (1976) (holding that Congress may condition aliens’ eligibility for participation in a federal medical insurance program on continuous residence in the United States for a five-year period and admission for permanent residence, without depriving aliens

The *Mathews* Court explained that while illegal aliens are given minimal constitutional protection, they are not entitled to the full array of rights available to U.S. citizens: “The fact that all persons, aliens and citizens alike, are protected by the Due Process Clause does not lead to the further conclusion that all aliens must be placed in a single homogenous legal classification.”²²⁶

As a result of this differing protection, while illegal aliens are “persons”²²⁷ that are entitled to some due process and equal protection rights under the Fourteenth Amendment,²²⁸ they are not a “suspect class” under the Equal Protection Clause.²²⁹ This means that illegal aliens who try to assert constitutional rights are only accorded rational basis review.²³⁰ Under this standard, the Court “seek[s] only the assurance that the classification at issue bears some fair relationship to a legitimate public purpose.”²³¹ Even if illegal aliens were part of “the people,” it is possible that the Second Amendment would nevertheless be restricted to U.S. citizens based on deference to “a legitimate public purpose.”²³²

In analyzing whether an illegal alien should be entitled to the same right as a U.S. citizen under an equal protection analysis, the Court requires that the right concerned be either fundamental or that the governmental regulation of this right imposes “a lifetime hardship” on the individual.²³³

Even when a fundamental right is concerned, the Court has been inconsistent regarding which rights apply equally to illegal aliens. In the context of the government’s denial of habeas corpus to alien defendants who were unlawfully detained and imprisoned, the Court in *United States v. Wong Kim Ark*, *Yick Wo v. Hopkins*, and *Wong Wing v. United States* held that the illegal alien was entitled to the same fundamental right to personal liberty as a citizen.²³⁴

Meanwhile, the Fourth Amendment has not yet been extended to

of due process of the law).

²²⁶ *Id.* at 78.

²²⁷ This broadens the rights accorded to aliens under the U.S. Constitution: “[T]he term ‘person,’ used in the Fifth Amendment, is broad enough to include any and every human being within the jurisdiction of the republic.” *Plyler v. Doe*, 457 U.S. 202, 212 n.11 (1982) (quoting *United States v. Wong Wing*, 163 U.S. 228, 242–43 (1896) (Field, J., concurring in part and dissenting in part)).

²²⁸ *Id.* at 202.

²²⁹ *Id.*

²³⁰ *Id.*

²³¹ *Id.* at 216.

²³² *See id.*

²³³ *Id.*

²³⁴ *See United States v. Wong Kim Ark*, 169 U.S. 649, 649 (1898); *United States v. Wong Wing*, 163 U.S. 228, 229 (1896); *Yick Wo v. Hopkins*, 118 U.S. 356, 356 (1886).

illegal aliens. While illegal aliens could *potentially* be afforded Fourth Amendment protection if they have "sufficient connections" to the United States, the *Verdugo-Urquidez* Court declined to confront this issue "squarely."²³⁵ The fact that the Court *assumed* that the Fourth Amendment could potentially protect illegal aliens "for the sake of argument," as Judge Dennis explains, does not mean that illegal aliens are necessarily afforded Fourth Amendment rights.²³⁶ It is uncertain how the Supreme Court would rule on this issue.

Similarly, although the Supreme Court recognized in *Bridges* that aliens have rights under the First Amendment, more recent Supreme Court decisions like *Reno* seem to limit this right, at a minimum, to resident aliens.²³⁷

As the above analysis demonstrates, even if illegal aliens are considered "persons" under the Fourteenth Amendment, as part of "the people" in the First Amendment, and *potentially* as part of "the people" in the Fourth Amendment, they are not consistently protected under these provisions. This shows that constitutional rights are not accorded to illegal aliens on an automatic basis.²³⁸

The arguments of Judge Dennis, Professor Winkler, and other critics are therefore inconsistent with U.S. Supreme Court precedent.²³⁹ Judge Dennis, for example, argues that the *Portillo-Munoz* majority decision signifies that millions of persons in the United States may be subject to unjustified searches and cannot "peaceably assemble or petition the government."²⁴⁰ Professor Winkler also asks whether the *Portillo-Munoz* decision signifies that police can "invade [illegal aliens'] homes without probable cause" or "stop them from peaceably assembling."²⁴¹

²³⁵ *United States v. Verdugo-Urquidez*, 494 U.S. 259, 272 (1990).

²³⁶ *See United States v. Portillo-Munoz*, 643 F.3d 437, 446 (5th Cir. 2011) (Dennis, J., concurring in part and dissenting in part) (citing *Verdugo-Urquidez*, 494 U.S. at 273).

²³⁷ *See Bridges v. Wixon*, 326 U.S. 135, 148 (1945); *Bridges v. California*, 314 U.S. 252, 282 (1941). *But see Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 491–92 (1999) (rejecting illegal aliens' First Amendment claims).

²³⁸ *See, e.g., Am.-Arab Anti-Discrimination Comm.*, 525 U.S. at 491–92; *see also* Michael Scaperlanda, *Partial Membership: Aliens and the Constitutional Community*, 81 IOWA L. REV. 707, 718–19 (1996) ("Like the noncitizen, the Court finds itself straddling two worlds, the one rooted in individual rights . . . and the other deeply concerned with communal formation. . . . [The Court] ignores the possible constitutional rights of the noncitizen, subordinating any such interests to Congress's plenary power to expel those not possessing membership in the national community.").

²³⁹ Johnson & Edmondson, *supra* note 94.

²⁴⁰ *Portillo-Munoz*, 643 F.3d at 443 (Dennis, J., concurring in part and dissenting in part).

²⁴¹ Johnson & Edmondson, *supra* note 94.

Although these arguments are fair and even arguably necessary, they are unfortunately not consistent with Supreme Court rulings. The Court has never ruled that illegal aliens have Fourth Amendment rights and has significantly abridged their First Amendment rights. The *Portillo-Munoz* majority cannot call into question constitutional rights that were never held—or were only tenuously held—by illegal aliens.

3. *Although the Second Amendment Is a Fundamental Right, It Is Not Clear Whether It Applies to Illegal Aliens*

Even though the Supreme Court has held that the Second Amendment is fundamental, this does not necessarily guarantee protection to illegal aliens. *McDonald v. City of Chicago* incorporated the right to keep and bear arms into the concept of due process.²⁴² According to the plurality of the Court, self-defense is “fundamental” to our “scheme of ordered liberty.”²⁴³

Once a right is deemed fundamental, like the Second Amendment here, a “distinction based on citizenship status would appear to be irrational.”²⁴⁴ This is because the Fourteenth Amendment’s Due Process Clause protects “person[s],” which is “presumably the broadest formulation” of those who are accorded constitutional rights.²⁴⁵ This broad formulation is based on cases like *United States v. Wong Kim Ark*, *Yick Wo v. Hopkins*, and *United States v. Wong Wing*, which have held that illegal aliens are “persons” under the Fourteenth Amendment.²⁴⁶ Because the Second Amendment is fundamental, it should theoretically be incorporated into the Due Process Clause, thereby including both citizens and noncitizens.²⁴⁷

However, it does not seem that *McDonald* has had any real impact on lower federal courts confronting the issue of illegal aliens and the Second Amendment. These courts have virtually ignored *McDonald*.²⁴⁸ For example, after its discussion of *Heller*’s reformulation of the phrase “the people,” the *Portillo-Munoz* majority added that “nothing in *McDonald v.*

²⁴² See *McDonald v. Chicago*, 130 S. Ct. 3020, 3042 (2010).

²⁴³ *Id.* at 3036.

²⁴⁴ Gulasekaram, *supra* note 145, at 1540.

²⁴⁵ *Id.*

²⁴⁶ See *United States v. Wong Kim Ark*, 169 U.S. 649, 649 (1898); *United States v. Wong Wing*, 163 U.S. 228, 229 (1896); *Yick Wo v. Hopkins*, 118 U.S. 356, 356 (1886).

²⁴⁷ See *Plyler v. Doe*, 457 U.S. 202, 230 (1982) (citing *Wong Wing*, 163 U.S. at 242–43) (holding that “person” in the Fifth and Fourteenth Amendments includes “any and every human being within the jurisdiction”); Gulasekaram, *supra* note 145, at 1540.

²⁴⁸ See, e.g., *United States v. Portillo-Munoz*, 643 F.3d 437, 440 (5th Cir. 2011).

City of Chicago . . . suggests otherwise.”²⁴⁹ Interestingly, Judge Dennis did not even mention *McDonald* in his *Portillo-Munoz* dissent.²⁵⁰

Part of this may be due to the fact that, as some scholars have argued, “unlike *Heller*, which declared Washington D.C.’s gun ban unconstitutional, *McDonald* merely remand[ed] Chicago’s gun law to the lower courts” and “despite that remand, the plurality again declined to articulate the precise standard of review [for Second Amendment cases] that the lower courts should use.”²⁵¹

Whatever the reasons, the fact that *McDonald* has not played a role in these decisions is significant, especially since rendering the Second Amendment fundamental should theoretically expand it to both citizens and noncitizens alike. This significance is underscored by the fact that “the effects of Supreme Court decisions are highly dependent upon treatment by lower courts.”²⁵² Courts confronting this issue have not considered the fundamentality of the Second Amendment as dispositive of illegal alien protection. *McDonald* has therefore not prevented lower courts from denying Second Amendment protection to illegal aliens.

Additionally, although *Heller* and *McDonald* did not mention whether or not illegal aliens have the right to bear arms, the *Heller* majority noted that the Second Amendment is not “absolute”—in other words, that some statutes and ordinances regulating gun use are still constitutional.²⁵³ The *McDonald* Court echoed these restrictions, despite its holding that the Second Amendment is fundamental, by holding that the right to bear arms is not absolute.²⁵⁴ In explicitly citing *Heller*’s “safe harbor” provision, Justice Alito said, “We repeat those assurances here. Despite municipal respondents’ doomsday proclamations, incorporation does not imperil every law regulating firearms.”²⁵⁵ These regulations could potentially include the prohibition on illegal alien gun ownership under 18 U.S.C. § 922(g)(5).²⁵⁶

In fact, that is exactly how lower federal courts have treated the issue.²⁵⁷ *Heller* emphasized that, despite mentioning specific restrictions on

²⁴⁹ *Id.* at 440 n.1.

²⁵⁰ *See id.* at 442–48.

²⁵¹ Brannon P. Denning & Glenn H. Reynolds, *Five Takes on McDonald v. Chicago*, 26 J.L. & POL. 273, 296 (2011).

²⁵² *Id.* at 294–95.

²⁵³ *District of Columbia v. Heller*, 554 U.S. 570, 626–27 (2008).

²⁵⁴ *McDonald v. Chicago*, 130 S. Ct. 3020, 3042, 3047 (2010); *see also* Denning & Reynolds, *supra* note 251, at 296.

²⁵⁵ *McDonald*, 130 S. Ct. at 3047.

²⁵⁶ *See* 18 U.S.C. § 922(g)(5) (2006).

²⁵⁷ *See* discussion *supra* Part III.B.

the possession of firearms by such groups as felons and the mentally ill,²⁵⁸ the Court did “not undertake an exhaustive historical analysis . . . of the full scope of the Second Amendment.”²⁵⁹ This means that other prohibitions in effect before *Heller*, not mentioned explicitly by the Court, are left undisturbed after its ruling.²⁶⁰ Because 18 U.S.C. § 922(g) is the same statute that also criminalizes gun possession by felons and the mentally ill,²⁶¹ the lower federal courts were likely correct in holding that the same statute applies to the long-standing prohibitions on possession of firearms by illegal aliens.²⁶²

Although the Second Amendment is fundamental, this fact has not helped illegal aliens asserting their Second Amendment rights in federal courts. According to both *Heller* and *McDonald*, illegal aliens may be excluded from the Amendment’s purview based on the long-standing prohibition on the possession of firearms by illegal aliens under 18 U.S.C. § 922(g)(5). As the above discussion on the Bill of Rights guarantees indicates, illegal aliens may also be excluded from the Second Amendment simply on the basis that the constitutional amendments are not automatically applied equally to illegal aliens. Just because the Second Amendment is fundamental, therefore, does not mean that illegal aliens are necessarily entitled to its protection.

²⁵⁸ *Heller*, 554 U.S. at 626–27.

²⁵⁹ *Id.* at 626.

²⁶⁰ See *supra* Part III.A, discussing *Heller*’s long-standing prohibitions; see also Allen Rostron, *Protecting Gun Rights and Improving Gun Control After District of Columbia v. Heller*, 13 LEWIS & CLARK L. REV. 383, 387 (2009) (“The [*Heller*] opinion notes that this list [of long-standing prohibitions] is not complete, and so there may be other gun control measures that are ‘presumptively’ valid as well. The majority’s endorsement of these sorts of sensible restrictions on guns helps make *Heller* seem like a much less radical decision. . . . [These measures] are reasonable policy measures that do not excessively burden anyone’s legitimate interests in being able to own and use guns.”).

²⁶¹ Section 922(g) provides, in relevant part, that “[i]t shall be unlawful for any person” who “has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year” (§ 922(g)(1)), or “who has been adjudicated as a mental defective or who has been committed to a mental institution” to possess a firearm (§ 922(g)(4)). 18 U.S.C. § 922(g)(1), (g)(4).

²⁶² See *United States v. Yanez-Vasquez*, No. 09-40056-01-SAC, 2010 WL 411112, at *2 (D. Kan. Jan. 28, 2010); *United States v. Guerrero-Leco*, No. 3:08cr118, 2008 WL 4534226, at *1 (W.D.N.C. Oct. 6, 2008); *United States v. Solis-Gonzalez*, No. 3:08-CR-145-MR-DCK-1, 2008 WL 4539663, at *1, *3 (W.D.N.C. Sept. 26, 2008) (“[D]ecisions by this Court as well as other district courts across the country consistently hold that *Heller* does not undermine the constitutionality of prohibitions under 18 U.S.C. § 922(g).”).

4. Restricting the Second Amendment Does Not Impose a “Lifetime Hardship” on Illegal Aliens

If the Second Amendment right to bear arms does not otherwise apply to illegal aliens, *Plyler* suggests that restrictions on aliens’ right to bear arms are unconstitutional only if they impose “a *lifetime hardship*” on the class of illegal aliens.²⁶³ Even though education was not considered fundamental in *Plyler*, the statute restricting public education to U.S. citizens nevertheless imposed a “lifetime hardship” on the illegal alien children because it posed a lifelong “obstacle on individual achievement.”²⁶⁴

First, the restriction on the right to bear arms—namely, 18 U.S.C. § 922(g)(5)—is not of the same character as an “obstacle” to the lifelong individual achievement of illegal aliens. Unlike the deprivation of education, which the Court in *Plyler* said “takes an estimable toll on the social, economic, intellectual, and psychological well-being of the individual, and poses an obstacle to *individual achievement*,”²⁶⁵ the deprivation of gun possession is entirely different.

Gun ownership does not have the detrimental “intellectual” and “psychological” effects on one’s “individual achievement” that the deprivation of education does. The right to bear arms instead involves the “inherent right of self-defense.”²⁶⁶ Rather than a civil right, the right to bear arms has historically been considered a political right.²⁶⁷ This is demonstrated by Professor Akhil Amar, who maintains that “the right to bear arms ha[s] long been viewed as a political right, a right of First-Class Citizens,” and one closely connected with the right to vote.²⁶⁸ *Heller*, of course, reaffirmed this view of the Second Amendment by restricting its application to a “political community” of citizens who are “law-abiding.”²⁶⁹

²⁶³ *Plyler v. Doe*, 457 U.S. 202, 202 (1982) (emphasis added).

²⁶⁴ *Id.*

²⁶⁵ *Plyler*, 457 U.S. at 203 (emphasis added).

²⁶⁶ *District of Columbia v. Heller*, 554 U.S. 570, 628 (2008).

²⁶⁷ Pratheepan Gulasekaram, *Aliens with Guns: Equal Protection, Federal Power, and the Second Amendment*, 92 IOWA L. REV. 891, 903 (2007).

²⁶⁸ AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 258 (1998) (“At 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.”); *see also* Gulasekaram, *supra* note 267, at 904 (“[The] divergence between voting and citizenship suggests that alien-voting bans, although constitutionally permitted, are not constitutionally mandated. When gun laws maintain these close connections with suffrage, alienage restrictions in firearms laws operate similarly to those in voting: they are not constitutionally mandated, but they are permitted.”).

²⁶⁹ *Heller*, 554 U.S. at 579–81, 635.

A restriction on the right to bear arms is therefore not an “obstacle” to *individual* achievement as education has been held to be; rather, it is a *political* privilege historically accorded to U.S. citizens.

Second, restrictions on the right to bear arms do not have a lifelong effect on illegal aliens attempting to assert Second Amendment rights. The *Plyler* Court noted that the denial of educational opportunities to illegal alien children would have lifelong effects on them because, as it explained, “[t]he stigma of illiteracy will mark them for the rest of their lives.”²⁷⁰ The Court further stated that “[b]y denying these children a basic education, we deny them the ability to live within the structure of our civil institutions, and foreclose any realistic possibility that they will contribute in even the smallest way to the progress of our Nation.”²⁷¹

Not being able to assert the right of self-defense does not pose lifelong effects because the status of the illegal alien is subject to change, due to either his acquisition of citizenship or residency status in the United States, or his voluntary or involuntary departure from the United States. In either of those scenarios, the individual could attain the right to possess a gun, while a child who is denied an educational opportunity would be disadvantaged for the rest of his or her life (as the Court said, “illiteracy is an enduring disability”).²⁷²

Third, illegal aliens asserting their Second Amendment rights are unlike the school-age children asserting their educational rights in *Plyler* because they are fully consenting adults.²⁷³ This is significant because *Plyler* underscored the involuntary nature of the children’s illegal status.²⁷⁴ While determining the rationality of the Texas law, the Court noted that it “may appropriately take into account its costs to the Nation and to the *innocent* children who are its victims.”²⁷⁵ The Court further provided that “the Texas statute imposes a lifetime hardship on a discrete class of children *not accountable for their disabling status*. These children can neither affect their parents’ conduct nor their own undocumented status.”²⁷⁶

²⁷⁰ *Plyler*, 457 U.S. at 223.

²⁷¹ *Id.*

²⁷² *See id.* at 221 (“Public education is not a ‘right’ granted to individuals by the Constitution. But neither is it merely some governmental ‘benefit’ indistinguishable from other forms of social welfare legislation. Both the importance of education in maintaining our basic institutions, and the lasting impact of its deprivation on the life of the child, mark the distinction. . . . [E]ducation has a fundamental role in maintaining the fabric of our society.” (citations omitted)); *see also id.* at 222.

²⁷³ *Id.* at 220.

²⁷⁴ *Id.*

²⁷⁵ *Id.* at 224 (emphasis added).

²⁷⁶ *Id.* at 202 (emphasis added).

The individuals who have access to firearms, by contrast, are fully consenting adults who voluntarily broke the law by illegally crossing the border of the United States. Even if there is a lifelong obstacle in not being able to possess a firearm, this obstacle is a self-imposed one and therefore distinct from children whose parents made the decision to cross the U.S. border illegally.

Plyler's analysis signifies that it would be difficult for an illegal alien to claim that a denial of his or her Second Amendment right is a lifelong obstacle because he or she voluntarily broke the law by illegally entering the United States in the first place.²⁷⁷ On the other hand, despite this right being fundamental, illegal aliens may nevertheless be excluded from its purview based on the long-standing prohibition on the possession of firearms by illegal aliens under 18 U.S.C. § 922(g)(5). Ultimately, however, it does not much matter whether or not the right to bear arms is a fundamental one because even if it is fundamental, constitutional rights are not accorded automatically to illegal aliens. As a result, illegal aliens could and should be excluded from the Second Amendment.

IV. CONCLUSION

Many questions still remain after the Supreme Court's ruling in *District of Columbia v. Heller*, including who are "the people" protected by the Second Amendment. The first federal court of appeals case on the issue, *United States v. Portillo-Munoz*, held that illegal aliens do not have such a right.

This Comment has argued that illegal aliens are not members of "the people" of the Second Amendment and that they lack the constitutional right to bear arms. *Heller* has limited "the people" from those individuals who are part of a "national" community to those who are now part of a "political" one. This constraint signifies that the right to bear arms is limited only to "law-abiding" American citizens. Even if illegal aliens are part of "the people," the government may restrict their Second Amendment right on the ground that illegal aliens are not a suspect class under the Equal Protection Clause. Accordingly, *Portillo-Munoz's* ultimate decision is consistent with Supreme Court precedent in according illegal aliens differing protection under the U.S. Constitution than U.S. citizens, particularly under the First, Fourth, and Fourteenth Amendments.

While it would be ideal for the U.S. Constitution to protect everyone within the United States' jurisdiction, even individuals who are here illegally, this protection has historically been inconsistent and only accorded on a case-by-case basis. The reasoning behind this inconsistency

²⁷⁷ *See id.*

seems to be premised on the fact that illegal aliens have broken U.S. law by illegally crossing the border. *Portillo-Munoz*, therefore, cannot be criticized as having dire consequences for the constitutional rights of illegal aliens because the existence and extent of these rights was uncertain long before the decision. It is possible that the Supreme Court may strengthen such rights in the future but until then, one court of appeals surely cannot be expected to change U.S. Supreme Court jurisprudence overnight.