

2017

The Second Amendment and “The People”: Who Has the Right to Bear Arms?, 51 J. Marshall L. Rev. 199 (2017)

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THE SECOND AMENDMENT AND “THE PEOPLE”: WHO HAS THE RIGHT TO BEAR ARMS?

KASIM CARBIDE

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I. INTRODUCTION

A. *The Current Problem*

To disarm, or not to disarm? This remains the primary question during a time when concern over gun rights is growing, and its application to “the people” has created a dichotomy in modern American jurisprudence. The Second Amendment states, “A well-regulated militia, being necessary to the security of a free state, the right of *the people* to keep and bear arms, shall not be infringed.”¹ These twenty-eight words have caused considerable debate in determining its true meaning and application to modern issues.² Proponents for gun rights claim regulations which promote firearm possession reduce crime, while proponents for gun control claim an epidemic, and argue that growing crime and violence is linked to gun possession.³⁴

For example, in 2015, John Hendricks, a gun proponent and Uber driver with a registered concealed and carry permit, was taking a break between his fares when he noticed a man yelling to

1. U.S. CONST. amend. II. (*emphasis added*).

2. Zachary Elkins, *Rewrite the Second Amendment*, N.Y. TIMES (Apr. 4, 2013), www.nytimes.com/2013/04/05/opinion/rewrite-the-second-amendment.html.

3. The Editorial Board, *End the Gun Epidemic in America*, N.Y. TIMES (Dec. 4, 2015), www.nytimes.com/2015/12/05/opinion/end-the-gun-epidemic-in-america.html.

4. Eric Lichtbau, *Gun-Control Groups Push Growing Evidence that Law Reduce Violence*, N.Y. TIMES (Oct. 11, 2016), www.nytimes.com/2016/10/12/us/gun-control-national-rifle-association.html.

a group of people from the side of the street.⁵ The bystander began open firing onto a crowd of people, which led Hendricks to immediately unload his registered firearm and shot the man six times before calling 911.⁶ Hendricks' quick reaction may have diffused a potential mass shooting, offering support to gun rights advocates who argue that gun laws should allow people to defend themselves and others.⁷ These advocates state events like the Chicago shooting demonstrate that gun rights reflect protection of people.⁸ Conversely, events like the Virginia Tech shooting provides support for anti-gun rights advocates who assert that easy access to guns lead to tragedies.⁹ What is clear is school shootings increasingly involve more guns, which is leading to more deaths than ever before.¹⁰ In response to the many cases of self-defense mass shootings, people have been turning to policy makers to create

5. Geoff Ziezulweicz, *Concealed carry shootings now part of Chicago's gun reality*, CHI. TRIB. (Nov. 20, 2015), www.chicagotribune.com/news/ct-concealed-carry-shooting-interview-met-20151120-story.html.

6. *Id.*

7. *Id.*

8. Dean Weingarten, *Police in Chicago Give Hero his Gun Back*, THE TRUTH ABOUT GUNS (Dec. 5, 2015), www.thetruthaboutguns.com/2015/12/dean-weingarten/police-in-chicago-give-hero-his-gun-back/; see also J.D. Heyes, *Armed Civilians Save lives and Reduce the Number Killed in Mass*, NAT. NEWS (Dec. 29, 2015), www.gmogottago.com/armed-civilians-save-lives-and-reduce-the-number-killed/ (discussing people who have used their concealed firearms for self-defense or protection purposes. Moreover, the article suggests studies are often conflated with misrepresented statistics, and that most people use their firearms generally only for self defense).

9. Amy Shuffelton, *Virginia Tech Shooting anniversary: Guns, schools, children and the laws we need*, THE HILL (Apr. 16, 2017), www.thehill.com/blogs/pundits-blog/the-administration/329031-virginia-tech-shooting-anniversary-guns-schools (discussing how school shootings have been an increasingly prevalent phenomenon, but that children are at an even greater risk of being shot at a friend's house). Eighty-nine percent of gun related deaths to children occur in homes. *Id.* In other words, accidental gun related deaths are increasing, but so are non-accidental gun related deaths, and the law should change to reflect these facts. *Id.*; see also, Stacey Leasca, *Have gun laws gotten more lax since Columbine? Here's what you need to know.*, MIC (Apr. 20, 2017), mic.com/articles/174724/have-gun-laws-gotten-more-lax-since-columbine-heres-what-you-need-to-know#.ht5rSapqA (discussing Congress's immediate reaction to the Columbine shooting was putting forth more than eight-hundred new bills dealing with guns, background checks, and regulations to prevent these kinds of shootings). However, federally, not much has changed in response to many of these shootings, but laws have changed significantly. Gun laws vary depending on the state, and gun lobbying groups such as the NRA often prevent any meaningful change from occurring. *Id.*; Zac Anderson, *Sandy Hook parent criticizes Steube's gun bills*, HERALD TRIB. (Apr. 3, 2017), www.heraldtribune.com/news/20170403/sandy-hook-parent-criticizes-steubes-gun-bills (comparing parents' tragedies like the Sandy Hook shooting who vehemently oppose gun rights supporters, with those who advocate for gun control. In response to bills proposing conceal and carry being allowed at schools, these parents state if guns made countries safe, America would be the safest country ever).

10. *262 Shootings In America Since 2013*, EVERYTOWN, everytownresearch.org/school-shootings/ (last visited Dec. 18, 2017).

laws which impact protection and safety.¹¹

Since policy makers have not created laws which have been met with public appraise, it may be the Supreme Court ultimately deciding the policy behind gun laws.¹² Prior to determining the proper policy regulating firearm possession, determining who the laws apply to is even more important. Although the Second Amendment references “the people,” which people are really included in this category?¹³ Is the right to self-defense applicable to everyone legally residing in the U.S.? It is self-evident that any natural born citizen of the U.S. enjoys these rights, but what about a legal alien residing in the U.S. for twenty years? Would noncitizens pose a greater threat to society than citizens? These questions present a deeper embedded issue regarding immigrants and public sentiment towards them. As one commentator states, “Forget about birthright citizenship for illegal immigrants . . . it’s not enough that we allow criminal noncitizens to stay here illegally, let’s give them guns too.”¹⁴ Another commentator posits, “[G]iven the common language that appears in multiple amendments, a loss in a Second Amendment case could have enormous consequences for the rights of undocumented immigrants who are harassed by police.”¹⁵

Circuit Courts are split on the question of who “the people” are in the context of the Second Amendment. The Seventh Circuit asserts that immigrants, who are not yet citizens, have a constitutional second amendment right to bear arms.¹⁶ Conversely, the Fifth, Sixth, and Eighth circuits hold unequivocally that

11. Nora Biette-Timmons and Olivia Li, *Peruta v. California: The Supreme Court’s Next Big Gun Case?*, THE TRACE (Apr. 13, 2017), www.thetrace.org/2017/04/peruta-v-california-gun-case-supreme-court-concealed-carry/ (discussing that although *Heller* suggests policy makers should set their own standard regarding public gun laws, this next case should be accepted by the Supreme Court and may set forth precedent and a standard to gun regulation).

12. Josh Bergeron, *Policy makers must take meaningful steps to address gun violence*, FOX.HOUSE.GOV (Dec. 6, 2015), www.foxh.house.gov/news/documentsingle.aspx?DocumentID=398775 (discussing that violence is increasing and U.S. policies are not strong enough to prevent people from dying).

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

14. Daniel Horowitz, *Gun Rights for Illegal Immigrants*, CONSERVATIVE REVIEW (Aug. 27, 2015), www.conservativereview.com/commentary/2015/08/gun-rights-for-illegal-immigrants.

15. Ian Millhiser, *Gun Rights Win a Major Victory in Federal Court, And That’s Actually a Good Thing*, THINKPROGRESS (Aug. 21, 2015), thinkprogress.org/gun-rights-win-a-major-victory-in-federal-court-and-thats-actually-a-good-thing-a25692714603#.rqf3nqlh8.

16. Josh Blackman, *7th Circuit Creates Circuit Split: Non-Citizens are “The People” Under the Second Amendment*, J.B.: BLOG (Aug. 20, 2015, 12:00PM), joshblackman.com/blog/2015/08/20/7th-circuit-creates-circuit-split-non-citizens-are-the-people-under-the-second-amendment/.

immigrants do not have a right to bear arms.¹⁷ After providing a brief history of Second Amendment Jurisprudence in Part II, the debate will be subsequently analyzed in Part III regarding immigrants and any Second Amendment Protections they may enjoy, finally, in Part IV an economic argument for resolution of the debate will be proposed.¹⁸

B. Brief Overview

Part II begins with a brief overview of the doctrine of incorporation to aid in understanding how Constitutional rights have developed, before providing a brief history of Second Amendment jurisprudence along with evolving interpretations of “the people,” beginning at *Dredd Scott* and finishing with *Meza-Rodriguez*.¹⁹ Part III analyzes and compares the Seventh Circuit’s

17. Andrew Kloster, *Appeals Court Ruling Could Threaten the Second Amendment Rights of American Citizens*, THE HERITAGE FOUNDATION (Mar. 16, 2016), www.heritage.org/firearms/report/appeals-court-ruling-could-threaten-the-second-amendment-rights-american-citizens#_ftn6 (summarizing the sister circuit’s split).

18. *See* United States v. Meza-Rodriguez, 798 F.3d 665 (7th Cir. 2004) (where an alien was convicted for illegal firearm possession, the Seventh Circuit interpreted “the people” to include individuals who have a substantial connection with the country, and thereby enjoy Second Amendment rights); *see also* Martinez-Aguero v. Gonzalez, 459 F.3d 618 (5th Cir. 2006) (where an alien crossed the border and was assaulted by a police officer, the Court held even an alien has redress against an officer of the law because the officer violated the Fourth Amendment, which applied in full force to the plaintiff even though she was an alien); *see also* Ibrahim v. Dep’t of Homeland Sec., 669 F.3d 983 (9th Cir. 2008) (explaining how a student alien pursuing a Ph.D. sought injunctive relief to remove her name from a government “no-fly list,” the Court held since the student pursued her degree in the United States and sought to further her connection to the country, her significant voluntary connection entitled her to First and Fifth Amendment protections).

19. *Id.*; *see also* Mathilda Mcgee-Tubb, *Sometimes You’re In, Sometimes You’re Out: Undocumented Immigrants And The Fifth Circuits Definition Of “The People” In The United States v. Portillo-Muñoz*, 53 B.C. L. REV. E. SUPP. 75 (2012). (where the term “the people” is examined through recent approaches). Since *Portillo-Muñoz* fits in with these interpretations and fits within the Supreme Court’s “substantial connections” test, then the Fifth Circuit’s approach is the proper approach. *Id.* Specifically, since the Second Amendment’s interpretation according to the Fifth Circuit allows for different types of rights and this approach allows a categorical approach to determining the people and marks a departure from the traditional approaches to defining “the people.” *Id.* In effect, *Portillo-Muñoz* allows arbitrary categorizations of constitutional rights, which dilutes the original purposes of the Bill of Rights and its constitutionality. *Id.*; *but see* Harv. L. Rev., *RECENT CASES: Constitutional Law – Second Amendment – Fifth Circuit Holds that Undocumented Immigrants do not have Second Amendment Rights – United States v. Portillo-Munoz*, 643 F.3d 437 (5th Cir. 2011), 125 HARV. L. REV. 835 (2001) (where two approaches to interpret *Heller* are offered: either the people are a broad group defined in *Verdugo-Urquidez*, which means the people are not required to be citizens in order to enjoy Second Amendment guarantees as long

reasoning and arguments in *Meza-Rodriguez* with other circuits' arguments regarding Second Amendment rights and their applicability to noncitizens.²⁰ Part IV provides an economic argument for solving the debate and contrasted with other proposals.

II. BACKGROUND

A. Incorporation

Although Constitutional Amendments are law applicable to all citizens, they apply only in a Federal sense. After Constitutional privileges and immunities were whittled down to nearly nothing, the Bill of Rights were eventually incorporated to also apply to the states.²¹ For some time after, nearly all Constitutional Amendments were incorporated except the Second, Third, Fifth, Seventh, and Eighth Amendments. During the evolution of the term "the people," the Second Amendment had not yet been incorporated, and only after *District of Columbia v. Heller* was it incorporated in the next landmark Supreme Court case.²²

as they have a "substantial connection to the country." On the other hand, the people may be interpreted to mean a different class of individuals than the people which enjoy other constitutional rights); *see also* *Dred Scott v. Sandford*, 60 U.S. 393 (1857). (ruling an African American individual was not a person under the Constitution because he was a slave, and therefore he could not bring suit against his slave-owner for assault); *see generally* DON E. FEHRENBACHER, *THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS* (1978). (discussing the historical background and significance of the *Dred Scott* opinion, and arguing this case was the catalyst necessary to effectuate change and provoke the civil rights movement); *see also* Gregory J. Wallace, *Facts about the Dred Scott Decision, one of the causes of the American Civil War*, HISTORYNET (2018), www.historynet.com/dred-scott (where the political motivations and effect of *Dred Scott* are analyzed, and used to posit this decision as one of the leading causes of the Civil War)

20. *Id.*

21. *See generally* *Slaughter-House Cases*, 83 U.S. 36 (where butcher's brought action to the Supreme Court alleging statutory violation and unlawful restraint on the butcher trade, the Supreme Court held since the statute was created to protect the public policy of protecting health for the safety of its citizens, companies slaughtering animals in the city was a direct statutory violation). Further, even though the statute created a monopoly depriving butchers their right to their trade, the Court held since the law only restricted butchers as to where they could practice their trade, and since states have exclusive police power rights to determine where butchers may practice their trade for public health, the Federal Constitution was not applicable in this case. *Id.*

22. *District of Columbia v. Heller*, 554 U.S. 570 (2008); *see also* *McDonald v. City of Chicago*, 561 U.S. 742, 748. (holding for purposes of self-defense, the Second Amendment applies to the States in full force and cannot be abrogated).

B. Originalism v. Nonoriginalism

This section analyzes the differing methods of constitutional interpretation, the development of Second Amendment jurisprudence, and the evolution of “the people” through time.

Since the Constitution is more than 200 years old, it does not reflect changes in technology, dialect, social norms, and law, which ultimately lead to different theories of interpretation. Proponents of “originalism” advocate for the theory that constitutional adjudication should be guided by the intent of the original framers.²³ In other words, “[originalism] regards the discoverable meaning of the Constitution at the time of its initial adoption as authoritative for purposes of constitutional interpretation in the present.”²⁴ Upon its inception, originalism started with the framers’ intent, but also incorporated the definitions and societal norms of particular words in that era.²⁵

On the other hand, non-originalism is the theory of a living Constitution. In other words, the Constitution’s meaning is not fixed; rather, malleable and adaptable to allow “. . . a constantly changing society while also preserving the authority of the original document and constitutional traditions of the past.”²⁶ The problem with interpreting a flexible document is the original intent of the framers may be diluted, or lost.²⁷ In other words, “[t]he glaring defect of living Constitutionalism is that there is not agreement, and no chance of agreement, upon what is to be the guiding principle of the evolution.”²⁸

Ultimately, “[a]s observed by Harvard Law Professor Laurence Tribe, ‘people on opposite sides of the gun rights vs. gun control argument have tended to interpret the Amendment in a way that

23. DENNIS J. GOLDFORD, *THE AMERICAN CONSTITUTION AND THE DEBATE OVER ORIGINALISM* 1, 55 (2005); *see generally* ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 38 (1998) (where Justice Scalia argues statutory interpretation has been overlooked, while urging reform of the judicial system because judicial interpretation of statutes is inherently flawed because the original meaning of the lawmakers intent is thus dissipated). Justice Scalia thereafter posits that the idea of a “living constitution” is flawed, and Constitutional interpretation and law must be interpreted only through its original meaning because judges cannot use their discretion to manipulate the founder’s intentions. *Id.*

24. Lawrence Rosenthal, *The Limits of Second Amendment Originalism and The Constitutional Case for Gun Control*, 92 WASH. U. L. REV. 1187, 1189 (2015).

25. *Id.* at 55.

26. *Id.* at 57.

27. John Randolph Prince, *The Naked Emperor: The Second Amendment and the Failure of Originalism*, 40 BRANDEIS L.J. 659, 670 (2001).

28. Thomas B. Colby and Peter J. Smith, *Living Originalism*, 59 DUKE L.J. 239, 241 (2009) [hereafter *Living Originalism*]

fits their political views.”²⁹ “The originalism vs. non-originalism debate is not a type of confirmation bias; rather, originalism is useful in two specific categories. First, in cases of constitutional impression and second, in categories that involve issues which the politically oriented originalist revival movement has, “tagged as vulnerable to attack on originalist grounds: abortion, religious establishment, limitations on capital punishment, and so forth.”³⁰ Although these two constitutional theories are polar opposites, both are required to resolve the Second Amendment’s application to noncitizens.³¹ Furthermore, this foundation will be critical to understanding the court decisions elaborated on in Part III.

C. History of Second Amendment Jurisprudence

In 1857, the United States Supreme Court first interpreted the application of Second Amendment rights in *Dred Scott v. Sandford*, 60 U.S. 393.³² In *Scott*, Petitioner-slave sought certiorari to

29. TB Colby, *Unfaithful to Textualism*, 10 GEO. J.L. & PUB. POL’Y 385, 386 (2004); see also Jamal Greene, *Heller High Water? The Future of Originalism*, 3 HARV. L. & POL’Y REV. 325 (2009) [hereafter *Heller High Water*] (arguing the claim that subsequent to the *Heller* decision, that judges and legal academics are all now originalists, was dispelled and originalism in practice is useful only in cases of constitutional first impression, and issues that the political movements considered vulnerable to attacks by originalism, and therefore originalism will remain less substantive and more of a procedural decision).

30. *Heller High Water*, *supra* note 29, at 326.

31. See generally *Living Originalism*, *supra* note 28 (where originalism and non-originalism is compared for purposes of Constitutional Interpretation). The author argues that despite widespread approval of originalism, the theory itself is not uniform or coherent, and it is a disparate collection of distinct constitutional theories which creates a fundamental flaw in originalism. *Id.* Since the inception of originalism, its underlying principles have been broad, while viewed narrowly and disagreed as to how to practically implement those same principles. *Id.* Ultimately, the author proposes originalists, and especially judges, should begin with the proposition that originalism isn’t the only appropriate method of constitutional interpretation, and it should be narrowed to exclude judicial discretion as a means of interpretation. *Id.*; see also Mark S. Stein, *Originalism and Original Exclusions*, 98 KY. L.J. 397 (2010) (where the author suggests current constitutional interpretation should be affected by prior constitutional development, for example, that constitutional interpretation originally only applied to a small minority of the population). Therefore, “a justification for originalism based on notions of popular sovereignty must fail.” *Id.* In other words, originalism includes the idea of original exclusions, and since the last constitutional amendments historical and societal progress makes current constitutional amendment difficult to propose. *Id.* Since this is the case, the author argues against authority of original meaning derived from an antebellum source. *Id.* So, unexpected applications can adopt in some form an argument based on original exclusions. *Id.*

32. *Dred Scott v. Sandford*, 60 U.S. 393 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIII.

determine whether an African-American slave had a Constitutional right to sue his owner for assault?³³ The Court held the Petitioner did not have a constitutional right, but similarly analyzed the consequences of applying the Second Amendment to a slave.³⁴

The Court found that applying the Second Amendment to slaves would provide African American citizens the right to carry arms “wherever they went,” which was interpreted as negative.³⁵ This decision is a smudge on American jurisprudence which lead jurisprudence in a more positive direction, “[*Dredd Scott*] is generally regarded as a complete abdication by the United States Supreme Court of the rule of law.”³⁶ Moreover, “Chief Justice Taney expressly equated ‘the people’ with white ‘citizens,’” which, in effect, meant during this time the Second Amendment allowed any “citizen” to carry arms wherever they went.³⁷ This decision illustrates the beginning of Second Amendment jurisprudence, and demonstrates how much it changed in the following years.

In 1875, the Supreme Court revisited the application of the Second Amendment in *United States v. Cruikshank*.³⁸ In *Cruikshank*, defendants were charged with conspiracy to oppress a citizen, with the intent to prevent their free exercise of the laws of the United States.³⁹ To determine the sufficiency of the counts defendants were charged with, the Court analyzed the application

33. *Id.*

34. *Id.* at 417, 454.

35. *Id.*

36. Charles I. Lugosi, *Conforming To The Tule of Law: When Person and Human Being Finally Mean the Same Thing in Fourteenth Amendment Jurisprudence*, 4 GEO. J. L. & PUB. POL'Y 361, 391 (2006); see also Darrell A.H. Miller, *Text, History, and Tradition: What the Seventh Amendment can Teach us About the Second*, 122 YALE L.J. 852 (2013) [hereafter *Text, History, and Tradition*] (Miller argues the previous Roberts Court demanded inconsistent judgments from the lower courts by adhering to Second Amendment interpretation which preserved reasonableness, but did not stay faithful to Second Amendment jurisprudence). Therefore, the solution is to apply the Second Amendment by way of the Seventh Amendment's historical pattern test. In this way, judges should not manipulate historical sources by applying their discretion, rather apply historical patterns to pave way for future interpretation. *Id.*

37. Pratheepan Gulasekaram, *"The People" of the Second Amendment: Citizenship and the Right To Bear Arms*, 85 N.Y.U.L. REV. 1521, 1534 (2010); see also Dave Kopel, *The Supreme Court's Thirty-Five Other Gun Cases: What the Supreme Court Has Said About The Second Amendment*, 18 ST. LOUIS U. PUB. L. REV. 99 (1999) [hereinafter *"The People" of the Second Amendment*] (When disputing the guarantees, the Second Amendment affords to “the people,” the cases in question suggest that the Supreme Court has always believed the Second Amendment right to be an individual right of “the people” and not a state right). Since most of the Second Amendment jurisprudence has been in the form of dicta only, the only proper and possible interpretation of the Second Amendment can be that it is a right of the individual, and applies broadly to all in this country. *Id.*

38. *United States v. Cruikshank*, 92 U.S. 542 (1875).

39. *Id.* at 548.

of Constitutional Amendments to individuals.⁴⁰ Specifically, the Court reasoned that the Second Amendment “is not a right granted by the Constitution . . . [rather] this is one of the amendments that has no other effect than to restrict the powers of the national government, leaving the people to look for their protection against any violation by their fellow-citizens of the rights it recognizes to local legislation.”⁴¹ Thus, during this time, the Second Amendment’s application to the individual to bear arms was accepted as Federal law, and lack of incorporation had not yet included State government in its reach.

In 1939, a man was caught transporting a double barrel shotgun across state lines.⁴² The Court held, absent evidence illustrating possession of a handgun for militia usage, that the Second Amendment did not guarantee the right to possess the shotgun.⁴³ The Court reasoned that the Second Amendment was applicable to the Militia by citing history, legislation of the Colonies and States, and the writings of approved commentators.⁴⁴

In 1989, the Supreme Court addressed the question of whether the Fourth Amendment applies to the search and seizure by US agents of property that is owned by a nonresident alien and located in a foreign country.⁴⁵ In *United States v. Verdugo-Urquidez*, the Supreme Court reviewed a noncitizen’s motion to suppress evidence obtained during a search outside of the U.S., and argued the search was unconstitutional.⁴⁶ In forming its conclusion, the Court interpreted the meaning of “the people” as referring 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 the community.”⁴⁷

Although “the people” remained ambiguous in regards to

40. *Id.*

41. *Id.* at 553; see *Vietnamese Fishermen’s Ass’n v. Knights of Ku Klux Klan*, 543 Supp. 198 (1982) (where Vietnamese fishermen sued the Ku Klux Klan for bearing arms, intimidation, and threats to the fisherman’s families and homes). The Court held since the Second Amendment had not yet been directly incorporated to the States, the defendant’s military operations had no relationship to any state or federal militia and was therefore a violation of a State statute prohibiting firearms. *Id.*; see also *Presser v. Illinois*, 116 U.S. 252 (1886) (where a militiaman marched in the streets of Chicago without a license, the Court held the Second Amendment only limited the power of the federal government and did not apply to the states).

42. *Id.* at 183.

43. *United States v. Miller*, 307 U.S. 174, 175, 178 (1939).

44. *Id.* at 179.

45. *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990); see *United States v. Emerson*, 270 F.3d 203, 228 (5th Cir. 2001) (where “the people” confers a personal right to bear arms).

46. *Id.*

47. *Id.* at 265.

Second Amendment jurisprudence, Courts began analyzing the application of Constitutional rights to noncitizens.⁴⁸ In 2006, the Fifth Circuit held that noncitizens are unequivocally entitled to Fourth Amendment Protection.⁴⁹ When a noncitizen was prevented from lawfully entering the U.S. and suffered physical abuse at the hands of an officer, the Court held noncitizens are entitled to the protections of the Fifth and Fourteenth Amendments under the due process clause.⁵⁰ The Court reasoned, “noncitizens receive constitutional protections when they have come within the territory of the United States and developed substantial connections with the country.”⁵¹

In 2008, the Supreme Court revisited the application of the Second Amendment in its unprecedented case *District of Columbia v. Heller*.⁵² In *Heller*, the Supreme Court addressed whether a policeman had a Constitutional right to possess a firearm when the State denied his handgun registration.⁵³ Dick Heller was authorized to carry a handgun while on duty as a special police officer, but was denied a registration certificate for a personal handgun stored in his home.⁵⁴ The Court divided its interpretation into two segments: operative clause analysis, and prefatory clause

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

49. *Id.* at 627.

50. *Id.* at 623.

51. *Id.* at 625

52. *Heller*, 554 U.S. 570; see also *Construction and Application of United States Supreme Court Holding in District of Columbia v. Heller*, 554 U.S. 570, 128 (2008); *That Second Amendment Confers Individual Right to Keep and Bear Arms to Federal Statutes Regulating Firearms and Other Weapons or Devices*, 56 A.L.R. FED. 2d 1 (where a discussion of the impact of *Heller* and subsequent cases is compared to regulations on gun possession, and argues that the decision does not operate as a retroactive rule of constitutional law which extends time limits for firearms bans); see generally Robert Hardaway, *The Inconvenient Militia Clause Of The Second Amendment: Why The Supreme Court Declines To Resolve The Debate Over The Right To Bear Arms*, 16 ST. JOHN'S J.L. COMM. 41 (2002) (the authors argue that the American Bar Association agrees that there is no collective right for an individual to own a firearm). Arguing that there is would take the view that there is a broad right the Second Amendment provides for everyone. *Id.* Conversely, the authors argue another perspective is that the Second Amendment provides a narrow individual right to possess a gun, and this right is extremely narrow. *Id.* Ultimately, the authors argue that gun owners should be protected, especially those who are law abiding citizens. *Id.* In other words, as long as guns exist, law abiding citizens should be allowed to own guns. *Id.* The authors argue that every circuit case since *Miller*, has upheld the collective rights interpretation, and that even if the Second Amendment only protected the rights of the members of a militia to carry weapons for their duties in the militia, history supports the facts that all law-abiding citizens are part of that same militia. *Id.* Moreover, common law supports this same premise. *Id.* The authors criticize gun lobbyists groups as overzealous and using tactics to threaten the basic rights of gun owners. *Id.*

53. *Id.* at 576.

54. *Id.*

analysis.⁵⁵ The court ultimately held the right to self-defense was inherent to the Second Amendment.⁵⁶

In 2010, the Supreme Court addressed the application of the Second Amendment to the states.⁵⁷ As of 2010, most of the Bill of Rights was incorporated against the states through the Fourteenth Amendment, but some Amendments remained unincorporated – namely, the Second Amendment.⁵⁸ Although *McDonald* is factually similar to *Heller*, the issue and outcome are starkly different. The Court in *McDonald* reasoned that “The first sentence of the Fourteenth Amendment makes ‘[a]ll persons born or naturalized in the United States and subject to the jurisdiction thereof . . . citizens of the United States and of the *State wherein they reside*.’”⁵⁹ In effect, the Supreme Court, by a plurality, incorporated the Second Amendment against the states through the Fourteenth Amendment.⁶⁰

In *United States v. Meza-Rodriguez*, the Seventh Circuit interpreted the application of the Second Amendment to a noncitizen.⁶¹ Mariano Meza-Rodriguez, a citizen of Mexico, was arrested while in possession of a firearm.⁶² Although he was involuntarily brought to the U.S. as a child, his immigration status was never authorized.⁶³ The Seventh Circuit reasoned the language in *Heller* unequivocally protected only authorized U.S. citizens.⁶⁴ However, the Court suggested “[o]ther language in *Heller* supported

55. *Id.* at 579-605.

56. *Id.* at 628.

57. *McDonald v. City of Chicago*, 561 U.S. 742, 748 (2010).

58. *Id.* at 750.

59. *Id.* at 834 (emphasis added).

60. *Id.* at 858.

61. *Meza-Rodriguez*, 798 F.3d 664.

62. *Id.* at 666.

63. *Id.*

64. Joseph Blochert & Darrell Miller, *Incidental Burdens and The Nature Of Judicial Review, A Response To Joseph Blocher and Darrell A.H. Miller, What Is Gun Control? Direct Burdens, Incidental Burdens, and the Boundaries of the Second Amendment*, 83 U. CHI. L. REV. 295 (2016) (arguing that Second Amendment jurisprudence deals with the interpretation of twenty-seven words). However, Dorf argues the laws are not targeting fundamental constitutional rights and may infringe on certain rights depending on the circumstances. *Id.* In other words, *Heller* does not contradict the approach proposed here because *Heller* involves a direct burden. *Id.* Here, the author argues that the Second Amendment is actually an incidental burden, because the burdens arise from the application of historical doctrines and tradition stemming from common-law. *Id.* Moreover, Second Amendment jurisprudence disproportionately affects white Americans who own guns, and this right differs significantly from any other rights, for example, first amendment rights, equal protection, and liberty. *Id.* Ultimately, the author argues that Second Amendment is deceptive in that it will be a difficult question to resolve, and have the country espouse a uniform law. *Id.*

that all people, including non-U.S. citizens, whether or not they are authorized to be in the country, enjoy at least some rights under the Second Amendment.”⁶⁵ The Court posited an expansive interpretation of the Second Amendment, and held unauthorized noncitizens enjoy Constitutional rights when “they have come within the territory of the United States and developed substantial connections with this country.”⁶⁶ Although the Court held the application of the Second Amendment to Mariano as valid,⁶⁷ the Court also acknowledged this right was not unlimited and did not protect Mariano under intermediate scrutiny.⁶⁸

In sum, the Second Amendment originally was interpreted to apply only to white men, but was extended to all citizens following the Thirteenth Amendment. Although this right was recognized, its application was limited only to the Federal Government.

Ultimately, the Supreme Court ruled that the Second Amendment applied to self-defense, that it was an un-enumerated Constitutional right, and was then shortly after incorporated to apply to the states. Although states regulated gun licensing, interference with this fundamental right was a violation of the Constitution. Currently, a circuit split exists regarding the application of the Second Amendment to noncitizens, and the next section will discuss the merits of each argument.

III. ANALYSIS

First the Supreme Court’s reasoning in Second Amendment cases will be examined and dissected for reasonableness, and then contrasted with 7th Circuit and Second Circuit jurisprudence to evaluate the practicality of the decisions.

A. *The Supreme Court’s Reasoning*

In *Cruikshank*, Justice Waite reasoned that the Second Amendment has no other effect, “. . . than to restrict the powers of the national government, leaving the people to look for their protection . . . by the Constitution”⁶⁹ In other words, an individual’s right to bear arms is a consequence of the Constitution, not because of it.⁷⁰

The Supreme Court ruled, in *Verdugo-Urquidez*, that the purpose of drafting the Fourth Amendment suggests limiting its application to domestic matters.⁷¹ This suggests that the phrase

65. *Id.*

66. *Id.* at 670.

67. *Id.* at 671.

68. *Id.* at 672.

69. *Cruikshank*, 92 U.S. 542.

70. *Id.* at 553.

71. See CARLOS R. SOLTERO, *U.S. v. Verdugo-Urquidez (1990) and Limits to*

“the people,” “refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community.”⁷² The Court further distinguishes “the people” by contrasting the prevalence of “person” and “accused” used in other Amendments.⁷³ Yet, this opinion suggests that extension of constitutional rights is limited to the people in America, but does not extend to noncitizens in foreign nations.⁷⁴

On the other hand, Justice Stevens posits that constitutional provisions should even apply in foreign nations.⁷⁵ For example, in *Verdugo-Urquidez*, an officer was in Mexico, but the Fourth Amendment applied to him and the plaintiff.⁷⁶ This point is further illustrated by Justice Stevens opining, “noncitizens who are lawfully present in the United States are among the ‘people’ who are entitled to the protection of the Bill of Rights . . .”⁷⁷ Justice Brennan characterized the majority’s holding as requiring foreign nationals to abide by the Constitution while in our country, however our government does not need to abide by the Constitution while outside its borders.⁷⁸ Justice Brennan reasoned that although “the people” is characterized as a term of art by the majority, the framers original intention derives from distinguishing American law from British law.⁷⁹ In short, “‘the people’ [are] better understood as a

the Applicability of the Bill of Right Geographically and as to Only “The People” (1990), in *LATINOS AND AMERICAN LAW: LANDMARK SUPREME COURT CASES 146-156* (2006) (where the opinion and the limits of Constitutional provisions applying to noncitizens are discussed); *see also* Michele Levy Cohen, *United States v. Verdugo-Urquidez, the Fourth Amendment Has Limited Applicability to Noncitizens Abroad*, 14 *MARY. J. OF INT’L. TECH.* 175 (1986) (where the majority opinion is discussed and supported by referencing other case law, however argues that the majority cites case law older than the dissent, and therefore argued the majority first reached its conclusion, and later sought supporting authority); *but see* Mary Lynn Nicholas, *United States v. Verdugo-Urquidez: Restricting the Borders of the Fourth Amendment*, *MARYLAND JOURNAL OF INTERNATIONAL LAW* (2010), digitalcommons.law.umaryland.edu/cgi/viewcontent.cgi?article=1324&context=mjil (where it is argued the Supreme Court’s decision in *Verdugo-Urquidez* was the first step in allowing the Constitution to become the first casualty in the ‘War on Drug’).

72. *Id.*

73. *Id.* at 266.

74. *Id.* at 268.

75. *Id.* at 276; *see also* Pamela S. Karlan, *The Partisan of Nonpartisanship: Justice Stevens and the Law of Democracy*, *FORDHAM LAW REVIEW* (2006), ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=4151&context=flr (where it is suggested that one pervasive theme running through Justice Stevens’s jurisprudence is a commitment to nonpartisanship).

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

77. *Id.* at 279.

78. *Id.* at 279.

79. *Id.* at 287; *see also* Mark W. Janis, *The Verdugo Case: The United States and the Comity of Nations*, *U. OF CONNECTICUT* (1991), opencommons.uconn.edu

rhetorical counterpoint to ‘the Government,’ such that rights that were reserved to ‘the people’ were to protect all those subject to ‘the Government.’”⁸⁰

The framers designed the Bill of Rights to prohibit government intrusion of individual rights which were pre-existing, while suggesting the Bill of Rights as a limitation on the Government’s conduct, “to all whom it seeks to govern.”⁸¹ Justice Blackmun elaborated that any foreign national tried under U.S. laws has effectively been treated as one of the “governed,” and thus, entitled to Constitutional protections.⁸² Although the majority holds that some Constitutional provisions apply to noncitizens in limited conditions, the dissent’s reasoning is supported by recent case law, and seems to properly delineate the intent of the framers.⁸³

In extending the substantive reach of the Bill of Rights, the Supreme Court reasons, in *Heller*, that the Second Amendment should be evaluated based on its two separate clauses.⁸⁴ First, the right of the people, and specifically, “the people,” appear several times in the Bill of Rights.⁸⁵ Since this term unequivocally refers to members of the political community in six other provisions of the Constitution, “the people” can be reasonably interpreted as applying broadly.⁸⁶ Contrasting this definition with the historical reference to militia only including able-bodied white males, the

[/cgi/viewcontent.cgi?article=1168&context=law_papers](#) (arguing that the *Verdugo* case suggests whatever is not prohibited by international law, is permitted, and therefore Justice Brennan’s dissent suggesting if law and order is sought, these principles must first be adhered to in America should be followed).

80. *Verdugo-Urquidez*, 494 U.S. 259 at 287.

81. *Id.* at 288.

82. *Id.* at 297; *but see* Leonard X. Rosenberg, *Fourth Amendment – Search and Seizure of Property Abroad: Erosion of the Rights of Noncitizens*, NU. J. OF CR. L. AND CRIM. (1991) (arguing the Court diverged from precedent and cast a blind eye to fairness and the philosophy of mutuality implicit in the Bill of Rights in general).

83. *Id.*; *see* NCC Staff, *Supreme Court takes case about border patrol shooting*, CONST. DAILY (2016), [constitutioncenter.org/blog/supreme-court-takes-case-about-border-patrol-shooting](#) (arguing the effect of the *Verdugo* decision echoes in a contemporary case regarding a little boy shot by a U.S. Border Patrol officer); *see also* Bill Federer, *What Does ‘A Well-Regulated Militia’ Really Mean?*, WND (2016), [www.wnd.com/2016/10/what-does-a-well-regulated-militia-really-mean/](#) (arguing since America is considered a last hope for millions of enslaved people, and because precedent seems to suggest, the Second Amendment applies to all who seek refuge under the laws of the U.S.).

84. *District of Columbia v. Heller*, 554 U.S. 570, 578 (2008); *see generally* Eileen Kaufman, *The Second Amendment: An Analysis of District of Columbia v. Heller*, TOURO L. R. (2013), [digitalcommons.tourolaw.edu/cgi/viewcontent.cgi?referer=www.google.com/&httpsredir=1&article=1240&context=lawreview](#) (arguing *Heller* will usher in a new era of gun litigation, and will present the constitutional question: what standard should the courts use to evaluate the constitutionality of said regulations?)

85. *Heller*, 554 U.S. at 579.

86. *Id.*

Court reasons “keep and bear arms” does not fit logically with this

definition, and therefore begins with a presumption that Second Amendment rights belong individually to all Americans.⁸⁷

The Court then consulted an 18th Century definition of “arms” and concluded that there was no change in its meaning.⁸⁸ Although the Court acknowledged the defense argument that “arms” refers only to arms available in the 18th Century, the Court rejected this claim by referencing the First Amendment’s inclusion of modern forms of communications, and extrapolated this reasoning to the Second Amendment.⁸⁹ The Court then unambiguously stated that “bear” refers to carry, which was the idiomatic meaning even during the Framers’ era, therefore rejecting any argument limiting the right to “bear arms” to a military context only.⁹⁰

In short, the Court reasoned that the Second Amendment guaranteed an individual the un-enumerated pre-existing right to possess and carry weapons.⁹¹ The Court further emphasized this point by examining the historical progression of the individual right to bear arms such as: British governments utilizing militias to suppress political dissidents and their effect on creating the Declaration of Rights for Englishmen, Blackstone (regarded as “the preeminent authority on English law for the founding generation”) citing the arms provision of the Second Amendment as a fundamental right of Englishmen, and the Crown disarming rebellious inhabitants and Americans reacting by positing the right to arms as a fundamental right applying to all.⁹²

The Court discusses the prefatory clause, “well-regulated

87. *Id.* at 581.

88. *Id.*; see also Rory K. Little, *Heller and Constitutional Interpretation: Originalism’s Last Gasp*, 60 HASTINGS L.J. 1415 (2009) (arguing applying originalist methodology to constitutional interpretation is inadequate, while arguing the Framers’ original intent is inapplicable and implausible as the specific and exclusive meaning given to words in the Constitution, because our society has grown farther away from the culture, realities, and understanding from the time of the Framers).

89. *Heller*, 554 U.S. at 582; see also David C. Williams, *Death to Tyrants: District of Columbia v. Heller and the Uses of Guns*, 69 OH. ST. L. J. 641 (2008) (arguing original Second Amendment proponents faced their demise after the *Heller* decision, but also arguing the Supreme Court de facto eliminated the right to resistance previously enjoyed by Americans).

90. *Heller*, 554 U.S. 570 at 586-88.

91. *Id.* at 593.

92. *Id.* at 593-95; see also *The Founders’ Documents (and more) on the Right to Keep and Bear Arms*, KIM WEISSMAN’S CONGRESS ACTION NEWSLETTER, www.tysknews.com/Depts/2nd_Amend/rkba_docs_kw/political_philosophers.htm (last visited Mar. 23, 2017) (positing 18th Century philosophers as acknowledging, contemplating, and arguing that the right to self-defense, and the ability to enact that right are fundamental and natural rights).

militia,” and reasons given historical interpretation of the clause, that this phrase connotes a militia upon which Congress may conscript, but does not limit the individual right to all citizens.⁹³ Additionally, taking the Second Amendment as a whole, its interpretation can logically only signify the reason as to why the right was codified, and an explanation of the right itself.⁹⁴ In other words, the Court discusses militia to provide context for how this right was historically interpreted, which gives the interpretation of the right as fundamental.

Justice Stevens conversely posits that the Second Amendment was adopted only to protect the right of the people to maintain a militia in the States.⁹⁵ Stevens supports his claims by referencing a dearth of legislative authority that attempts to regulate private civilian uses of firearms.⁹⁶ Furthermore, the majority’s interpretation of “the people” is inconsistent with the Framers’ intent since the constitutional protections of the First and Fourth Amendment are not limited to non-felons, whereas Second Amendment protections are limited to non-felons, and therefore Stevens interpretation is congruent with previous definitions of “the people.”⁹⁷

Justice Breyers disagrees with the Majority’s conclusion reasoning that Second Amendment protections were to protect a militia traditionally limited by tyrants, which does not include self-defense related interests.⁹⁸ Public safety necessitates a limitation

93. *Heller*, 554 U.S. 570 at 595-97.

94. *Id.* at 598-99; *see also* Jeffrey Toobin, *So You Think You Know The Second Amendment?* THE NEW YORKER (2012), www.newyorker.com/news/daily-comment/so-you-think-you-know-the-second-amendment (arguing the *Heller* decision is ambiguous because of a push for originalism, but the future scope of the Second Amendment will be determined by law and politics, and the Courts will likely uphold gun control regulation).

95. *Heller*, 554 U.S. 570 at 637.

96. *Id.*; *see also* Lawrence B. Solum, *District of Columbia v. Heller and Originalism*, 103 NW. U.L.REV. 923-81 (2009) (arguing *Heller’s* purpose will be its long-term effect on the relationship between originalism as an academic theory, and contrasted being a component of constitutional rhetoric). Further, arguing the majority opinion will not have a generative force, and the composition of Supreme Court Justices will ultimately determine the future of Second Amendment jurisprudence, interpretation, and the ultimate effect of the *Heller* decision. *Id.*

97. *Heller*, 554 U.S. 570 at 644.

98. *Id.* at 681; *see generally* Stephen Breyer, *Justice Breyer on the Future of the Supreme Court: The case for a judiciary better suited to our interconnected world*, THE WALL. ST. J. (Dec. 2, 2015), www.wsj.com/articles/justice-stephen-breyer-on-the-future-of-the-supreme-court-1449071185 (arguing the interdependence of today’s world manifests itself in the court’s dockets which poses a challenge for the judiciary, and therefore the rule of law and natural laws should be maintained to build a just democratic society); *District of Columbia v. Heller*, 554 U.S. 570, 681-783 (2008); *see* Lyle Denniston, *Links to new gun right lawsuits*, SCOTUS BLOG (2008), web.archive.org/web/20090109214004/www.scotusblog.com/wp/links-to-new-gun-rights-lawsuits/print/ (for current and new gun right cases); *see also* Lyle Denniston, *More Second*

on the Second Amendment, citing primitive municipal fire-safety laws, which prohibited the storage of gunpowder, thus proving the Second Amendment has never traditionally been connected to civilian gun regulation.⁹⁹

B. *The Seventh Circuit's Reasoning*

In *Meza-Rodriguez*, the Seventh Circuit seemed to extend the scope of the *Heller* decision.¹⁰⁰ The Seventh Circuit reasoned that *Heller* did not create a fundamental Second Amendment right for the undocumented immigrant, while acknowledging that the Supreme Courts' references to "the people" and notions of "law abiding citizens" and "members of the political community" are not reflective of "the people."¹⁰¹¹⁰²

The Seventh Circuit acknowledges that "the people" appears in a different context in other provisions of the Bill of Rights, however, it reasons that since it appears in a different context, it can readily be distinguished from its intended meaning because these provisions deal with elections, and not individual fundamental rights.¹⁰³ Identifying "the people" as consistent with the perceived meaning in the Bill of Rights is simply the first step here.¹⁰⁴

Amendment Cases, SCOTUS BLOG (June 28, 2008), web.archive.org/web/20090109005949/www.scotusblog.com/wp/more-second-amendment-cases/ (for additional current gun right and regulation cases); *but see* David G. Savage, *Justices' decision triggers questions: How far does the constitutional right to gun ownership extend? Is it 'fundamental,' or an it be regulate?*, L.A. TIMES (June 28, 2008), articles.latimes.com/2008/jun/28/nation/na-scotus28 (suggesting Justice Breyer's dissent as the proper reasoning to decide the issue in *Heller*, while predicting the future of Second Amendment upholding reasonable regulations of firearms).

100. *United States v. Meza-Rodriguez*, 798 F.3d 665, 672-73 (7th Cir. 2004); *see generally* *New Circuit Split: Seventh Circuit Rules that Unlawfully Present Noncitizens with "Extensive Ties" to the United States have Second Amendment Rights*, LEGAL SIDEBAR (Dec. 17, 2015), www.fas.org/sgp/crs/misc/extensive.pdf (arguing that the Seventh Circuit's decision is of little consequence because the Supreme Court will not rule on the issue); *but see* Bob Owens, *Court Rules Illegal Aliens Have Second Amendment Rights*, BEARING ARMS (Aug. 25, 2015), bearingarms.com/bob-o/2015/08/25/judge-rules-illegal-aliens-second-amendment-rights/ (arguing the founding fathers would have never given criminal illegal noncitizens rights because they are both criminals and noncitizens and therefore should be reconsidered excluded from the Second Amendment since the Fourth, Fifth, and Eight Circuit also support this author's view).

101. *Meza-Rodriguez*, 798 F.3d 664 at 669.

102. *See also* *United States v. Huitron-Guizar*, 678 F.3d 1164 (where the 10th Circuit also declined to infer a similar question because the *Heller* opinion did not use the word citizen to settle the issue).

103. *Id.* at 670.

104. *Id.*

Verdugo-Urquidez's reference to "the people" as 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," is a clear indication of what this phrase represents.¹⁰⁵ Moreover, the Seventh Circuit identifies the Supreme Court's acknowledgment that "noncitizens receive constitutional protections when they have come within this territory of the United States and developed substantial connections with this country," and from this reasons this decision's effect "governed the applicability of the Fourth Amendment to noncitizens."¹⁰⁶ The Seventh Circuit further reasons that since Meza-Rodriguez was voluntarily in the United States, had extensive ties to the United States, had attended public schools and had developed close relationships with family members and other acquaintances, he developed sufficient connections with this country.¹⁰⁷

The government argues noncitizens have not accepted basic obligation of U.S. citizenship because a criminal record, unsavory traits, failure to pay tax returns, and lack of employment refutes a substantial connection to this country.¹⁰⁸ However, the Seventh Circuit points out that both citizens and noncitizens may raise a Fourth Amendment claim while having criminal records, and concludes the government's rationale as an irrelevant consideration because this kind of standard would be difficult to uphold, and because the Second Amendment is not a light switch, which can be "flipped" depending on the facts of a case.¹⁰⁹

In other words, the only consideration that is relevant in determining an alien's constitutional protections is whether they have developed *any* substantial connections with this country.¹¹⁰

105. *Id.*

106. *See* United States v. Vilches-Navarrete, 523 F.3d 1 (2008) (where an involuntary alien lacks any significant connection to the United States and therefore did not enjoy Fourth Amendment Protections"; *see, e.g.*, Martinez-Aguero v. Gonzalez, 459 F.3d 618 (5th Cir. 2006) (the standard for determining a noncitizen's Fourth Amendment rights depends on a substantial connection to the United States); *see also* Ibrahim v. Dep't of Homeland Sec., 669 F.3d 983 (9th Cir. 2008) (applying the substantial connections test to a noncitizen concluding the pursuit of a post-graduate degree constituted developing a significant and substantial connection to this country).

107. United States v. Meza-Rodriguez, 798 F.3d 665, 671 (7th Cir. 2004)

108. *Id.*

109. *Id.*

110. *Id.*; *see* Bruce Vielmetti, *Unlawful immigrants can have gun rights appeals court rules*, J. SENTINEL (Aug. 24, 2015), archive.jsonline.com/news/crime/unlawful-immigrants-can-have-gun-rights-appeals-court-rules-b99561826z1-322737461.html/ (confirming that the Seventh Circuit allows noncitizens a right to bear arms, but restricts this right similar to bans on the mentally ill, felons, and those convicted of domestic violence); *see also* Jared Morgan, *2A win could have greater implications for immigrants*, GUNS.COM [hereafter

Since the Supreme Court's holding in *Heller* was not singular, the Court reasons Meza-Rodriguez nonetheless is included in "the people" because he is "a person" in the ordinary definition of the term, and therefore enjoys due process rights which then must follow he enjoys *some* constitutional protections as an alien.¹¹¹

Meza-Rodriguez's analysis is reasonable, especially considering noncitizens often come to the U.S. involuntarily. This decision established the idea that an alien developing sufficient connections with the U.S., and being on U.S. soil, allows such an individual to enjoy Constitutional protections. Accordingly, these individuals are considered part of "the people."¹¹² While the Seventh Circuit proposes to resolve the issue of noncitizens enjoying Constitutional protections, they nonetheless reason that the right to bear arms is by no means unlimited.¹¹³

Justice Flaum's concurrence posits that all adults in this country share the basic need to defend themselves, and historically a militia constituted anyone who was in the country, which now includes any undocumented immigrants.¹¹⁴ However, the *Heller* decision causes considerable doubt in this conclusion only because of the Supreme Court beginning with a strong presumption that the Second Amendment is exercised individually.¹¹⁵

Ultimately, Justice Flaum argues he would refrain from addressing the scope of the Second Amendment because of 18 U.S.C. § 922(g)(5) (defining unlawful acts and firearms) which only requires strict scrutiny, and under this rationale, passes constitutional muster.¹¹⁶ Although relevant, Justice Flaum's reasoning is not consistent with the holding in *Heller*, and therefore the Seventh Circuit properly posited the rule for noncitizens carrying firearms.

C. *The Second Circuit's Reasoning*

The Second Circuit's reasoning parallels the main messages

GUNS.COM] (Aug. 21, 2015), www.guns.com/2015/08/21/second-amendment-win-could-have-greater-implications-for-illegal-immigrants/ (arguing although the Seventh Circuit's decision is a win for gun rights, it will have profound ripple effects extending into the right to be free from abusive police tactics, and the right to protest).

111. GUNS.COM, *supra* note 110.

112. *Id.* at 672.

113. *Id.*

114. *United States v. Meza-Rodriguez*, 798 F.3d 665, 673-74 (7th Cir. 2004); *see also United States v. Huitron-Guizar*, 678 F.3d 1164 (10th Cir. 2012) (arguing denying Second Amendment protections to those who enjoy Fourth Amendment protections is unsettled and ambiguous).

115. *Mesa-Rodriguez*, 798 F.3d 665 at 674.

116. *Id.*

of the Fifth, Sixth, and Eighth Circuits. For example, in *United States v. Cordoba*, the Sixth Circuit unequivocally stated that, “[b]ased on the reasoning set forth in *Carpio-Leon*, *Portillo-Munoz* and *Flores*, and the myriad of district court cases cited above, this Court finds that illegal aliens do not fall within the scope of “people”. . .”¹¹⁷ The Fifth Circuit has similarly stated that “the people” defined in the Second Amendment do not include aliens illegally in the United States.¹¹⁸ Moreover, the Eighth Circuit has stated that the protections of the Second Amendment also do not apply to aliens illegally in the United States.¹¹⁹

Therefore, the analysis found in *Kachalsky v. Cacase*, where the Second Circuit upheld New York’s concealed and carry law in the home, provides a baseline for comparison and similarly echoes its sister circuit’s reasoning.¹²⁰ The Court contrasts with the Supreme Court and Seventh Circuit in asserting that history does not guide Second Amendment jurisprudence.¹²¹ Although the Second Circuit ultimately upholds the concealed and carry laws, it does not extend these laws to noncitizens (immigrants).¹²² This reasoning is suspect because the Supreme Court has already reasoned that noncitizens still have a connection to the country, and therefore may have extended rights, similar to the Seventh Circuit’s reasoning. However, it is important to note this has only been stated in dicta. Therefore, the analysis should boil down to two inquiries: (1) whether noncitizens can have a connection to this country, and (2) whether this connection is sufficient for a Second Amendment right.

IV. PROPOSAL

First, the general rule for Second Amendment rights will be proposed, followed by an argument for which method of interpretation should govern this analysis. Finally, an economic argument for noncitizens owning guns will be presented. Second Amendment applying to noncitizens should be interpreted through people who have a substantial connection to this country and

117. *United States v. Cordoba*, 2015 U.S. Dist. Lexis 147822, *4.

118. *United States v. Portillo-Munoz*, 643 F.3d 437, 442 (5th Cir. 2011).

119. *United States v. Flores*, 663 F.3d 1022, 1023 (8th Cir. 2011).

120. *Kachalsky v. Cacase*, 817 F. Supp. 2d 235 (S.D.N.Y. 2011); *but see State v. Chandler*, 5 La. Ann. 489 (1850) (where a statute made it a crime for anyone to be carrying a concealed weapon which was not in open sight for everyone to view). This was to protect citizens so that people knew who had weapons on their person, and so that people and places were all equal in terms of owning a weapon. *Id.*; *see also Priestley v. Headminder, Inc.*, 647 F.3d 497 (2d Cir. 2011) (another Second Circuit opinion granting summary judgment because plaintiffs had a fair opportunity to submit materials in opposition to any counter motions).

121. *Kachalsky*, 817 F. Supp. at 245.

122. *Id.* at 274.

whether the noncitizen has been convicted of a crime. Yet, should this be interpreted through non-originalism? Thomas B. Colby and Peter J. Smith suggest proponents of originalism advocate for strict adherence to originalism rhetoric because this theory constrains judges from interpreting law at their own discretion, and instead forces them to interpret the Constitution using “an objective criterion.”¹²³ In other words, proponents of originalism that posit interpreting an old document through the lens of its time, discourages interpretation through discretion.¹²⁴ Moreover, nonoriginalist interpretation “invites” judicial discretion to supplement for objective interpretation.¹²⁵

The authors contend, however, originalism rhetoric is inconsistent and anachronistic to modern Constitutional interpretation because judges cherry-pick which words to interpret to parallel their perceptions.¹²⁶ The authors instead suggest being guided by the “original meaning” of a text and stick to one theory, rather than diverging interpretation when a particular meaning does not parallel their perspective.¹²⁷ If an originalist is to interpret the Second Amendment consistent with originalist theory, the interpretation must be consistent with historical traditions, and cannot be manipulated.¹²⁸ As such, here the jurisprudence should adopt a living constitution approach through the lens of historical

123. *Living Originalism*, *supra* note 28, at 250; *see also* GOLDFORD, *supra* note 23 (distinguishing the literalism approach originalists use, contrasted with a pragmatic approach with flexibility allowing to reflect changes in the law and society); *see also* Thomas B. Colby, *The Sacrifice Of The New Originalism*, 99 GEO. L.J. 713 (2011) (arguing the new originalism is more accepted, but only because the approach has sacrificed constraint. In other words, Colby posits that new originalism contains no constraint, and now affords much greater discretion to judges).

124. *See e.g.*, Geoffrey Schotter, *Diachronic Constitutionalism: A Remedy for the Court's Originalist Fixation*, 60 CASE W. RES. L. REV. 1241 (2010) (discussing the fixation thesis and its implicit inadequacy as a mechanism of constraint on judges. Schotter proposes that instead of applying the fixation thesis, a diachronic method to interpret the constitution, and require judges to focus on constitutional structure over time). Inherent in this approach is the duality of interpretation which results from the constitution's structure. *Id.*

125. *Id.* at 290.

126. *Id.* at 297.

127. *Id.* at 304-07.

128. *But see* Andrew Kent, *The New Originalism In Constitutional Law The New Originalism And The Foreign Affairs Constitution*, 82 FORDHAM L. REV. 757 (2013) (implicating a deeper meaning rooted in parts of the constitution, and arguing this meaning is in fact the true meaning intended by the framers of the constitution). However, Kent approaches this approach of originalism with skepticism of any one approach capturing all the meanings intended in the constitution, and not a philosophic skepticism, rather a practical skepticism. *Id.* Kent uses religions as a metaphor arguing no prophet has ever convinced the world that that prophet represents one faith and argues the originalism rhetoric and methodology will always fragment similarly. *Id.*

interpretation.

Others argue the Second Amendment should be interpreted not through Constitutional modalities, but rather through the lens of other Constitutional Amendments.¹²⁹ The authors argue a Second Amendment historical test “patterned on the Seventh Amendment may provide a pathway to a solution.”¹³⁰ The Second Amendment’s “emerging doctrine” should not be interpreted with the same pitfalls inherent of the Seventh Amendment. Rather, by avoiding balancing-tests, various categories, and recognizing the residual institutional parameters of the newly found right, Courts could interpret the Second Amendment with the same jurisprudence of the Seventh allowing for a better application of the Second Amendment to “the people.”¹³¹

This approach is with merit, but ultimately fails because it does not consider that the Constitution is a “living document,” which has been amended several times throughout its life, and therefore incorporated social and political factors not present during its drafting. The Forefathers realized this during the Constitution’s inception, and allowed the Constitution to be amended to allow social and political changes.¹³² To apply a rigid approach to interpret the Constitution would fail to consider societal changes like gay marriage, women’s right to vote, and future Constitutional Amendments. However, this approach is inherently flawed. Like all Constitutional Amendments, each was created within the context of particular social and political pressures during its time. To allow Constitutional interpretation to rely on previous or future Amendments allows those pressures to dictate current interpretation. In other words, using the considerations of the Seventh Amendment to interpret the Second Amendment would create a dangerous precedent for future Amendment interpretation.

Interpreting the Constitution through the lens of only originalism inevitably leads to disaster; rather, gun rights originally were applicable to, “white, propertied, first-class

129. *Text, History, and Tradition*, *supra* note 36; *see also* Oral Argument at 44, *District of Columbia v. Heller*, 554 U.S. 570 (2008) (No. 07-290).

130. *Text, History, and Tradition*, *supra* note 36, at 938; *see also* Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in Heller*, 122 HARV. L. REV. 191 (2008).

131. *Text, History, and Tradition*, *supra* note 36, at 929-30; *see also* *In American Publishing Co. v. Fisher*, 166 U.S. 464, 468 (1897) (where the court discussed a trial by jury as an essential feature of common law, and deeply rooted in the Due Process Clause, and American tradition).

132. *See* Adam Winkler, *A Revolution Too Soon: Women Suffragists and The “Living Constitution”*, 76 N.Y.U.L. REV. 1456, 1463 (2001) (discussing societal changes allowing the Constitution to incorporate and change to reflect these changes through time); *see also* MCBAIN, HOWARD LEE, *THE LIVING CONSTITUTION, A CONSIDERATION OF THE REALITIES AND LEGENDS OF OUR FUNDAMENTAL LAW* (1948) (referring to the Constitution as a “vehicle of life”).

citizens,” but this definition expanded to include other races, genders, and eventually all citizens.¹³³ In other words, the definition of the people expanded from one narrow category of people, to broadly include most Americans. Interpreting the Constitution through its historical lens then dispels rhetoric that noncitizens have never enjoyed the right to bear arms. On the contrary, noncitizens have never been a unique violent threat to America (indeed immigrants make up a large portion of America), and therefore their inclusion in the expanding interpretation of the Second Amendment should not be surprising.¹³⁴

Instead the Second Amendment should be interpreted through its original meaning, while considering nonoriginalism as well. By treating the Constitution as a living document as well as understanding it through the lens of its original intended meaning, a multi-faceted flexible approach can account for not only the Forefather’s intent, but allow a pragmatic approach to include political and societal problems the Forefathers’ never contemplated. This is a similar approach to the ratification of the 19th Amendment.

At first glance, the right to vote was reserved for the white upper class. However, as society grew, and traditional conventions was dissipated, citizens argued “the people” included all races and genders, which was reflective not only of this time period, but also of original intent.¹³⁵ Although obvious in today’s world, it seems silly to argue “the people” rejected women altogether. In reality, although the founding Fathers may not have understood the role women play in the general population, they created a mechanism to allow “the people” to incorporate recent developments like this.¹³⁶

This Amendment, and many others, have not been strictly and rigidly interpreted because had they been, all of these rights would be moot since these concepts did not exist during the Constitution’s conception. Allowing non-citizens the right to bear arms through the lens of originalism, nonoriginalism, and by way of other expansive Constitutional Amendments still opens the floodgates to several dangers. Namely, the risk of criminal noncitizens receiving an enumerated Constitutional right.

Establishing a database for noncitizens seeking to enjoy their Constitutional right to bear arms would remedy this dilemma. Similar to voting, this process would require registration, and only

133. *“The People” of the Second Amendment*, *supra* note 37, at 1577-78.

134. *Id.*

135. See ELLEN CAROL DUBOIS, *WOMAN SUFFRAGE AND WOMEN’S RIGHTS* 174-76 (1998).

136. See also BLANCA RODRIGUEZ-RUIZ & RUTH RUBIO-MARIN, *THE STRUGGLE FOR FEMALE SUFFRAGE IN EUROPE: VOTING TO BECOME CITIZENS* (2012).

adhering to strict guidelines would allow an alien access to a “Gun card.” The alien must be at least 21 years of age and not convicted of any felonies. By setting these minimum requirements, proponents of restricting gun rights would feel at ease because their main argument is that noncitizens would pose a danger to all lawful residents.¹³⁷ By requiring noncitizens to register and excluding any felonious behavior, this risk is nearly eliminated, if not completely eradicated.¹³⁸ Furthermore, by requiring a general database, any alien carrying a gun would be easily locatable, detectable, and would require a photo at the time of registration. By requiring a fee to register, the government would benefit significantly through the screening process because only those qualified would be selected, and the remaining fees would be kept as a surplus.¹³⁹

The right to bear arms for noncitizens can be regulated and taxed to avoid most of the negative effects associated with noncitizens owning firearms. For example, any alien seeking to register a firearm must go through the aforementioned procedures, and then would be taxed annually to own the firearm. By creating a tax of this sort, the U.S. economy can benefit from the proceeds, while allowing noncitizens an opportunity to enjoy hunting and personal protection.

By interpreting the Constitution through this dual lens, creating requirements for noncitizens to obtain a gun license, and monitoring gun usage, the Second Amendment is easily understood to include noncitizens in “the people,” while allowing the United States to create a mutually beneficial and respectful relationship towards noncitizens attempting to exercise their Constitutional rights. Ultimately, there would be negligible negative effects because several other Amendments have been interpreted in this way, and the registration process would suppress any remaining fears or concerns.

137. See Anjali Motgi, *Of Arms and Noncitizens*, STANFORD LAW REVIEW (2013), www.stanfordlawreview.org/online/of-arms-and-aliens/ (arguing for allowing noncitizens an unenumerated right to bear arms).

138. *But e.g.*, Malia Zimmerman, *Right to Bear Arms? Gun grabbing sweeping the nation*, FOX NEWS POLITICS (Apr. 13, 2015), www.foxnews.com/politics/2015/04/09/right-to-bear-arms-gun-grabbing-sweeping-nation.html (discussing the problem lawyers face when law abiding citizens have their guns taken away from them for failure to register their firearms with the NRA database, and the paradox created because even gun owners don't follow the rules created by the Department of Justice).

139. *But see*, Awr Hawkins, *Donald Trump to be First President since Reagan to speak at NRA annual meetings*, BREITBART (Apr. 15, 2017), www.breitbart.com/big-government/2017/04/15/donald-trump-to-be-first-president-since-reagan-to-speak-at-nra-annual-meetings/ (discussing Trump's plans to create a fugitive database and the quiet repeal of Obama-era gun control laws).

V. CONCLUSION

The English language is often ambiguous resulting in confusion when particular historic phrases and words are analyzed. Although Constitutional Amendments are, for the most part, understood and concrete, the Second Amendment continues to provide problems to interpreters. In sum, “the people,” can be said to include *all* American citizens, including noncitizens, as long as they have a substantial connection to America. From an economic standpoint, allowing lawful noncitizens to obtain firearms to exercise their Second Amendment rights, while requiring noncitizens to register is essentially killing two birds with one stone. By allowing noncitizens the opportunity to exercise their fundamental constitutional rights, but imposing hurdles will allow for a better economy, while staying true to Constitutional jurisprudence.

