COMMENT

THE CONSTITUTIONALITY OF BARRING UNDOCUMENTED IMMIGRANTS FROM SECOND AMENDMENT PROTECTIONS

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Under current federal law, undocumented immigrants remain unable to access one of the most fundamental rights contained within our Constitution: the Second Amendment right to keep and bear arms. Several undocumented immigrants have challenged the constitutionality of the federal prohibition (18 U.S.C. § 922(g)(5)(A)), resulting in a three-way circuit split on whether undocumented immigrants are protected by the Second Amendment. The Supreme Court, however, has remained silent on the issue, leaving undocumented immigrants unprotected.

The Supreme Court's 2022 Second Amendment decision, N.Y. State Pistol & Rifle Ass'n v. Bruen, *upended the traditional method of constitutional review, means-end scrutiny, in favor of a textual-historical approach to Second Amendment challenges. This Comment applies the two-step approach elucidated in* Bruen, *arguing that (1) undocumented immigrants are part of "the people" and thus are protected by the plain text of the Second Amendment and (2) that the nation's history of firearm regulation is not consistent with a categorical ban on undocumented immigrants' firearm possession. Accordingly, this Comment*

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concludes that the Supreme Court should strike down § 922(g)(5)(A) as violative of the Second Amendment.

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INTRODUCTION

Nicolas Carpio-Leon resided in South Carolina for thirteen years with no criminal record, paying taxes, and caring for his three children, all U.S. citizens.[1] The firearms that he stored in his master bedroom were there to protect his home, wife, and children.[2] Unfortunately, unlike many American households with firearms for the same reasons, Carpio-Leon was convicted in 2012 of possessing firearms in violation of federal law due to his status as an undocumented immigrant.[3]

Undocumented immigrants have found themselves held in a constitutional limbo wherein they have not been damned to a complete denial of rights;[4] yet, they remain unable to access other fundamental rights protected by our Constitution.[5] This Comment concerns undocumented immigrants' right to keep and bear arms

1. United States v. Carpio-Leon, 701 F.3d 974, 975 (4th Cir. 2012).

2. *Id.*

3. *Id.* at 976; *see* 18 U.S.C. § 922(g)(5)(A) (prohibiting illegal or unlawful "aliens" from possessing firearms).

4. *See* Rachel F. Moran, *Dreamers Interrupted: The Case of the Rescission of the Program of Deferred Action for Childhood Arrivals*, 53 U.C. DAVIS L. REV. 1905, 1941 (2020) (discussing the Court's decision in *Plyler v. Doe*, 457 U.S. 202 (1982), which held that a Texas statute denying undocumented students access to public education was unconstitutional but noted that "[*Plyler*] was a jurisprudential anomaly—narrowly construed, normatively eclipsed by other decisions, yet never overruled").

5. *See id.* (noting that because "*Plyler*'s normative power [is] tightly constrained, the evolution of constitutional personhood has been stunted—at least for the most vulnerable among us"); *see also* Karen N. Moore, *Aliens and the Constitution*, 88 N.Y.U. L. REV. 801, 876–77 (2013) (discussing the various protections immigrants enjoy under the Constitution, including Due Process and Fourth Amendment protections, but noting that "[c]ourts have . . . evidenced greater pause in extending the full panoply of rights to nonimmigrant aliens" and that the constitutional rights of "aliens physically present in the United States, but unlawfully so, . . . remain in the greatest state of flux").

under the Second Amendment.[6] Three words cement the modern American citizen's basic understanding of constitutional protection: "We the People."[7] The preamble of the U.S. Constitution introduces this phrase, and the idea of a single people is woven into the protections enumerated throughout the Constitution and Bill of Rights.[8] The Second Amendment details that "[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."[9] While the Constitution continually references "the people," it does not define the phrase distinctly to exclude or include undocumented immigrants[10] and, to this day, it remains unclear whether undocumented immigrants are considered a part of "the people" to whom the Second Amendment applies.[11]

Furthermore, the Supreme Court has not defined "the people" within the context of the Second Amendment, nor has it issued a cementing decision addressing undocumented immigrants' Second

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6. *See* Jarod D. Arnold, *An Unqualified Right to Self-Defense: Alienage Restrictions and the Second Amendment*, 45 CAP. U. L. REV. 481, 482–83 (2017) (referencing the circuit split on the Second Amendment rights of undocumented immigrants that emerged after *District of Columbia v. Heller*, 554 U.S. 570 (2008), and the Court's reasoning in *Heller*, which "may be a preemptive attempt to extinguish any possibility that illegally-present noncitizens are entitled to the constitutional right to possess firearms in the home for the purpose of self-defense").

7. U.S. CONST. pmbl.

8. *See id.*; *see also, e.g.*, U.S. CONST. amend. I ("Congress shall make no law . . . prohibiting . . . the right of *the people* peaceably to assemble, and to petition the Government for a redress of grievances." (emphasis added)); U.S. CONST. amend. II ("[T]he right of the people to keep and bear Arms . . . ."); U.S. CONST. amend. IV ("The right of *the people* to be secure . . . against unreasonable searches and seizures, shall not be violated . . . ." (emphasis added)); U.S. CONST. amend. IX ("The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by *the people*." (emphasis added)); U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution . . . are reserved to the States respectively, or to *the people*." (emphasis added)).

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

10. *See* U.S. CONST. amend. I; U.S. CONST. amend. IV; U.S. CONST. amend. IX; U.S. CONST. amend. X; *see also* Moore, *supra* note 5, at 806–08 (noting that while the Constitution provides some insight as to the meaning of "the people" or "persons," it remains unclear which groups of people these terms refer to).

11. *See* Pratheepan Gulasekaram, *The Second Amendment's "People" Problem*, 76 VAND. L. REV. 1437, 1439 (2023) (discussing the apparent need for all people, regardless of immigration status, to enjoy the protections provided by *Heller* and *Bruen* despite the Court declaring in *Heller* that only "law-abiding citizens" are a part of "the people" the Second Amendment protects).

Amendment rights.[12] It has thus fallen to the federal circuit courts to decide to whom the Second Amendment applies and, overarchingly, the constitutionality of banning undocumented immigrants from exercising the Second Amendment right to keep and bear arms.[13] Currently, federal law broadly prohibits undocumented immigrants' exercise of Second Amendment rights.[14] Section 922(g)(5)(A) of Title 18 of the U.S. Code (the "Statute") states that "aliens"[15] unlawfully in the country may not receive or possess firearms of any kind.[16]

Over the last decade and a half, several undocumented immigrants have argued that the Statute violates their constitutional rights,[17] which has led to a three-way circuit split over undocumented immigrants' Second Amendment rights.[18] The Eighth and Fifth Circuits have held that the Second Amendment does not apply to undocumented immigrants;[19] the Second, Ninth, and Tenth Circuits have assumed,

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12. *See id.* at 1451 (explaining that the *Heller* decision departed from the Supreme Court's usual avoidance of defining "the people" in the Second Amendment context).

13. *See* Arnold, *supra* note 6, at 489–90 (emphasizing that the language used in *Heller* has confused lower federal courts' determination of whether Second Amendment protections extend to undocumented immigrants, resulting in several of these courts upholding statutes banning noncitizens from possessing firearms).

14. 18 U.S.C. § 922(g)(5)(A).

15. An "alien" is "any person" who is "not a citizen or national of the United States." 8 U.S.C. § 1101(a)(3). Use of the word "alien" to describe a person not from the United States has a problematic history and is considered by many to be a dehumanizing term. *See* Adrian Florido, Tracing the Shifting Meaning of 'Alien,' NPR (Aug. 22, 2015, 12:03 PM), https://www.npr.org/sections/codeswitch/2015/08/22/432774244/tracing-the-shifting-meaning-of-alien [https://perma.cc/LW58-9XML] (tracing the history of the term "alien"). This Comment, wherever possible, will refer to "aliens" as undocumented immigrants. However, when quoting the language of statutory or case law directly, use of the word alien will be necessary.

16. § 922(g)(5)(A).

17. *See* United States v. Jimenez-Shilon, 34 F.4th 1042, 1044, 1048–49 (11th Cir. 2022) (holding that while "the people" includes undocumented immigrants, the Second Amendment is a "citizen's right"); United States v. Carpio-Leon, 701 F.3d 974, 981 (4th Cir. 2012) (holding 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").

18. *See* Arnold, *supra* note 6, at 481–82 (discussing the different outcomes in undocumented immigrants' Second Amendment rights cases and noting that "[t]his . . . difference amongst the circuits on . . . the fundamental right to self-defense has created a split . . . and . . . increased the likelihood of a Supreme Court review").

19. *See* United States v. Sitladeen, 64 F.4th 978, 987 (8th Cir. 2023) (holding that the binding law of the Eighth Circuit is that the Second Amendment does not extend

without deciding, that the Second Amendment protects undocumented immigrants;[20] and the Seventh Circuit has held that the Second Amendment protects undocumented immigrants who have formed substantial connections with the United States.[21] Notably, no circuit court has found the Statute to be unconstitutional.[22]

The Supreme Court's first landmark Second Amendment case, *District of Columbia v. Heller*,[23] induced federal courts to apply a two-part

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to undocumented immigrants); United States v. Portillo-Munoz, 643 F.3d 437, 442 (5th Cir. 2011) (holding that since the Constitution does not prohibit Congress from distinguishing between citizens and undocumented immigrants, the Second Amendment makes a similar distinction); United States v. Flores, 663 F.3d 1022, 1023 (8th Cir. 2011) (per curiam) (agreeing with the Fifth Circuit's determination that undocumented immigrants are not protected by the Second Amendment (citing *Portillo-Munoz*, 643 F.3d at 437)).

20. *See* United States v. Perez, 6 F.4th 448, 450 (2d Cir. 2021) (finding that the Statute withstood intermediate scrutiny even under the assumption that undocumented immigrants were protected by the Second Amendment); United States v. Torres, 911 F.3d 1253, 1264–65 (9th Cir. 2019) (concluding that while undocumented immigrants may hold Second Amendment rights, such rights are not unlimited); United States v. Huitron-Guizar, 678 F.3d 1164, 1169 (10th Cir. 2012) (assuming that some unlawful immigrants are included in the Second Amendment's protections). The language "assuming" without deciding has been used by the Second, Ninth, and Tenth Circuits to avoid introducing the issue of whether undocumented immigrants are considered a part of "the people" within the context of the Second Amendment. *Perez*, 6 F.4th at 450–51; *Torres*, 911 F.3d at 1257–58; *Huitron-Guizar*, 678 F.3d at 1169. The Ninth Circuit provided clarity on why it chose to avoid deciding the issue, namely that "the state of the law precludes us from reaching a definite answer" on whether undocumented immigrants fall within the scope of the Second Amendment because the question is "large and complicated," and it would be "imprudent" for them to make such a determination. *Torres*, 911 F.3d at 1261 (citing *Huitron-Guizar*, 678 F.3d at 1168–70).

21. *See* United States v. Meza-Rodriguez, 798 F.3d 664, 670–72 (7th Cir. 2015) (applying the "substantial connections" test to determine that an undocumented immigrant falls within Second Amendment protections but that such a right is not unlimited).

22. *See Sitladeen*, 64 F.4th at 987 (holding that the Statute did not violate the Second Amendment); *Perez*, 6 F.4th at 449–50 (holding the Statute withstands intermediate scrutiny); *Torres*, 911 F.3d at 1265; *Meza-Rodriguez*, 798 F.3d at 672 (holding that Congress may circumscribe the Second Amendment right in some circumstances without violating the Constitution); *Huitron-Guizar*, 678 F.3d at 1170 (holding that Congress was exercising its authority in a constitutionally permissible manner when it passed the Statute); *Portillo-Munoz*, 643 F.3d at 442 (holding the Statute constitutional under the Second Amendment); *Flores*, 663 F.3d at 1023 (holding the Statute constitutional and agreeing with the Fifth Circuit).

23. 554 U.S. 570 (2008).

test to evaluate Second Amendment challenges to gun regulations.[24] The first part of this test analyzed the Second Amendment's plain text to determine whether the conduct prohibited by the challenged regulation was within the scope of the Second Amendment's protections.[25] The second part of the test used means-end scrutiny to determine whether the regulation was constitutional under either intermediate or strict scrutiny.[26]

In 2022, the Supreme Court redefined the standards set by *Heller* in *N.Y. State Rifle & Pistol Ass'n v. Bruen*,[27] changing the landscape of Second Amendment jurisprudence.[28] In this ruling, the Court implemented a new test to evaluate Second Amendment challenges to gun regulations.[29] Like *Heller*, the test articulated in *Bruen* is two-steps.[30] The first part of the test closely mirrors the first prong of *Heller*, wherein the plain text of the Second Amendment must cover the conduct regulated by law.[31] The second prong of the *Bruen* test replaced lower federal court's application of means-end analysis to now require that the government demonstrate that the law is consistent with the country's historical firearm regulation to pass constitutional muster.[32]

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24. *E.g.*, N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 18 (2022) (recognizing the post-*Heller* two-part test relied on in the U.S. Courts of Appeals). In *Bruen*, the Supreme Court clarified that *Heller* did not prescribe the use of means-end scrutiny in evaluating Second Amendment cases; nevertheless, circuit courts adopted and have continued the use of this type of constitutional review. *Id.* at 19–20.

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

26. *See id.* at 628–29; Graham v. Richardson, 403 U.S. 365, 371–72 (1971) (noting that the Court's prior decisions enumerated alienage classifications as being subject to heightened scrutiny because the classification is "inherently suspect" and "a prime example of a 'discrete and insular minority' for whom such heightened judicial solicitude is appropriate"(quoting United States v. Carolene Prods. Co., 304 U.S. 144, 152–53 n.4 (1938))); Moore, *supra* note 5, at 819 (discussing the Supreme Court's unwillingness to treat undocumented immigrants "as a suspect class because their presence in this country in violation of federal law is not a 'constitutional irrelevancy.'" (quoting Plyler v. Doe, 457 U.S. 202, 223 (1982))).

27. 597 U.S. 1 (2022).

28. *See id.* at 17–18. The Court's decision in *Bruen* denotes an extreme departure from the traditional method of constitutional review employed to determine the scope of other rights contained within the Bill of Rights. Such a decision "purports to jettison completely the 'tiers of scrutiny' approach in favor of text and history." Gulasekaram, *supra* note 11, at 1464.

29. *Bruen*, 597 U.S. at 17.

30. *Id.*

31. *Id.*

32. *Id.*

Denying certiorari to six cases in the last decade and a half, the Supreme Court has yet to hear a case on the constitutionality of the Statute.[33] The highly contentious circuit split over undocumented immigrants' Second Amendment rights that emerged prior to *Bruen* exemplifies that that the issue has become increasingly difficult for federal courts to navigate.[34] However, courts can now apply the new test prescribed by *Bruen* to the Statute.[35] This Comment argues that the Statute is unconstitutional through analyzing the historical basis and case law surrounding relevant gun laws and then applying the *Bruen* test to the Statute.[36]

Part I comprehensively reviews gun regulations dating back to 1631 concerning undocumented immigrants and other noncitizens.[37] For context, Part I also explains the current Second Amendment limitations on firearm possession, particularly the standing prohibition on undocumented immigrants.[38] Next, Part I presents applicable case law defining the parameters of standing laws, including the Supreme Court's conception of "the people," the three legal approaches within the circuit split pre-*Bruen*, and the evolution of Second Amendment jurisprudence in determining the constitutionality of gun regulations.[39] Part II contends that the Statute is unconstitutional by applying the *Bruen* test discussed in Part I.[40] First, undocumented immigrants are included in "the people" referenced in the Second Amendment.[41] Second, historical gun regulations in the United States do not support

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33. United States v. Perez, 6 F.4th 448 (2d Cir. 2021), *cert. denied*, 142 S. Ct. 1133 (2022); United States v. Meza-Rodriguez, 798 F.3d 664 (7th Cir. 2015), *cert. denied*, 578 U.S. 925 (2016); United States v. Carpio-Leon, 701 F.3d 974 (4th Cir. 2012), *cert. denied*, 571 U.S. 831 (2013); United States v. Huitron-Guizar, 678 F.3d 1164 (10th Cir. 2012), *cert. denied*, 568 U.S. 893 (2012); United States v. Flores, 663 F.3d 1022 (8th Cir. 2011), *cert. denied*, 567 U.S. 938 (2012); United States v. Portillo-Munoz, 643 F.3d 437 (5th Cir. 2011), *cert. denied*, 566 U.S. 963 (2012).

34. *See* Gulasekaram, *supra* note 11, at 1439 (explaining how the post-*Heller* and pre-*Bruen* circuit split caused lower federal courts to grapple with questions—not raised in *Heller* but prompted by its language—such as: "Are noncitizens rightsholders under the Second Amendment?" and "[i]s the right to keep and bear arms a citizen-only right?").

35. *See* discussion *infra* Part II.

36. *See* discussion *infra* Sections II.A–II.B.

37. *See* discussion *infra* Section I.A.

38. *See* discussion *infra* Section I.B.

39. *See* discussion *infra* Sections I.C–G.

40. *See* discussion *infra* Sections II.A–B.

41. *See* discussion *infra* Section II.A.

a blanket prohibition on undocumented immigrants' firearm possession.[42]

I. BACKGROUND

The Second Amendment of the U.S. Constitution provides that: "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."[43] Today, several questions remain regarding the meaning and application of the Second Amendment. This Part provides a broad overview of statutory and case law relevant to undocumented immigrants' and other noncitizens' relationship with the Second Amendment.

A. The History of U.S. Gun Regulations Concerning Undocumented Immigrants and Other Noncitizens

While the federal government did not begin attempting to regulate firearm possession nationwide until the 1920s,[44] States started regulating noncitizens' ability to possess or receive firearms in the 1630s.[45] This Section first discusses the period prior to federal intervention.[46] The latter half of this Section follows federal legislation from the initial 1920s gun policies to current standing legislation, focusing primarily on § 922(g)(5)(A), today's federal prohibition on undocumented immigrants' firearm possession (the Statute).[47]

1. State regulations disarming noncitizens and other "dangerous" groups

Early colonial state gun regulations focused on foreigners and others deemed dangerous by the state and were primarily aimed at Native

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42. *See* discussion *infra* Section II.B.

43. U.S. CONST. amend. II.

44. Michael A. Bellesiles, *Firearms Regulation: A Historical Overview*, 28 CRIME & JUST. 137, 173–74 (2001) (noting that "[i]n 1924 alone, thirteen firearm regulation acts were introduced in the House of Representatives, all of which died in committee").

45. *See, e.g.*, Act of Aug. 21, 1633, 1633 Va. Acts 219, Act X ("An act that no [Arms] or Ammunition be [sold or bartered] to the Indians"); Act of June 6, 1651, 1651 Laws of New Plymouth 94 ("It is ordered that whosoever henceforth shall heir or [e]mploy any Indian or Indians and furnish them with guns [powder] and [shot] . . . shall forfeit for every such default 40 shillings . . . .").

46. *See* discussion *infra* Section I.A.1.

47. *See* discussion *infra* Section I.A.2.

Americans,[48] who were not granted citizenship until 1924.[49] For example, in 1631, Virginia forbade *all* trade, public and private, with Native Americans.[50] Although earlier regulations mirrored Virginia's, state governments' focus shifted in the following decades to specifically restrict the weapons trade.[51] Between 1633 and 1675, several states enacted laws prohibiting their citizens from selling, lending, or trading arms and ammunition to Native Americans.[52] Some states included prohibitions on "mend[ing] or repair[ing]" any weapon for Native Americans, acknowledging Native Americans did possess firearms

48. *See* Joseph G.S. Greenlee, *The Historical Justification for Prohibiting Dangerous Persons from Possessing Arms*, 20 WYO. L. REV. 249, 273 (2020) (noting that "[a]s had always been the case throughout American history, the people being disarmed were perceived as dangerous"). While non-citizen gun restrictions "unquestionably included many peaceable persons who did not deserve to be deprived of their rights," Greenlee notes that "however misguided, preserving public safety was the underlying rationale for these restrictions." *Id.*; Joseph Blocher & Catie Carberry, *Historical Gun Laws Targeting "Dangerous" Groups and Outsiders* 4–8, (Duke L. School Publ. L. & Legal Theory Series No. 2020-80, 2020) https://ssrn.com/abstract=3702696 (discussing colonial laws that targeted Native Americans, ranging from prohibitions on the mere possession of firearms to the sale of such weapons and ammunition). *See generally* Mark Frasetto, Firearms and Weapons Legislation Up to the Early Twentieth Century (Jan. 15, 2013) (unpublished manuscript) https://ssrn.com/abstract=2200991 (providing a comprehensive overview of firearms legislation leading up to the twentieth century, including laws specifically targeted at Native Americans and other groups deemed dangerous by the state).

49. *See United States Citizenship for Native American*, LIBR. OF CONG., https://www.loc.gov/classroom-materials/immigration/native-american/united-states-citizenship-for-the-native-american [https://perma.cc/KU94-CGLV].

50. Act of Feb. 24, 1631, 1631 Va. Acts 173, Act XLVI ("A[ll] trade with the Savages prohibited, as well [public] as private.").

51. *See, e.g.*, Act of Aug. 9, 1633, 1633 Va. Acts 219, Act X (prohibiting the sale of arms and ammunition to Native Americans and listing penalties for such sales, including imprisonment).

52. *See, e.g.*, *id.*; Act of June 6, 1651, 1651 Laws of New Plymouth 94 ("It is ordered that whosoever henceforth shall [hire] or [e]mploy any Indian or Indians and furnish them with guns powder and shot[] . . . shall forfeit for every such default [forty] shillings . . . ."). In some states, such as Virginia, partaking in the trade of firearms or ammunition was deemed a felony. Act of Jan. 6, 1639, Act XVII, 1639 Va. Acts 224, 227 ("[T]rading with [Native Americans] for arms and [ammunition] shall be felony, and for other commodities imprisonment at discretion of the Governor and Council."). In other states, like Massachusetts, doing so would result in the death penalty. Act of Nov. 4, 1676, 1676 Laws of New Plymouth 178 ("That whosoever [shall be] found to sell barter or give directly or indirectly any gun or guns or [ammunition] of any kind to any Indian or Indians . . . [shall be] put to death . . . .").

despite the widespread prohibitions.[53] Over time, however, bans on the sale or trade of firearms with Native Americans relaxed.[54] From 1676 until the beginning of the Revolutionary War, all recorded laws contained either exceptions for trading or selling firearms with Native Americans who obtained licenses or provided for a maximum number of firearms or ammunition permitted to be sold to Native Americans.[55]

These earliest regulations were primarily premised on English arms traditions disarming individuals perceived as "dangerous."[56] While this dangerousness consideration was undoubtedly a significant factor in the disarming of Native Americans, the context in which these prohibitions arose is critical. Specifically, pre-Revolutionary War, there were longstanding conflicts between Native Americans and settlers, giving rise to fears of the dangers posed by them.[57] Historically, conflicts with Native Americans were framed to be one-sided and assigned fault almost entirely to Native Americans.[58] Though this notion has largely been dispensed with today, historical understandings of the purpose behind the Second Amendment were, in part, to protect against Native Americans.[59] As exemplified by Justice

53. Act of Mar. 3, 1639, 1639 Laws of New Plymouth 65.

54. *See* Blocher & Carberry, *supra* note 48, at 7 (examining the shift from serious punishments associated with selling firearms to Native Americans to an easing of sentences for such violations of the law).

55. *Id.* at 8.

56. *See* Greenlee, *supra* note 48, at 262 (stating that after the Revolutionary War, Americans continued the English tradition of "disarming those perceived as dangerous" and "[l]ike English laws, colonial laws were sometimes discriminatory and overbroad—but even those were intended to prevent danger"); *see also* Ann E. Tweedy, *"Hostile Indian Tribes . . . Outlaws, Wolves, . . . Bears . . . Grizzlies and Things Like That?" How the Second Amendment and Supreme Court Precedent Target Tribal Self-Defense*, 13 U. PA. J. CONST. L. 687, 736 (2011) (noting that "historical state and colonial gun control measures directed at Indians demonstrate[] the extent to which states and colonies, like the federal government, viewed Indians as untrustworthy (i.e. as savage) or, in other words, as violent and irrational").

57. *See* Ann E. Tweedy, *Tribes, Firearm Regulation, and the Public Square*, 55 U.C. DAVIS L. REV. 2625, 2639 (2022) (commenting that "historically, in the colonial era and during the early years of the Republic, tribes' conflicts with settlers often resulted from tribes' defense of their lands from settler encroachment, but that tribes engaging in such conflicts were painted as savage aggressors").

58. *Id.* at 2640 (discussing modern courts' reliance on the "monolithic view that tribes historically were threatening forces that citizens needed to defend against, without addressing the one-sidedness of this view").

59. *See* Angela R. Riley, *Indians and Guns*, 100 GEO. L.J. 1675, 1681 (2012) (remarking that "[t]hough contentious debates abound as to what the Second

Kennedy's line of questioning during *Heller*'s oral argument, the prevailing view is "that settlers' fears of 'hostile' Indians . . . motivated the Framers' commitment to a right to bear arms."[60] However, these colonial prohibitions also served the convincing purpose of not arming Native Americans who threatened the settlers' goal of westward expansion.[61] Society still viewed Native Americans as hostile, "impeding white's efforts to overtake enormous tracts of land for settlement . . . mark[ing] relations between settlers and tribes."[62]

The arrival of the Revolutionary War forced states to turn their attention to other groups deemed dangerous, namely those disaffected by the state or those who did not swear fealty to the United States.[63] In 1776, Massachusetts enacted a law recommending that persons "notoriously disaffected to the cause of America" or those who refused to defend the nation be disarmed.[64] The same year, Pennsylvania's legislature permitted military officers to seize all arms from "non-associators."[65] A year later, Massachusetts promulgated a law requiring all adult, white male inhabitants of the state to take an oath of

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Amendment means, there is wide consensus on one basis for its enactment—to protect white settlers against Indians"); SAUL CORNELL, A WELL-REGULATED MILITIA: THE FOUNDING FATHERS AND THE ORIGINS OF GUN CONTROL IN AMERICA 39–40 (2006) (discussing the Framers' many concerns regarding the burgeoning nation, including protecting the country against "Indian attack"). *See generally* Young v. Hawaii, 992 F.3d 765, 819 (9th Cir. 2021) (en banc) (providing a brief discussion of colonial laws requiring colonists to bring their weapons to public places, noting that "these early statutes were . . . [drafted to address] the perceived need for protection from outside groups, such as slaves and Native Americans").

60. See Riley, *supra* note 59, at 1677. During oral argument, Justice Kennedy posed the question: "It had nothing to do with the concern of the remote settler to defend himself and his family against hostile Indian tribes and outlaws, wolves and bears and grizzlies and things like that?" Transcript of Oral Argument at 8, District of Columbia v. Heller, 554 U.S. 570 (2008) (No. 07-290).

61. Riley, *supra* note 59, at 1693.

62. *Id.*

63. *See* Blocher & Carberry, *supra* note 48, at 8 (noting that "[i]n 1776, the Continental Congress recommended that the colonies disarm those who 'are notoriously disaffected to the cause of America, or who have not associated, and shall refuse to associate, to defend, by arms, the[] United Colonies, against the hostile attempts of the British fleets and armies'" (alterations in the original) (quoting 4 JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789, at 205 (Worthington Chauncey Ford ed., 1906)).

64. Act of May 1, 1776, ch. 21, 1776 Province Laws 479 (noting that the purpose of this Act was to defend against the "hostile attempts of the British fleets and armies").

65. Act of July 19, 1776, ch. 729, § 1, 1776 Laws of Pa. 9.

allegiance to the United States.[66] Any refusal to take the oath would result in such individuals being disarmed.[67]

The disarmament of those who refused to perform a loyalty oath also stemmed from English tradition focused on disarming "dangerous" individuals,[68] defined as "often those involved in or sympathetic to rebellions and insurrections."[69] The colonists similarly sought to ensure that no such rebellions or insurrections occurred by disarming anyone who would not perform a loyalty oath.[70] The Fifth Circuit referred to similar rationales for the revolution and founding-era gun regulations, noting that these regulations "targeted particular groups for public safety reasons" and that "American legislators had determined that permitting these persons to keep and bear arms posed a potential danger."[71] Another scholar notes that these regulations were "obvious precaution[s]" aimed at "deal[ing] with the potential threat coming from armed citizens who remained loyal to Great Britain."[72] Thus, public safety became the modern rationale for laws banning oath refusers and potentially threatening disloyal citizens from possessing firearms.[73]

Following the ratification of the Second Amendment, total prohibitions on the sale or trade of firearms with Native Americans resurfaced in some states.[74] Other states maintained limiting restrictions on trading firearms with Native Americans via permit requirements and restricting the sale of weaponry to Native Americans "traveling through the state."[75]

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66. *Id.* § 5. *See* Act of May 1, 1776, ch. 21, § 1, 1776 Province Laws 479 (using the language "every male person above sixteen years of age" to indicate that adulthood was considered sixteen-years and above).

67. Act of May 1, 1776, ch. 21, § 1, 1776 Province Laws 479.

68. Greenlee, *supra* note 48, at 258.

69. *Id.*

70. At this point in history, the colonists disarmed individuals they suspected may rebel against them. *Id.* at 265.

71. Nat'l Rifle Ass'n of Am. v. Bureau of Alcohol, Tobacco, Firearms & Explosives, 700 F.3d 185, 200 (5th Cir. 2012) *abrogated by* N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1 (2022).

72. Saul Cornell & Nathan DeDino, *A Well Regulated Right: The Early American Origins of Gun Control*, 73 FORDHAM L. REV. 487, 506 (2004).

73. *Id.*

74. HARRY TOULMIN, THE STATUTES OF THE MISSISSIPPI TERRITORY, Part V § 10 (1807).

75. Act of Feb. 27, 1845 Mo. Laws 577.

After the ratification of the Fourteenth Amendment in 1868, a debate raged over whether the Due Process clause incorporated all or any of the Bill of Rights as restrictions on the States.[76] State laws following the ratification of the Fourteenth Amendment did not reference foreigners or immigrants in any way; instead, these laws mentioned those who had "borne arms against the government of the United States"[77] or those who had not obtained licenses, prohibiting these groups from possessing firearms.[78] Moreover, it was not until 2010, in *McDonald v. City of Chicago*,[79] that the Supreme Court held that the Fourteenth Amendment fully incorporated the Second Amendment.[80]

State laws did not address the issue of disarming undocumented immigrants until the early twentieth century.[81] Even so, the initial state laws did not prohibit the possession of firearms by these individuals;[82] instead, the laws only required noncitizens to acquire a gun license.[83] The first total ban on the armament of noncitizens took place in Pennsylvania in 1909 with the passing of the unnaturalized foreign-born citizen prohibition, which was enacted explicitly to prohibit

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76. U.S. CONST. amend. XIV, § 1 ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . .").

77. Act of Feb. 23, 1867, 1868 Gen. Stat. Kan. Art. 1, Ch. 31, § 313.

78. *E.g.*, 1899 Wyo. Sess. Laws 32–33, ch. 19, § 14 (implying that only those with valid licenses are permitted to pursue, hunt, and kill animals).

79. 561 U.S. 742 (2010).

80. In its landmark decision, *McDonald v. City of Chicago*, the Supreme Court confirmed that the Second Amendment is fully incorporated and applicable to the states through the Fourteenth Amendment's Due Process Clause. *Id.* at 791.

81. *See* Blocher & Carberry, *supra* note 49, at 4 (noting that the first laws in the Duke Repository of Historical Gun Laws explicitly referencing the disarmament of unnaturalized foreign-born citizens did not appear until 1923).

82. Act of Apr. 14, 1903, § 1 P.L. 178 (1903) ("[E]very non-resident and every unnaturalized, foreign-born resident of this commonwealth shall be required to take out a license from the treasurer of the county in which he proposes to hunt . . . .").

83. *Id.*; 1907 Comp. Utah Laws 475 ("Any person who is a non-resident of the state of Utah, or who is not a citizen of the United States, shall, . . . be entitled to receive . . . a non-resident license, which license shall permit such person to pursue, hunt, or kill [game] . . . ."). Washington, Montana, and Wyoming later enacted similar laws; however, these laws instead prohibited noncitizens' possession of firearms unless they obtained a gun license from the state. Act of Mar. 11, 1911, 1911 Wash. Sess. Laws 303; 1913 Mont. Laws 53, ch. 38, § 1; 1919 Wyo. Sess. Laws 645.

hunting by undocumented individuals.[84] New York quickly followed suit with the Sullivan Act, which made noncitizens' possession or carrying of firearms a felony.[85] However, the Sullivan Act expressly prohibited such activity "in any public place" and contained no prohibition on noncitizens' possession of firearms on private property.[86] In 1917, New Hampshire enacted its own prohibitory statute, which was almost immediately challenged on Second Amendment grounds in *State v. Rheaume*.[87] The court noted the justifications behind distinguishing between citizens and noncitizens for arms-bearing purposes:

> Citizens as a class have more settled domiciles, and are better known to the local police officials, while the sojourn of aliens in this country, in theory, and usually in practice, is temporary, and their abode, while here, capricious and uncertain. Citizens by means of taxation bear the expense of the government and of police protection, while the alien does not necessarily pay taxes or share any part of the public burden. Native citizens are justly presumed to be imbued with a natural allegiance to their government which unnaturalized aliens do not possess. The former inherit a knowledge and reverence for our institutions, while the latter as a class do not understand our customs or laws, or enter into the spirit of our social organization. Or, passing more directly to the use of firearms, the citizen has an obligation to defend the state, while the alien has none.[88]

In 1972, the California Supreme Court rejected this historical understanding of the purpose behind distinguishing between citizens

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84. Act of May 8, 1909, 1909 Pa. Laws 6304 ("[I]t shall be unlawful for any unnaturalized foreign born resident to hunt for or capture or kill . . . any wild bird or animal . . . and to that end it shall be unlawful for any unnaturalized foreign born resident, within this Commonwealth, to either own or be possessed of a shotgun or rifle of any make.").

85. N.Y. PENAL LAW § 1897 (Consol. 1911).

86. *Id.*

87. 116 A. 758, 762 (N.H. 1922).

88. *Id.* at 763. The Supreme Court of California subsequently rejected this justification in *People v. Rappard*, when the court struck down an alien-in-possession prohibition on the grounds that "the California courts . . . have recognized that there are no rational grounds for believing that all residents who are not also citizens are ipso facto uncommitted to peaceful and lawful behavior." People v. Rappard, 104 Cal. Rptr. 535, 536 (Ct. App. 1972). The California court asserted that "[a]ny classification which treats all aliens as dangerous and all United States citizens as trustworthy rests upon a very questionable basis." *Id.* at 536–37.

and noncitizens within the context of the Second Amendment.[89] Nevertheless, from this point forward, state regulation and federal gun legislation trended heavily toward restricting noncitizen possession of firearms.[90]

2. Federal regulations

Congress did not begin to consider national gun legislation until the 1920s.[91] Furthermore, there was no *codified* federal gun regulation until the National Firearms Act of 1934, which regulated the transfer and taxation of firearms.[92] Four years later, the National Firearms Act of 1938 further restricted the movement of firearms by providing licensing and record-keeping procedures for gunmakers and dealers and prohibiting interstate shipping of firearms pursuant to state law.[93] Though evidently for public safety, these initial congressional measures taken by Congress did not include any provisions pertaining to undocumented immigrants.[94]

The Alien Registration Act of 1940[95] was the first federal law making it unlawful for undocumented immigrants to possess firearms.[96] The sole purpose of the Act was to prevent sedition or treason by undocumented immigrants by prohibiting "subversive" activities and requiring the registration of immigrants.[97] Notably, the Act explicitly

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89. *Id.*

90. *E.g.*, 1915 N.J. Laws 662; 1915 N.D. Law 946–59; 1917 N.H. Laws 723 (containing an exception for noncitizens who obtained a permit); 1917 Or. Laws 3482; MINN. STAT. § 9976 (1917); 1917 Utah Laws 278; 1919 Colo. Sess. Laws 416; MICH. COMP. LAWS § 7480(15) (1922); 1922 Mass. Acts 485 (amending § 130) (containing an exception for foreign-born persons with a permit); 1923 Cal. Stat. 695; 1923 N.Y. Laws 191; 1930 Conn. Acts 3120; 1923 N.D. Laws 853; 1925 Wyo. Sess. Laws ch. 106, § 1; 1925 Nev. Stat. 54 (prohibiting firearms "capable of being concealed upon the person . . ."); 1925 Cal. Stat. 542; 1933 Or. Laws 488 (prohibiting possession of firearms capable of being concealed upon the person, as well as machine guns).

91. Bellesiles, *supra* note 44.

92. *See generally* United States v. Miller, 307 U.S. 174 (1939) (holding that the provisions contained within the National Firearms Act were not a violation of the Second Amendment).

93. Bellesiles, *supra* note 44, at 176.

94. *See* Gulasekarem, *supra* note 11, at 148 (noting that the first federal firearms legislation did not occur until 1934, with "specific prohibitions on immigrant possession appear[ing] a few years later").

95. Act of June 28, 1940, ch. 439, 54 Stat. 670, *repealed by* Act of June 27, 1952, ch. 477, 66 Stat. 280 (1952).

96. *Id.* (providing grounds for deportation for undocumented immigrants).

97. *Id.*

provided that an undocumented immigrant's possession of such weapons was grounds for deportation.[98] Congress subsequently repealed this Act in 1952,[99] and it was not until 1968 that the federal government enacted a blanket prohibition on undocumented immigrants' ability to possess firearms.[100]

B. Current Second Amendment Limitations: 18 U.S.C. § 922(g)(5)(A)

The most prominent standing firearms regulation concerning undocumented immigrants is the Gun Control Act of 1968, codified in the U.S. Code as § 922(g)(5)(A)[101] (the "Statute"). The Statute enumerates a blanket prohibition on the possession, receipt, or transfer of firearms by undocumented immigrants.[102] The primary rationale for the Statute was to "keep guns out of the hands of presumptively risky people" and to "suppress[] armed violence."[103] The legislative history of the Statute shows this same purpose, noting that the individuals prohibited from firearm possession have "by their actions . . . demonstrated that they are dangerous, or that they may become dangerous."[104] Specifically regarding undocumented

98. *Id.*
99. *Id.*
100. Gun Control Act of 1968, 18 U.S.C. §§ 921–29 (2006).
101. *Id.*
102. 18 U.S.C. § 922(g)(5)(A) ("It shall be unlawful for any person . . . who, being an alien is illegally or unlawfully in the United States . . . to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.").
103. United States v. Yancey, 621 F.3d 681, 683–84 (7th Cir. 2010) (citing S. REP. NO. 90-1501, at 22 (1968)); *see* Maria Stracqualursi, *Undocumented Immigrants Caught in the Crossfire: Resolving the Circuit Split on "the People" and the Applicable Level of Scrutiny for Second Amendment Challenges*, 57 B.C. L. Rev. 1447, 1479 (2016) (noting that applying this purpose to undocumented immigrants requires the assumption that undocumented immigrations fall within the category of being "presumptively risky or dangerous," which several studies disprove).
104. 114 CONG. REC. 14773 (1968). The Congressional Record also indicates that Congress enacted the Statute to prevent firearm possession by those who have "shown violent tendencies" or who "may not be trusted to possess a firearm without becoming a threat to society." *Id.* However, the majority of the Senate's discussion of this bill focused its reasoning on felons and others who had *already* committed crimes, namely the individuals responsible for the assassinations of former President John F. Kennedy and Martin Luther King. *Id.* at 14773–74. While the emphasis was broadly placed on criminals, there was no specific mention of undocumented immigrants by Congress aside from their inclusion in this group of presumptively dangerous people. *Id.* at 14772–75.

immigrants, the Statute was enacted to ensure that the government could keep track of firearms to prevent criminal activity because undocumented immigrants are not easily traced.[105] Additionally, one commentator noted the racial underpinnings of the Statute as likely a backlash against the Civil Rights Movement.[106]

Though the general public has shifted away from previously held presumptions regarding the dangers posed by immigrants,[107] the Statute has withstood many constitutional challenges in the last decade and a half.[108] However, the Supreme Court has not heard a case

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105. Justin Hay, *The Second Amendment, Undocumented Immigrants, and the Shifting Definition of "People": How the Federal Gun Control Act of 1968 Prevents Undocumented Immigrants from Exercising Second Amendment Rights*, 87 CIN. L. REV. 571, 587 (2018). Hay acknowledges that while this argument has surface-level value, the United States' "light restrictions" on citizen's ability to purchase firearms and loopholes available to those citizens who wish to remain anonymous while purchasing firearms reveals that "the government's purpose behind the Act seems to rely heavily on the fact that the Act targets individuals based on national origin." *Id.*; *see also* United States v. Meza Rodriguez, 798 F.3d 664, 673 (7th Cir. 2015) (agreeing that undocumented immigrants are more difficult to trace as they live their lives "outside the formal system," but disagreeing that undocumented immigrants are more likely to commit crimes than the citizenry at large).

106. Pratheepan Gulasekaram, "*The People" of the Second Amendment: Citizenship and the Right to Bear Arms*, 85 N.Y.U. L. REV. 1521, 1563–65 (2010) (discussing the emergence of the Gun Control Act of 1968 as a reaction to the Civil Rights Movement and the assumption that undocumented immigrants were "inherent[ly] violen[t] and dangerous[]").

107. The latter half of the twentieth century saw a rejection of such assumptions "underlying regulations and judicial opinions" as being "incorrect or hyperbolized," *id.*, as was evidenced by the California Supreme Court's striking down of its alien-in-possession prohibition law in 1972, *see, e.g.*, People v. Rappard, 104 Cal. Rptr. 535, 537 (Cal. Ct. App. 1972) (holding the law violated the Equal Protection Clause).

108. *E.g.*, United States v. Sitladeen, 64 F.4th 978, 982 (8th Cir. 2023) (holding constitutional a federal statute prohibiting an "unlawfully present alien" from possessing a firearm); United States v. Jimenez-Shilon, 34 F.4th 1042, 1050 (11th Cir. 2022) (concluding undocumented immigrants do not enjoy Second Amendment protections); United States v. Perez, 6 F.4th 448, 449 (2d Cir. 2021) (affirming the lower court's judgment that U.S.C. § 922(g)(5) is constitutional); United States v. Torres, 911 F.3d 1253, 1255 (9th Cir. 2019) (stating that the federal statute "withstands constitutional scrutiny and is a valid exercise of Congress's authority"); United States v. Meza-Rodriguez, 798 F.3d 664, 666 (7th Cir. 2015) (deciding the Second Amendment does not "preclude" actions like barring unlawfully residing individuals from possessing firearms); United States v. Huitron-Guizar, 678 F.3d 1164, 1165, 1170 (10th Cir. 2012) (explaining "courts must defer to Congress as it lawfully exercises its constitutional power to distinguish between . . . lawful and unlawful aliens"); United

concerning the Statute, nor has it determined what "the people" means in the context of the Second Amendment.[109] However, over the last century and a half, the Court has repeatedly held that certain constitutional rights and protections apply to undocumented immigrants, creating the implicit assumption that "the people" and "persons" referenced in such constitutional provisions include undocumented immigrants.[110]

C. The Supreme Court's Conception of "the People"

The U.S. Constitution and Bill of Rights contain several references to "the people," vesting certain constitutional rights to this group. The preamble of the Constitution proclaims that it is established by "the People of the United States."[111] The First, Second, Fourth, Ninth, and Tenth Amendments protect various constitutional rights of "the people."[112] Because of their identical language, these rights have been widely understood to apply to the same group of people.[113] However,

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States v. Carpio-Leon, 701 F.3d 974, 975 (4th Cir. 2012) (holding the federal statute constitutional); United States v. Portillo-Munoz, 643 F.3d 437, 439 (5th Cir. 2011) (finding the phrase "the people" in the Second Amendment did not extend to individuals unlawfully residing in the country); United States v. Flores, 663 F.3d 1022, 1022–23 (8th Cir. 2011) (per curiam) (noting that the federal law prohibiting the possession of firearms by undocumented immigrants did not violate the Second Amendment).

109. *See* United States v. Perez, 6 F.4th 448 (2d Cir. 2021), *cert. denied*, 142 S. Ct. 1133 (2022) (declining to hear a case about undocumented immigrants possessing firearms and the Second Amendment); United States v. Meza-Rodriguez, 798 F.3d 664 (7th Cir. 2015), *cert. denied*, 578 U.S. 925 (2016) (same); United States v. Carpio-Leon, 701 F.3d 974 (4th Cir. 2012), *cert. denied*, 571 U.S. 831 (2013) (same); United States v. Huitron-Guizar, 678 F.3d 1164 (10th Cir. 2012), *cert. denied*, 568 U.S. 893 (2012) (same); United States v. Flores, 663 F.3d 1022 (8th Cir. 2011) (per curiam), *cert. denied*, 567 U.S. 938 (2012) (same); United States v. Portillo-Munoz, 643 F.3d 437 (5th Cir. 2011), *cert. denied*, 566 U.S. 963 (2012) (same).

110. *See* Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886) (applying the Fourteenth Amendment to "all persons" within U.S. jurisdictional territory); Plyler v. Doe, 457 U.S. 202, 210 (1982) (applying the Fifth and Fourteenth Amendments to noncitizens, regardless of immigration status); Mathews v. Diaz, 426 U.S. 67, 77–78 (1976) (applying the Fifth and Fourteenth Amendments to undocumented immigrants, regardless of their status under immigration law).

111. U.S. CONST. pmbl.

112. U.S. CONST. amend. I–II, IV, IX–X.

113. District of Columbia v. Heller, 554 U.S. 570, 644 (2008) (Stevens, J., dissenting); *see* D. McNair Nichols, Jr., Note, *Guns and Alienage: Correcting a Dangerous Contradiction*, 73 Wash. & Lee L. Rev. 2089, 2125–27 (2016) (arguing for a consistent interpretation of "the people" across amendments).

there has been pushback in uniformly applying this term to undocumented immigrants when considering whom the Second Amendment protects.[114] Moreover, the Supreme Court has looked at the meaning of "the people" only within the context of certain constitutional amendments, and, in *Heller*, the majority emphasized the importance of taking a uniform, whole-document approach to its meaning.[115]

Throughout its history, the Supreme Court has released several decisions extending constitutional protections to undocumented immigrants.[116] As early as 1886, the Supreme Court held, in no uncertain terms, that the Fourteenth Amendment applied to all individuals within the United States.[117] In *Yick Wo v. Hopkins*,[118] the Court held that "all persons" within the United States "shall have the same right . . . to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens."[119] Furthermore, the Court stated: "the questions we have to consider and decide in these cases, therefore, are to be treated as involving the rights of every citizen of the United States equally with those of the strangers and aliens who now invoke the jurisdiction of

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114. *See, e.g.*, United States v. Sitladeen, 64 F.4th 978, 987 (8th Cir. 2023) (holding that undocumented immigrants are not part of "the people"); United States v. Portillo-Munoz, 643 F.3d 437, 442 (5th Cir. 2011) (deciding that "the people" protected by the Second Amendment does not include undocumented immigrants); United States v. Flores, 663 F.3d 1022, 1023 (8th Cir. 2011) (concluding that Second Amendment protections do not extend to undocumented immigrants because they are within "the people").

115. *See Heller*, 554 U.S. at 579–80 (relying on its holding in *Verdugo-Urquidez*, the Court explains that "the people" is a "term of art" used selectively throughout the Constitution to refer to those people who are part of the national community).

116. *See, e.g.*, Yick Wo v. Hopkins, 118 U.S. 356, 368–69 (1886) (holding that the Fourteenth Amendment applies to people of all backgrounds and "is not confined to the protection of citizens"). This case implicitly assumes that undocumented immigrants fall within the scope of the Fourteenth Amendment and are granted its protections. *Id.; see also Plyler*, 457 U.S. at 210–12 (holding that an "alien" is a "person" under the Fifth and Fourteenth Amendments regardless of lawful or unlawful status); Mathews v. Diaz, 426 U.S. 67, 77–78 (1976) (holding that "aliens", regardless of their immigration status, are protected by the Fifth and Fourteenth Amendments). The Court additionally held that although the Due Process Clause identically protects "aliens" and citizens, they are not "entitled to enjoy all the advantages of citizenship," nor should they be "placed in a single homogenous legal classification." *Mathews*, 426 U.S. at 78.

117. *Yick Wo*, 118 U.S. at 369.

118. 118 U.S. 356 (1886).

119. *Id.* at 369.

the court."[120] In doing so, the Court interpreted "persons" under the Fourteenth Amendment to include undocumented immigrants.[121] Though *Yick Wo* dealt only with the Due Process and Equal Protection Clauses of the Fourteenth Amendment, the Court has applied similar principles to the Fifth Amendment.[122]

In *Mathews v. Diaz*,[123] almost a century after *Yick Wo*, the Court extended Fifth Amendment protections to undocumented immigrants.[124] Although the Court noted that the Fifth and Fourteenth Amendments do not permit undocumented immigrants from enjoying all the benefits of citizenship, it nevertheless maintained that aliens whose presence was "unlawful, involuntary, or transitory" were still entitled to the constitutional protections against deprivation of life, liberty, or property without due process of law.[125] Moreover, the Court's holding implied that the "person[s]" referenced by the Fifth Amendment also includes undocumented immigrants.[126]

Just fourteen years later, in *United States v. Verdugo-Urquidez*,[127] the Supreme Court held that the Fourth Amendment also extends to individuals who have formed voluntary, "substantial connections" with the United States such that they are part of the "national community."[128] While this decision did not directly apply the Fourth Amendment to undocumented immigrants, holding only that a noncitizen *involuntarily* in the United States is not protected by the Fourth Amendment, the decision indicates that the Supreme Court's conception of "the people" may include undocumented immigrants,

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120. *Id.*

121. *Id.*

122. *See, e.g.*, Mathews v. Diaz, 426 U.S. 67, 77–78 (1976) (holding that the Fifth Amendment also protects undocumented immigrants).

123. 426 U.S. 67 (1976).

124. *Id.* at 77.

125. *Id.* at 77–78 (relying on *Wong Wing v. United States*, 163 U.S. 228, 342 (1896), wherein the Court notes that according to the Fifth and Sixth Amendments, all persons within the territory of the United States are entitled to the constitutional protection).

126. *See* Moore, *supra* note 5, at 808 (noting that the Court suggested that a "person" is a term that can be broadly applied).

127. 494 U.S. 259 (1990).

128. *Id.* at 265, 271. The Court additionally discusses that the phrase "the people" is spread throughout the Constitution and Bill of Rights and notes that its repetition suggests that "the people" covered by the Fourth Amendment constitutes the same group of people protected by the First, Second, Ninth, and Tenth Amendments. *Id.* at 265.

assuming they have formed the requisite substantial connections with the country.[129] Moreover, the Court examined several cases relied upon in *Verdugo-Urquidez* to argue that undocumented immigrants are afforded other constitutional rights, finding that such cases establish that "aliens receive constitutional protections when they have come within the territory of the United States and develop[] substantial connections with this country."[130] Federal courts have applied this "substantial connections test"[131] to undocumented immigrants, finding that, should an undocumented immigrant meet the requirements of being voluntarily in the United States and having established

129. *Id.* at 271, 274–75 (noting that Respondent was, at the time of the search, a citizen and resident of Mexico who had no "*voluntary* attachment to the United States" (emphasis added)). Furthermore, the search conducted in this case occurred in Mexico, and the Court held that these circumstances rendered the Fourth Amendment inapplicable. *Id.* at 273. The Court leaves open whether undocumented immigrants are included in "the people" to which the Fourth Amendment refers, and the opinion suggests that the Fourth Amendment may not protect undocumented immigrants. *Id.* at 283 n.7; *see* Moore, *supra* note 5, at 808 (discussing the Supreme Court's broad interpretation of "the people" in *United States v. Verdugo-Urquidez*).

130. *Verdugo-Urquidez*, 494 U.S. at 271. The Court further noted that because Verdugo-Urquidez was a noncitizen who had no voluntary connections to the United States, other cases preserving undocumented immigrants' constitutional rights did not apply to him. *Id.* at 270–71 (explaining that the respondent relied on a "series of cases in which we have held that aliens enjoy certain constitutional rights"). Such cases enumerate that certain classes of immigrants are protected by the Equal Protection Clause, as well as the Fifth, First, Sixth, and Fourteenth Amendments. *See, e.g.*, Plyler v. Doe, 457 U.S. 202, 211–12 (1982) (holding that undocumented immigrants are protected by the Equal Protection Clause); Russian Volunteer Fleet v. United States, 282 U.S. 481, 491–92 (1931) (holding that the Just Compensation Clause of the Fifth Amendment does not categorically exclude undocumented immigrants due to their "lack of recognition by the government of the United States" and because "alien friends are embraced within the terms of the Fifth Amendment"). *But see* Kwong Hai Chew v. Colding, 344 U.S. 590, 596 (1953) (holding that resident "aliens" are "person[s]" under the Fifth Amendment); Bridges v. Wixon, 326 U.S. 135, 148 (1945) (holding that resident "aliens" have First Amendment rights); Wong Wing v. United States, 163 U.S. 228, 238 (1896) (holding that resident "aliens" are entitled to Fifth and Sixth Amendment rights).

131. Other scholars also refer to the *Verdugo-Urquidez* analysis as the "substantial connections test." *See* Alan Mygatt-Tauber, *Rethinking the Reasoning of* Verdugo-Urquidez, 8 IND. J.L. & SOC. EQUALITY 240, 241 (2020) (offering alternatives to the substantial connections test outlined in *Verdugo-Urquidez*).

substantial connections with the country, they are thereby included in "the people" to which the Fourth Amendment refers.[132]

Justice Scalia's majority opinion in *Heller*, to be discussed in more detail in Section D, provides the Court's first insight into what population "the people" refers to within Second Amendment jurisprudence.[133] In analyzing the operative clause, "the right of *the people* to keep and bear arms,"[134] the Court explicitly stated that the Second Amendment codified a "right of the people," referring to an individual, not collective, right to keep and bear arms.[135] This individual right "unambiguously refers to all members of the political community, not an unspecified subset."[136]

To operationally define "the people" in *Heller,* Justice Scalia relied heavily on the Supreme Court's decision in *Verdugo-Urquidez*."[137] In *Verdugo-Urquidez*, the Court held that "the people," as protected by the First, Second, Fourth, 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."[138] Although the majority in *Heller* largely adopted the interpretation of "the people" defined by the Court in

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132. U.S. CONST. amend. IV; *see* United States v. Meza-Rodriguez, 798 F.3d 664, 670 (7th Cir. 2015) (holding that Fourth Amendment protections apply to undocumented immigrants when they have shown "substantial connections" with the United States). The Court relies on a series of other federal cases establishing the same rule and that those involuntarily in the country may not invoke the protections of the Fourth Amendment. *Id.* The *Meza-Rodriguez* Court cited to *United States v. Vilches-Navarrate*, 523 F.3d 1, 13 (1st Cir. 2008), which held that a noncitizen involuntarily in the United States with no prior connection with the country is not protected by the Fourth Amendment and *Martinez-Aguero v. Gonzalez*, 459 F.3d 618, 625 (5th Cir. 2006), which explained that whether a noncitizen may rely on Fourth Amendment protections depends on if the noncitizens are voluntarily in the United States and "[have] accepted some societal obligations," *id.*

133. *See* District of Columbia v. Heller, 554 U.S. 570, 579 (2008) (analyzing the phrase "right of the people" as used throughout the Constitution to bring context to its meaning in the Second Amendment).

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

135. *Heller*, 554 U.S. at 579 (noting that identical language is used only in the First, Second, and Fourth Amendments of the Constitution, and similar language is used in the Ninth Amendment).

136. *Id.* at 580.

137. *See id.* at 580–81 (reiterating that the holding in *Verdugo-Urquidez* strongly presumes that "the people" refers to a Second Amendment individual right).

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

Verdugo-Urquidez, Justice Scalia slightly altered the phrasing by replacing "national" with "political."[139] It is unclear whether Justice Scalia's alteration of the language was meant to limit the Court's interpretation of the group to whom the Second Amendment applies.[140] Nevertheless, the Court neglected to decide who receives Second Amendment rights and made only passing references to "Americans" and "law-abiding citizens."[141] Several lower courts have relied on this language to establish that "the people" does not include undocumented immigrants.[142] For example, in *United States v. Flores*,[143] the Eighth Circuit rejected the appellant's argument that undocumented immigrants are included in "the people" and therefore held that this group is not afforded Second Amendment protections.[144]

Justice Stevens expressed such concerns about the majority's inconsistent application of the meaning of "the people" between the First, Second, and Fourth Amendments in his dissenting opinion.[145] He opined that the majority refers to a narrow "subset" of people protected by the Second Amendment ("law-abiding, responsible citizens"), whereas "the class of persons protected by the First and Fourth Amendments is *not* so limited."[146] Several scholars have

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139. *Heller*, 554 U.S. at 580.

140. *See* Gulasekaram, *supra* note 11, at 1453 (noting that "the *Heller* majority purported to rely on the plurality-backed standard from *Verdugo*, but misquoted and altered its definition of 'the people'" with no further explanation).

141. *Heller*, 554 U.S. at 581, 625.

142. *See, e.g.*, United States v. Sitladeen, 64 F.4th 978, 987 (8th Cir. 2023) (holding that undocumented immigrants "are not included in 'the people' to whom the Second Amendment applies"); United States v. Portillo-Munoz, 643 F.3d 437, 442 (5th Cir. 2011) (deciding that "the people" protected by the Second Amendment does not include undocumented immigrants); United States v. Flores, 663 F.3d 1022, 1023 (8th Cir. 2011) (holding in a four-sentence opinion that the Second Amendment protections "do not extend to aliens illegally present in this country"). As such, both the Fifth and Eighth Circuits have upheld the constitutionality of § 922(g)(5)(A).

143. 663 F.3d 1022 (8th Cir. 2011) (per curiam).

144. *Flores*, 663 F.3d at 1023; *see also Sitladeen*, 64 F.4th at 983–84 (elucidating its decision in *Flores* and discussing its reliance on *Heller*'s references to "law-abiding, responsible citizens" and "members of the political community").

145. *Heller*, 554 U.S. at 644 (Stevens, J., dissenting).

146. *Id.* at 644 (noting that "even felons (and presumably irresponsible citizens as well) may invoke the protections of those constitutional provisions," referring to the First and Fourth Amendments); *see also* Anjali Motgi, *Of Arms and Aliens*, 66 STAN. L. REV. ONLINE 1, 5 (2013) (discussing how the *Heller* majority opinion defines "the people" broadly yet applies Second Amendment rights to a much narrower class of people than those protected by the First and Fourth Amendments).

commented on the importance of a consistent interpretation of "the people" for the Second and Fourth Amendments.[147] Moreover, applying an inconsistent definition of "the people" across various constitutional amendments violates the paramount principle of constitutional interpretation: identical terms are afforded identical meanings.[148]

By gradually granting rights to undocumented immigrants in these cases, the Supreme Court has indicated that undocumented immigrants are a part of "the people" and "persons" to which the Constitution refers.[149] *Heller* may suggest that the Court will construe "the people" to mean citizens within the context of the Second Amendment; however, previous Court decisions have outlined a much different meaning of "the people" in other constitutional provisions.[150]

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147. McNair Nichols, *supra* note 113, at 2126 (contending that the "default position should be a consistent reading of 'the people' throughout the Bill of Rights, which the Framers adopted as a package"); *see also* Matthew Blair, *Constitutional Cheap Shots: Targeting Undocumented Residents with the Second Amendment*, 9 SETON HALL CIRC. REV. 159, 175 (2012) (arguing that, absent other textual distinctions, the identical wording of "the people" in the First, Second, and Fourth Amendments refers to the class of persons recognized by the Supreme Court in *Verdugo-Urquidez*); Motgi, *supra* note 146, at 5 (contending that "[i]f the right to self-defense is truly as prominent among the pantheon of individual rights protected by the Constitution as *Heller*'s progeny would have us believe, . . . 'the people' is best understood as an inclusive indicator of the scope of a right . . . underscoring rather than circumscribing the protections afforded by the First, Second, and Fourth Amendments"). Specifically, D. McNair Nichols, Jr. noted that a narrower interpretation of "the people" in the case of the Second Amendment and not in the Fourth is not warranted by Supreme Court precedent. *Id.* at 2126.

148. *Id.* at 2127.

149. *See* Gulasekaram, *supra* note 11, at 1455 (arguing that Justice Kennedy's concurrence in *Verdugo* suggests that constitutional rights apply to all individuals, not because "the people" denotes a specific group of rightsholders, but rather because essential constitutional safeguards limit government authority).

150. *See* United States v. Verdugo-Urquidez, 494 U.S. 259, 265, 272–73 (1990) (holding that those with substantial connections to the United States have Fourth Amendment rights and that "aliens" who have formed substantial connections with the country may be considered "the people" under the Fourth Amendment); Plyler v. Doe, 457 U.S. 202, 210–12 (1982) (holding that "aliens" are "person[s]" under the Fifth and Fourteenth Amendments, regardless of their immigration status); Mathews v. Diaz, 426 U.S. 67, 77–78 (1976) (holding that the Fifth and Fourteenth Amendments apply to undocumented immigrants and considering them "persons" protected by these amendments regardless of immigration status); Russian Volunteer Fleet v. United States, 282 U.S. 481, 492 (1931) (holding that the Just Compensation Clause of the Fifth Amendment does not exclude "alien[s]"); Wong Wing v. United States, 163 U.S.

Although the Supreme Court has not addressed the issue of whether, under the Second Amendment, undocumented immigrants are included in "the people," the Court has provided guiding principles to determine other Second Amendment questions.[151]

*D. Pre-*Bruen *Means-End Approach to Determining the Constitutionality of Gun Regulations* – District of Columbia v. Heller

To date, the Supreme Court has decided only three critical Second Amendment cases that changed the landscape for gun legislation in the United States[152]: *District of Columbia v. Heller* in 2008, *McDonald v. City of Chicago*[153] in 2010,[154] and *New York State Rifle & Pistol Association v. Bruen* in 2022.[155] Significantly, all three cases fail to explicitly address the "who" of the Second Amendment.[156] However, the three cases all provided guidelines for lower courts in their attempts to determine a gun regulation's constitutionality.[157] Specifically, the Court's decision in *Heller* was understood by lower courts to prescribe a two-part test to determine whether a gun regulation passes constitutional muster, as well as clarifying longstanding questions regarding the reach of the Second Amendment.[158]

228, 238 (1896) (holding that all persons within the territorial jurisdiction of the United States, including "aliens," are protected by the Fifth and Sixth Amendments); Yick Wo v. Hopkins, 118 U.S. 356, 368–69 (1886) (holding that the Fourteenth Amendment applies to undocumented immigrants).

151. *See* District of Columbia v. Heller, 554 U.S. 570, 579–81 (2008) (holding that "right of the people" for purposes of the Second Amendment refers to individual rights and not collective rights).

152. *See* Gulasekaram, *supra* note 11, at 1440 (noting that both *McDonald* and *Bruen* expanded the substantive scope of the Second Amendment right).

153. 561 U.S. 742 (2010).

154. *Id.* at 858 (holding that the Fourteenth Amendment's incorporation clause makes the Second Amendment applicable to the states). This particular case is beyond the scope of this Comment, as the Statute is federal and not subject to issues of state incorporation of the Second Amendment.

155. N.Y. State Rifle & Pistol Ass'n. v. Bruen, 597 U.S. 1 (2022).

156. *See* McNair Nichols, *supra* note 113, at 2102 (noting that "[t]he Supreme Court has not directly spoken on who constitutes 'the people' afforded Second Amendment rights").

157. *See, e.g.*, *Heller*, 554 U.S. at 578–79, 634–35 (analyzing the text and brief historical context of the Second Amendment to determine where guns should not be allowed, who should not possess them, and what guns should not be included in Second Amendment protections).

158. *Id.* at 626–29.

First, the Court determined that the text of the Second Amendment, particularly the words "the right of *the people* to keep and bear arms,"[159] codified an individual, not collective, right.[160] Accordingly, the Court held that a blanket prohibition on handgun ownership is unconstitutional.[161] Although the Court did not enumerate a specific level of scrutiny to apply to gun regulations—and, according to *Bruen*, did not apply or prescribe means-end scrutiny at all[162]—it provided an extensive interpretation of the meaning of the Second Amendment.[163] Writing for the majority, Justice Scalia stated in no uncertain terms that constitutional rights, such as the Second Amendment, are "enshrined with[in] the scope they were understood to have when the people adopted them."[164] Furthermore, though *Heller* interpreted the Second Amendment to codify an individual right to keep and bear arms, the opinion was clear that this right was not unlimited.[165] Moreover, the decision was not meant to call into question historical prohibitions on certain types of individuals, locations, and regulations of firearm trade.[166] In their attempts to apply *Heller* to Second Amendment challenges, federal courts apply a two-part framework, combining a historical inquiry into the Second Amendment with means-end scrutiny to analyze the Second Amendment challenge.[167]

The first part of the federal courts' analysis is straightforward and requires a court to perform an "ordinary-meaning textual analysis of the Second Amendment" to determine "whether a challenged law

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

160. *Heller*, 554 U.S. at 579–81.

161. *Id.* at 636.

162. N.Y. State Rifle & Pistol Ass'n. v. Bruen, 597 U.S. 1, 19–20 (2022).

163. *See Heller*, 554 U.S. at 626–27, 634–35 (reading the Second Amendment as establishing a limited individual right to be understood by considering the context surrounding the date of enactment).

164. *Id.* at 634–35 (further noting that this fact stands regardless of "whether or not future legislatures or [sic] even future judges think that scope too broad").

165. *Id.* at 595.

166. *Id.* at 626–27 (stating that the opinion does not prevent laws prohibiting possession of firearms by felons and the mentally ill, laws prohibiting carrying firearms in sensitive areas such as schools or government buildings, or laws imposing conditions on the commercial sale of firearms).

167. *See Bruen*, 597 U.S. at 17 (discussing how the Court of Appeals adopted a two-step framework after *Heller*).

burdens conduct within the scope of the Second Amendment."[168] If the Second Amendment does cover such conduct, a court may move on to the second part of the evaluation: a means-end analysis of the gun regulation using either strict or intermediate scrutiny.[169] Although the majority in *Heller* did not actually *apply* means-end scrutiny to the D.C. gun regulation—stating that it would have failed under any level of scrutiny—this two-pronged test has nonetheless become lower federal courts' framework for performing a constitutional review of gun regulations.[170] Under the second prong of the test, the government must meet, at a minimum, intermediate scrutiny.[171] Although *Heller* provided the necessary framework to determine whether a gun regulation is constitutional, lower federal courts applied this test differently, resulting in a three-way circuit split regarding the constitutionality of the Statute.[172]

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168. Jacob D. Charles, *The Dead Hand of a Silent Past:* Bruen, *Gun Rights, and the Shackles of History*, 73 DUKE L.J. 67, 82, 84 (2023) (discussing the "methodological approach" in *Heller* where the Court "began with an ordinary-meaning textual analysis of the Second Amendment, continued on to confirm that conclusion was consistent with history, and then used history 'to demark the limits on the exercise of that right'").

169. *Id.* at 84.

170. *See Bruen*, 597 U.S. at 23 (explaining that the majority in *Heller* "specifically ruled out" means-end scrutiny by relying only on "text and history"). This is seen in the majority's statement that the "historically unprecedented nature of the District's ban" was determinative in the case, not a means-end analysis. *Id.*; *see also* Charles, *supra* note 168, at 83–84 (analyzing how lower courts interpret *Heller* differently and that their use of means-end scrutiny was merely filling the gaps the *Heller* decision left by "employing the same framework used elsewhere in constitutional litigation"); *see also, e.g.*, United States v. Marzzarella, 614 F.3d 85, 89 (3d Cir. 2010) (discussing the court's understanding of *Heller*'s two-pronged test, which required applying intermediate or strict scrutiny); United States v. Skoien, 587 F.3d 803, 808–09 (7th Cir. 2009), on reh'g, 614 F.3d 638 (7th Cir. 2010) (en banc) (observing that *Heller* declined to set a standard of review and stating that if a law regulates conduct under the Second Amendment, its validity depends on the government's ability to meet the level of means-end scrutiny that applies).

171. *See* Charles, *supra* note 168, at 83–85 (identifying eleven out of twelve circuits which have adopted the two-part framework that applies intermediate or strict scrutiny).

172. *See* Gulasekaram, *supra* note 11, at 1439–40 (acknowledging that while lower federal courts have inconsistent views on the scope of the "people," they all have upheld the Statute).

*E. The Three Legal Approaches to § 922(g)(5)(A) – Circuit Split Pre-*Bruen

Until the Fifth Circuit's 2011 decision in *United States v. Portillo-Munoz*,[173] no federal court had addressed whether the Second Amendment applied to undocumented immigrants.[174] Since *Portillo-Munoz*, five other circuits have also issued decisions, each falling into one of three schools of thought.[175] The Eighth and Fifth Circuits released opinions just months apart in 2011, *Portillo-Munoz* and *Flores*, both holding that "the people" of the Second Amendment does not include undocumented immigrants.[176] Several circuits, including the Second, Ninth, and Tenth, were reluctant to decide whether the Second Amendment extends the constitutional right to bear arms to undocumented immigrants and instead *assumed* without deciding that "the people" includes undocumented immigrants.[177] The Seventh Circuit stands alone in unequivocally deciding that undocumented

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173. 643 F.3d 437 (5th Cir. 2011).

174. *See* United States v. Huitron-Guizar, 678 F.3d 1164, 1166 (2012) (illustrating challenges to other subsections of § 922(g) and noting that "last year," the Fifth Circuit and Eighth Circuit heard a case regarding the federal statute, citing no other cases that have addressed it).

175. *See* United States v. Perez, 6 F.4th 448, 453 (2d Cir. 2021) (declining to determine whether undocumented immigrants have a Second Amendment right but finding that § 922(g)(5) is a permissible restriction); United States v. Torres, 911 F.3d 1253, 1261 (9th Cir. 2019) (assuming without deciding that undocumented immigrants fall within the scope of the Second Amendment for the purposes of the two-part framework analysis); United States v. Meza-Rodriguez, 798 F.3d 664, 672 (7th Cir. 2015) (finding that the Second Amendment applies to undocumented immigrants while noting that "the right to bear arms is not unlimited"); *Huitron-Guizar*, 678 F.3d at 1169 (assuming that even if undocumented immigrants are protected by the Second Amendment, § 922(g)(5) is constitutional); United States v. Flores, 663 F.3d 1022, 1023 (8th Cir. 2011) (per curiam) (holding that Second Amendment protections do not extend to undocumented immigrants).

176. United States v. Portillo-Munoz, 643 F.3d 437, 442 (5th Cir. 2011) (holding that § 922(g)(5) is constitutional under the Second Amendment); *Flores*, 663 F.3d at 1023 (relying on the Fifth Circuit's decision in *Portillo-Munoz* to deny Second Amendment protections to undocumented immigrants).

177. *See Perez*, 6 F.4th at 453 (declining to decide whether the Second Amendment protects undocumented immigrants to avoid "introducing difficult questions into our jurisprudence"); *Torres*, 911 F.3d at 1261 (finding the question of whether undocumented immigrants have Second Amendment rights to be "large and complicated" and therefore imprudent for the court to decide); *Huitron-Guizar*, 678 F.3d at 1169 (assuming that at least some undocumented immigrants have a Second Amendment right to avoid deciding a significant constitutional question).

immigrants are considered part of "the people" to whom the Second Amendment applies.[178]

1. The Second Amendment does not apply to undocumented immigrants

The Fifth and Eighth Circuits determined that the Second Amendment does not protect undocumented immigrants and deemed the Statute constitutional.[179] The Fifth Circuit's decision in *Portillo-Munoz* comprehensively analyzed why the court found that undocumented immigrants should be denied the Second Amendment right to keep and bear arms, which the Eighth Circuit has relied on.[180] Relying primarily on *Heller's* verbiage, the court determined the meaning of "the people" within the context of the Second Amendment to be exclusive of undocumented immigrants, holding that the Supreme Court's use of the terms "law-abiding, responsible citizens," "members of the political community," and "all Americans" invalidated the Respondent's argument that Second Amendment protections extended to undocumented immigrants.[181] Furthermore, the Fifth Circuit examined the Supreme Court's interpretation of "the people" in *Verdugo-Urquidez*, noting that neither its own decisions nor the Supreme Court explicitly held that the Fourth Amendment "extends to a native and citizen of another nation who entered and remained in the United States illegally."[182]

The Fifth Circuit then distinguished the Fourth and Second Amendments based on each right's nature.[183] The court asserted that the Fourth Amendment was a "protective right" to prevent government

178. *Meza-Rodriguez*, 798 F.3d at 672 (reasoning that an undocumented immigrant has Second Amendment rights when they live continuously in the United States and have substantial connections with the country).

179. *See Portillo-Munoz*, 643 F.3d at 442 (reasoning that the Constitution does not prohibit all differences in government treatment between citizens and undocumented immigrants); *Flores*, 663 F.3d at 1023 (agreeing with the Fifth Circuit that undocumented immigrants have no Second Amendment rights).

180. *See Portillo-Munoz*, 643 F.3d at 440–42 (deciding that undocumented immigrants do not fall within the scope of the Second Amendment because they are not law-abiding citizens and because the Second Amendment, as an affirmative right, may not be extended to undocumented immigrants); *see also Flores*, 663 F.3d at 1023 (citing *Portillo-Munoz* as its guidance in deciding that the Second Amendment does not protect undocumented immigrants).

181. *Portillo-Munoz*, 643 F.3d at 440 (noting that undocumented immigrants are neither law-abiding citizens nor are they members of the political community).

182. *Id.* at 440.

183. *Id.* at 440–41.

abuses, and was inherently different in its application than the Second Amendment, which the court categorized as strictly an "affirmative right," granting individuals the ability to engage in certain conduct.[184] In distinguishing the two amendments, the court justified its finding that the Second Amendment does not apply to undocumented immigrants because affirmative rights may be extended to fewer groups than protective rights.[185] The court also relied on the Supreme Court's longstanding opinion that "Congress has the authority to make laws governing the conduct of aliens that would be unconstitutional if made to apply to citizens,"[186] as well as its precedent holding that it is constitutional to distinguish between governmental treatment of lawful and unlawful immigrants.[187] As a result, the Fifth Circuit upheld the Statute as constitutional.[188]

The Eighth Circuit followed suit just one year later in *United States v. Flores*, where the court "tersely disposed"[189] of the Respondent's argument that undocumented immigrants were part of "the people" to whom the Second Amendment applies, doing so in only a four-sentence opinion.[190] The per curiam opinion stated that "the protections of the Second Amendment do not extend to aliens illegally present in this country."[191] No other circuits that have evaluated challenges to the Statute have explicitly excluded undocumented immigrants from "the people" of the Second Amendment.[192] Rather, some circuits refrained from explicitly determining the question,

184. *Id.* at 441.

185. *Id.* (noting that it is appropriate to restrict certain groups from protective rights because their purpose differs from that of affirmative rights).

186. *Id.* at 442–44.

187. *Id.* (citing Lynch v. Cannatella, 810 F.2d 1363, 1375 (5th Cir. 1987)).

188. *Id.* at 442.

189. United States v. Sitladeen, 64 F.4th 978, 983 (8th Cir. 2023).

190. *Id.* (citing United States v. Flores, 663 F.3d 1022, 1023 (8th Cir. 2011) (per curiam)).

191. *Flores*, 663 F.3d at 1023.

192. *See* Charlotte Nichols, Note, *Second Amendment Rights Come Second to Citizenship: Why Illegal Immigrants Are Not Included in "The People" of the Second Amendment*, 50 U. MEM. L. REV. 510, 525–26 (discussing the circuit split with the Fifth, Fourth, and Eighth Circuits finding illegal immigrants are not part of "the people" while the Seventh Circuit has found that the Second Amendment protects illegal immigrants).

instead assuming without analysis that the Second Amendment applies to undocumented immigrants.[193]

2. Assuming, without deciding, the Second Amendment applies to undocumented immigrants

The Ninth and Tenth Circuits released strikingly similar decisions in *United States v. Torres*[194] and *United States v. Huitron-Guizar*,[195] respectively.[196] In its 2012 decision, the Tenth Circuit in *Huitron-Guizar* expounded on the meaning of "the people"[197] and held that the Supreme Court's use of the phrase "citizen" was not dispositive for the purpose of deciding who the Second Amendment protects, and did not determinatively exclude undocumented immigrants.[198] Furthermore, the court emphasized its deference to congressional authority in distinguishing statutes between citizens and noncitizens, as well as lawfully and unlawfully present immigrants.[199] The Ninth Circuit followed a very similar rationale in *United States v. Torres*, noting that the Supreme Court provided insufficient guidance on whether undocumented immigrants fall within the scope of the Second Amendment.[200] Additionally, following prior cases in sister circuits, both courts applied intermediate scrutiny, finding that the Statute was

193. *See* United States v. Perez, 6 F.4th 448, 450 (2d Cir. 2021), *cert. denied*, 142 S. Ct. 1133 (2022) (explaining that this analysis introduces difficult questions into its jurisprudence, and, therefore, "[a]ssuming without deciding that, even as an undocumented alien, he is entitled to Second Amendment protection").

194. 911 F.3d 1253 (9th Cir. 2019).

195. 678 F.3d 1164 (10th Cir. 2012).

196. *Compare Torres*, 911 F.3d at 1261 (finding that the majority in *Heller* did not provide enough clarity to determine whether undocumented immigrants are a part of "the people" and thus are only assuming that the Second Amendment protects this class of people), *with Huitron-Guizar*, 678 F.3d at 1168–70 (assuming that "the people" of the Second Amendment includes undocumented immigrants, but hesitating to make this explicit determination because the Supreme Court did not provide sufficient guidance), *and Perez*, 6 F.4th at 451–53 (discussing the court's hesitance to determine whether "the people" includes undocumented immigrants to avoid undermining other constitutional protections afforded to undocumented immigrants by way of their inclusion in "the people").

197. *Huitron-Guizar*, 678 F.3d at 1168–70 (clarifying that determining *who* was included in "the people" covered by the Second Amendment was not the purpose of *Heller*, but that the purpose was only to determine whether the Second Amendment protected an individual or a collective right).

198. *Id.*

199. *Id.* at 1170.

200. *Torres*, 911 F.3d at 1261.

constitutional.[201] Specifically, both circuits credited the government's interest in public safety by way of preventing undocumented immigrants from firearm possession due to their ability to live below the law and their willingness to defy the law, as shown by their unlawful entry to the United States, and thus found the regulation sufficiently tailored to withstand intermediate scrutiny.[202]

The Second Circuit's decision in *United States v. Perez* was the most recent decision to assume without deciding that undocumented immigrants fall within the scope of the Second Amendment.[203] The court's decision relied heavily on *Heller* and, specifically, its suggestions of the meaning of "the people."[204] Although the court acknowledged that "presumably at least some noncitizens are covered by the Second Amendment," it refused to determine whether undocumented immigrants, specifically, are covered.[205] Regardless of its assumption that undocumented immigrants have Second Amendment protections, the Second Circuit nevertheless found that the Statute was constitutional under intermediate scrutiny.[206] In its application of intermediate scrutiny, the Second Circuit determined that the government had a substantial interest in public safety and that prohibiting undocumented immigrants, who are less easily regulated,

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201. *Huitron-Guizar*, 678 F.3d at 1169; *Torres*, 911 F.3d at 1255.

202. *See Huitron-Guizar*, 678 F.3d at 1170 (concluding that Congress may want to prevent undocumented immigrants from purchasing firearms as their status makes it difficult for Congress to trace their registration of guns because, *inter alia*, their identification can be easily falsified); *Torres*, 911 F.3d at 1264 (finding that the government has a legitimate interest in "disarm[ing] groups" who do not comply with the laws and responsibilities that come with being a U.S. citizen (quoting *Binderup v. Att'y Gen. U.S.*, 836 F.3d 336, 390–91 (3d Cir. 2016) (en banc)).

203. United States v. Perez, 6 F.4th 448, 454 (2d Cir. 2021), *cert. denied*, 142 S. Ct. 1133 (2022).

204. *Id.* at 452–53 (noting that the Supreme Court in *Heller* "left a 'vast *terra incognita*' as to what conduct or characteristics disqualify a person from the Second Amendment's protections").

205. *Id.* at 452 (quoting *United States v. Jimenez*, 895 F.3d 228, 233 n.1 (2d Cir. 2018)). The court notes that because Respondent is an undocumented immigrant without access to political processes, he may not fit into *Heller*'s suggestion that "the people" only refers to those who are part of the political or national community. *Id.* Further, the court expresses concern about introducing this issue into its jurisprudence for fear of undermining other determinations of what "the people" means in the context of other constitutional amendments. *Id.*

206. The court applied intermediate scrutiny, rather than strict scrutiny, stating that the "core of the Second Amendment right identified in *Heller*" was the right of self-defense in the home, not an interest in broad possession of firearms. *Id.* at 454.

from possessing firearms bore a substantial relation to the achievement of that goal.[207] Nevertheless, without more guidance from the Supreme Court about to whom the Second Amendment applies, these circuits have refrained from making such a determination, hence their language "assuming" without deciding that the Second Amendment protects undocumented immigrants.[208]

3. Undocumented immigrants are considered part of "the people" covered by the Second Amendment

The Seventh Circuit is the only circuit to determine that undocumented immigrants who have developed substantial connections with the United States are considered part of "the people" and are thus protected by the Second Amendment.[209] In *United States v. Meza-Rodriguez*,[210] the court found that *Heller*'s determination that the First, Second, and Fourth Amendments all use the phrase "the people" identically, coupled with the reasoning in *Verdugo-Urquidez*, was sufficient to overcome *Heller*'s "passing references" to "law-abiding, responsible citizens," "all Americans," and "members of the political community."[211] Furthermore, the Seventh Circuit argued that these descriptors do not define "the people" within the context of the Second Amendment.[212]

Meza-Rodriguez provides substantial insight into the congressional purposes behind the Statute, namely that undocumented immigrants

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207. The government asserted public safety as its rationale, achieving this goal through "preventing individuals who live outside the law from possessing guns, . . . assisting the government in regulating firearm trafficking by preventing those who are beyond the federal government's control from distributing and purchasing guns, and . . . preventing those who have demonstrated disrespect for our laws from possessing firearms." *Id.* at 455.

208. *See* United States v. Huitron-Guizar, 678 F.3d 1164, 1169 (10th Cir. 2012) (avoiding the constitutional question by assuming that the Second Amendment grants constitutional rights to at least some undocumented immigrants); *see also* United States v. Torres, 911 F.3d 1253, 1265 (9th Cir. 2019) (assuming that undocumented immigrants hold some degree of Second Amendment rights when issuing its decision); *Perez*, 6 F.4th at 450 (assuming without deciding that undocumented immigrants are entitled to Second Amendment protections).

209. *Meza-Rodriguez*, 798 F.3d 664, 672 (7th Cir. 2015).

210. 798 F.3d 664 (7th Cir. 2015).

211. *Id.* at 669–70 (noting the importance of consistency when dealing with identical phrasing in different amendments and "respecting the fact that the first ten amendments were adopted as a package"); District of Columbia v. Heller, 554 U.S. 570, 580–81, 635 (2008).

212. *Meza-Rodriguez*, 798 F.3d at 669–70.

"are able purposefully to evade detection by law enforcement."[213] The court agreed with the government's position on this matter, reinforcing the concern that "unauthorized noncitizens often live 'largely outside the formal system of registration, employment, and identification, [and] are harder to trace and more likely to assume a false identity.'"[214] Furthermore, the court noted the validity of governmental interests in preventing those who have "already . . . disrespected the law" from possessing firearms but doubted the government's assertions that unauthorized immigrants were "more likely to commit future gun-related crimes than persons in the general population."[215]

In its analysis, the court applied *Verdugo-Urquidez*'s substantial connections test to determine whether the Defendant's conduct fell within the scope of the Second Amendment.[216] The court held that Meza-Rodriguez had sufficient connections because he was voluntarily in the United States and had "extensive ties with this country"; accordingly, the court decided that Meza-Rodriguez was "entitled to invoke the protections of the Second Amendment."[217] Despite upholding the Statute under intermediate scrutiny as an appropriate exercise of congressional authority, the court rejected the government's claims that unlawful residents have shown a "willingness to defy [the] law."[218] The court maintains that the link between undocumented immigrants to firearms "is unclear, and unlawful presence in the country, is not, without more, a crime."[219]

While *Heller* provided guidelines for the federal courts to follow in deciding the constitutionality of the Statute, this highly contentious circuit split shows that the Court has left many questions

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213. *Id.* at 673.

214. *Id.* (alteration in the original) (quoting United States v. Huitron-Guizar, 678 F.3d 1164, 1170 (10th Cir. 2012)).

215. *Id.*

216. *Id.* at 670–72 (expounding on the substantial connections test, which includes the requirements of voluntary presence and acceptance of societal obligations).

217. *Id.* at 670–71 (noting that Meza-Rodriguez resided in the United States for over twenty years, attended public schools, and maintained close relationships with family and friends, which constituted "much more than the connections [the] sister circuits . . . found to be adequate").

218. *Id.* at 673 (disagreeing that undocumented immigrants are likely to abuse firearms).

219. *Id.* at 672–73 (citing Arizona v. United States, 567 U.S. 387, 407 (2012)).

unanswered.[220] Furthering the confusion following *Heller*, the Court disposed of means-end scrutiny for Second Amendment purposes in 2022, again changing the landscape of Second Amendment jurisprudence.[221]

F. The Evolution of Second Amendment Jurisprudence in Determining the Constitutionality of Gun Regulations (i.e., New Bruen *Test Prescribing a Textual-Historical Approach)*

The Court's most recent Second Amendment decision, *N.Y. State Rifle & Pistol Association v. Bruen*, held that New York's proper cause requirement, requiring applicants to "demonstrate a special need for self-protection distinguishable from that of the general community," was unconstitutional.[222] The Court declined to adopt the two-part approach used by the lower federal courts to decide a gun regulation's constitutionality[223] and instead outlined a new two-part test.[224] First, a court must determine if the Second Amendment's plain text covers the conduct regulated by law; if so, the Constitution presumptively protects such conduct.[225] Second, it is no longer sufficient for the government to assert an "important governmental interest."[226] Instead, the burden on the government is to show that the gun law is consistent with the United States' historical tradition of firearm regulation.[227] Notably, the Court explained that historical regulations need not be a "historical twin" but that they must be "relevantly similar" to the challenged

220. *See* Blair, *supra* note 147, at 185 (noting that the *Heller* decision provided some guidance for handling cases with statutes prohibiting firearm possession by undocumented immigrants but left many questions unanswered, including what "standard of review" should be used in reviewing gun laws).

221. *See* N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 17 (2022) (declining to adopt means-end scrutiny for Second Amendment issues).

222. *Id.* at 70 (quoting *In re* Klenosky, 428 N.Y.S.2d 256, 257 (N.Y. App. Div. 1980)).

223. *Id.* at 17.

224. *Id.* at 17–19.

225. *Id.*

226. *Id.* (quoting Kachalsky v. County of Westchester, 701 F.3d 81, 96 (2d Cir. 2012)).

227. *Id.* at 19.

regulation.[228] This Comment will refer to this new test as *Bruen*'s "textual-historical" approach.[229]

While the first part of the textual-historical approach largely mirrors part one in *Heller*, the emphasis on performing a historical inquiry is an unprecedented change in constitutional jurisprudence.[230] If a court concludes that an individual's conduct is covered by the Second Amendment, the government can only rebut this presumption by justifying the regulation through demonstrating that it is "consistent with the Nation's historical tradition of firearm regulation."[231] In performing this analysis, the Court notes that if the regulation at issue focuses on general social issues that existed surrounding the Second Amendment's ratification, the government must show a "*distinctly similar* historical regulation."[232] The Court emphasized that prior generations addressing the same issue using "materially different means" constitutes evidence that a modern regulation is unconstitutional.[233]

When addressing issues that were *not* pervasive at the time of the founding, the *Bruen* majority discussed the need for a "more nuanced approach," where a court should use analogical reasoning to determine whether a gun regulation meets constitutional muster.[234] Accordingly, modern gun regulations must be "relevantly similar"[235] to historical gun regulations in that they either "burden self-defense in

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228. *Id.* at 29–30 (explaining that modern laws pass constitutional muster and should be upheld when there is a "well-established and representative historical analogue," and the regulation does not have to be a "historical twin").

229. Given the recency of the *Bruen* decision, there is not yet a consistently used term for the test articulated in *Bruen*. This Comment will use the term "textual-historical" approach.

230. Charles, *supra* note 168, at 88 (discussing that while history has always been one part of the Supreme Court's two-part constitutional inquiry, *Bruen* ignores the traditional method of means-end scrutiny and makes history alone the decisive factor); *see also* Gulasekaram, *supra* note 11, at 1464 (noting that the *Bruen* majority's reliance on text and history casts aside the traditional "tiers of scrutiny" approach to Second Amendment constitutional review).

231. Charles, *supra* note 168, at 89 (quoting *Bruen*, 597 U.S. at 24).

232. *Bruen*, 597 U.S. at 26 (emphasis added).

233. *Id.* at 26–27. In applying this rationale, the Court found New York's proper cause requirement unconstitutional because historical regulations addressing the issue of public safety did not categorically restrict individuals' right to bear arms subject to a "special need." *Id.* at 70.

234. *Id.* at 27.

235. *Id.* at 28–29 (quoting Cass R. Sunstein, *On Analogical Reasoning*, 106 HARV. L. REV. 741, 773 (1993)).

the same or similar ways" or the two laws were "justified on the same or similar grounds."[236] This second prong, the *why* factor, is essential as it "prevents burdensome historical regulations 'that were enacted for one purpose from being used as a basis to impose burdens for other purposes.'"[237] In other words, modern-day regulations must be justified by an adequately similar purpose to historical regulations to constitute a sufficient historical analogue.[238] This standard provides guidelines for the federal courts to follow in deciding the constitutionality of a gun regulation and prescribes that the government must show that a modern gun regulation is a "well-established and representative historical *analogue*."[239]

When applying the historical analysis to New York's proper cause requirement, the majority in *Bruen* stated that "not all history is created equal" and, relying on *Heller*, emphasized the importance of historical evidence when the Constitutional right was adopted.[240] Because the Second Amendment was adopted in 1791 and the Fourteenth in 1868, the Court asserted that historical evidence that "long predates" either date may not accurately depict the scope of the right.[241] The Court insisted on "guard[ing] against giving postenactment history more weight than it can rightly bear."[242]

In its promulgation of the textual-historical approach to Second Amendment challenges, the Court dispensed with the tiers of scrutiny method traditionally used in constitutional review.[243] Furthermore, *Bruen*'s abandonment of traditional means-end analysis has resulted in

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236. Charles, *supra* note 168, at 90 (noting that "[t]hese 'how' and 'why' metrics were not meant to be comprehensive . . . but [were] important considerations in performing the required analogical reasoning").

237. Leo Bernabei, *Taking Aim at New York's Concealed Carry Improvement Act*, 92 FORDHAM L. REV. 103, 110 n.48 (2023) (quoting NICHOLAS J. JOHNSON, DAVID B. KOPEL, GEORGE A. MOCSARY, E. GREGORY WALLACE & DONALD KILMER, 2022 SUPPLEMENT FOR FIREARMS LAW AND THE SECOND AMENDMENT: REGULATION, RIGHTS, AND POLICY 89 n.34 (3d. ed. Supp. 2022)).

238. *Id.*

239. *Bruen*, 597 U.S. at 30 (explaining the analogical reasoning utilized to determine the validity of modern gun regulations).

240. *Id.* at 34.

241. *Id.*

242. *Id.* at 35. (stating that "[i]t is true that in *Heller* we reiterated that evidence of 'how the Second Amendment was interpreted from immediately after its ratification through the end of the [nineteenth] century' represented a 'critical tool of constitutional interpretation'").

243. *Id.* at 24 (holding that "the Courts of Appeals' [use of a means-end analysis] is inconsistent with *Heller*'s historical approach and its rejection of means-end scrutiny").

speculation by one scholar that the Second Amendment's scope will be substantially broadened.[244] Furthermore, because the Court provided, at best, an ambiguous standard for what constitutes a historical analogue, federal courts contending with Second Amendment issues, particularly § 922(g)(5)(A), will likely shy away from delving too deeply into the historical inquiry prescribed by *Bruen*.[245] This hesitance is illustrated in the Eighth Circuit's case, *United States v. Sitladeen*.[246]

G. What's Next: Applying Bruen*'s Textual-Historical Approach to § 922(g)(5)(A)*

The Eighth Circuit is the only federal circuit court that has addressed the "who" of the Second Amendment post-*Bruen*.[247] However, because of its prior decision in *Flores*, the court did not perform a historical inquiry regarding gun regulations prohibiting undocumented immigrants from possessing firearms.[248] Instead, the Eighth Circuit stopped after the first half of the textual-historical approach, holding again that undocumented immigrants are not within the scope of the Second Amendment because they are not included in "the people."[249] Although the Eighth Circuit fell short of providing a historical justification for upholding the federal ban on undocumented immigrants' firearm possession, it did reference *Bruen*'s emphasis on looking to regulations in effect surrounding the ratification of the Second Amendment, as these regulations "carry more weight in the analysis than those that existed long before or after

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244. *See* Charles, *supra* note 168, at 178 (noting the Court's historical test has the potential to substantially broaden the Second Amendment's scope as it appears *Bruen*'s novel approach mandates a finding that a contemporary gun law lacks validity unless it is firmly rooted in the distant past, regardless of the state's compelling interest or the regulation's narrow focus).

245. *See id.* at 72 & n.14 (citing United States v. Rahimi 61 F.4th 443, 460–61) (explaining how a lack of valid historical analogues renders *Bruen*'s new approach unconstitutional).

246. 64 F.4th 978 (8th Cir. 2023).

247. *See id.* at 983 (stating that the argument raised by Sitladeen was rejected in *United States v. Flores* in a four-sentence opinion where the court held "the protections of the Second Amendment do not extend to aliens illegally present in this country" (quoting 663 F.3d 1022, 1022–23 (8th Cir. 2011))).

248. *Id.* at 985 ("[W]e must first ask whether [the Statute] governs conduct that falls within the plain text of the Second Amendment . . . . In our view, *Flores* already answers [this] question, and its answer is no.").

249. *Id.*

that period."[250] Ultimately, the court upheld its precedent established in *Flores*, determining that undocumented immigrants are not part of "the people" to whom Second Amendment protections apply.[251] As such, the Eighth Circuit upheld the Statute as a constitutional limitation on the Second Amendment.[252]

II. ANALYSIS

In prescribing the new textual-historical test, the *Bruen* majority clarified that conduct regulated by a statute *must* fall under the plain text of the Second Amendment to be constitutionally protected.[253] The Court emphasized that the means-end test, in which the government must assert an important interest, was no longer sufficient.[254] Instead, the government must show that current gun regulations have an adequate historical analogue in gun regulations existing around the time of the ratification of the Second or Fourteenth Amendment.[255] In applying *Bruen*'s textual-historical approach, this Part argues that undocumented immigrants are considered a part of "the people" to whom the Second Amendment refers and, consequently, that the plain text of the Second Amendment protects undocumented immigrants.[256] Furthermore, the history and tradition of gun regulations in the United States, particularly surrounding the ratification of the Second and Fourteenth Amendments, does not provide a sufficient historical analogue to allow a blanket prohibition on the possession of firearms by undocumented immigrants today.[257]

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250. *Id.* at 985 (citing N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 34 (2022)).

251. *Id.* at 987.

252. *Id.*

253. *Bruen*, 597 U.S. at 17 (explaining that this principle aligns with the Court's stance in *Heller*, which established that when the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct).

254. *Id.*

255. *Id.* at 17, 24 (stating that the government must demonstrate that its regulation aligns with the nation's historical tradition of firearm regulation to justify it, as only then can a court conclude that an individual's conduct falls outside the Second Amendment's "unqualified command"). The Court additionally notes that "not all history is created equal" because "Constitutional rights are enshrined with the scope they were understood to have *when the people adopted them*." (emphasis added) (internal quotations omitted) (quoting District of Columbia v. Heller, 554 U.S. 570, 634–35 (2008)).

256. *See infra* Section II.A.

257. *See infra* Section II.B.

A. Undocumented Immigrants Are Included in "the People," thus the Plain Text of the Second Amendment Protects Their Condcut

In *Bruen*, the Supreme Court emphasized the supremacy of the Constitution's plain text in determining a gun regulation's constitutionality under the Second Amendment, particularly when there is an ambiguous constitutional provision.[258] *Bruen*'s prescription of the textual-historical test necessitates that, for a regulation to be constitutional, the Second Amendment's plain text must cover the conduct regulated by the law.[259] Knowing whether undocumented immigrants are considered part of "the people" is essential to determine whether their possession of firearms is conduct falling within the scope of the Second Amendment.[260] Given the Supreme Court precedent concerning the meaning of "the people" applied to other constitutional provisions, this Section argues that "the people" applies to undocumented immigrants under the Second Amendment.[261]

In *Heller* and *Verdugo-Urquidez*, the Supreme Court noted the similarities between the First, Second, and Fourth Amendments concerning the use of "the people," indicating that there should be consistency in the Court's interpretation of the term.[262] Moreover, in *Heller*, Justice Stevens criticized the majority's inconsistency in restricting the class of people to whom the Second Amendment applies

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258. *Bruen*, 597 U.S. at 36 ("[T]o the extent later history contradicts what the text says, the text controls. . . . Thus, 'post-ratification adoption or acceptance of laws that are *inconsistent* with the original meaning of the constitutional text obviously cannot overcome or alter that text.'" (quoting Heller v. District of Columbia, 670 F.3d 1244, 1274 n.6 (2011) (Kavanaugh, J., dissenting)). Nevertheless, the Court acknowledges that when a governmental practice has been observed openly, extensively, and without opposition since the inception of the Republic, this practice should influence our understanding of an unclear constitutional provision. *Id.* (citing NLRB v. Canning, 573 U.S. 513, 572 (2014) (Scalia, J., concurring)).

259. *Id.* at 18.

260. The Court held in *Bruen* that "when the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct." *Id.* at 2126.

261. *See supra* Section I.C.

262. *See supra* Section I.C; *Heller*, 554 U.S. at 580 (explaining that "the people" in the Constitution seems to refer to individuals protected by various amendments who are part of or connected to the national community); United States v. Verdugo-Urquidez, 494 U.S. 259, 265 (1990) (arguing that the text of the Fourth, First, and Second Amendments suggest that "the people" are those who are part of a national community).

while maintaining that the term "the people" applies to the same class of persons as the First and Fourth Amendments.[263] While lower courts have employed inconsistent interpretations, the Supreme Court stated that "the people" includes individuals who are either an essential part of the national community or have formed a significant connection with the country, making them a part of that community.[264] The Court relies on the textual similarities between the amendments in using the specific term "the people."[265] Even more compelling was the Court's emphasis on the need for consistency between both constitutional provisions in *Verdugo-Urquidez*, which resolved this issue by describing "the people" as "a term of art used in the same manner throughout the Bill of Rights."[266]

Despite the Supreme Court's scattershot references in *Heller* to Second Amendment rightsholders as "citizens" and "Americans," the term "the people" should remain consistent with its prior constitutional interpretations throughout the Bill of Rights.[267] There are deep concerns regarding interpreting "the people" inconsistently across constitutional provisions.[268] A Supreme Court determination that undocumented immigrants are not included in "the people" of the Second Amendment would create a notable distinction from the

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263. *Heller*, 554 U.S. at 644–45 (Stevens, J., dissenting) (discussing the Framers' use of the term "the people" throughout the Constitution and Bill of Rights and asserting that an inconsistent application of the meaning of "the people" contravenes the majority's statements that there should be a uniform reading of the term).

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

265. *Id.* The Court explains that the language of the Fourth Amendment, unlike the Fifth and Sixth Amendments, specifically applies to "the people," a term that appears to have a specific meaning in various sections of the Constitution. *Id.* The preamble states that the Constitution is established by "the People of the United States." *Id.* The Second Amendment safeguards "the right of the people to keep and bear arms," while the Ninth and Tenth Amendments specify that certain rights and powers belong to and are held by "the people" as part of that community. *Id.*

266. McNair Nichols, *supra* note 113, at 2127 & n.230.

267. *Heller*, 554 U.S. at 580, 635.

268. *See* McNair Nichols, *supra* note 113, at 2127–28 (expanding on the "parade of horribles" which would result from interpreting "'the people' differently depending on the specific right" as "it would violate a leading principle of interpretation, which provides that identical terms should be interpreted in an identical manner"). He continued by noting that "interpreting 'the people' in the Second Amendment as a small subset of 'the people' referred to in other Amendments would contradict the Supreme Court's understanding of 'the people' as described in *Verdugo-Urquidez* . . . [and] it would leave undocumented persons vulnerable to the arbitrary whims of the judiciary." *Id.* at 2127–28.

phrase as it is understood by precedent interpreting the First and Fourth Amendments and potentially the Ninth and Tenth Amendments, making the Second Amendment an unjustified outlier.[269] As such, it flows logically that the First, Second, and Fourth Amendments "protect the identical group of people," and the Court should use an identical interpretation of "the people" within the context of the Second Amendment to include undocumented immigrants in conformance with the Court's decision in *Verdugo-Urquidez*.[270]

Other Supreme Court decisions support this assertion as well, including those that hold that the Fifth and Fourteenth Amendments

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269. *See id.* at 2122 (arguing that "[i]nterpreting the scope of the Second Amendment narrowly to exclude undocumented persons threatens the current and more expansive interpretation of 'the people' in other amendments"). McNair Nichols additionally proffers that "[t]here is no intellectually honest way to carve out a distinction in the scope of 'the people' in the Bill of Rights." *Id.* at 2126. This sentiment was echoed by the Seventh Circuit in *Meza-Rodriguez*, wherein the court stated that "[i]n the post-*Heller* world, where it is now clear that the Second Amendment right to bear arms is no second-class entitlement, we see no principled way to carve out the Second Amendment and say that the unauthorized (or maybe all noncitizens) are excluded." United States v. Meza-Rodriguez, 798 F.3d 664, 672 (7th Cir. 2015). Furthermore, this exclusion would result in a need for the Supreme Court to correct its prior interpretations of "the people" in those other provisions. *See* United States v. Portillo-Munoz, 643 F.3d 437, 443, 445 (5th Cir. 2011) (Dennis, J., dissenting). In his dissent, Judge Dennis noted that the:

> Supreme Court and Fifth Circuit precedent recognize that the phrase "the people" has the same meaning in the First, Second, and Fourth Amendments. The majority's determination that Portillo-Munoz is not part of "the people" . . . renders them vulnerable . . . [and] effectively means that millions of similarly situated residents of the United States are 'non-persons' who have no rights to be free from unjustified searches of their homes and bodies and other abuses, nor to peaceably assemble or petition the government. In my view, Portillo-Munoz clearly satisfies the criteria given by the Supreme Court and our court for determining whether he is part of "the people": he has come to the United States voluntarily and accepted some societal obligations.

Id. at 443.

270. McNair Nichols, *supra* note 113, at 2127 (cautioning against the "parade of horribles" that would ensue should "the people" be interpreted inconsistently between the three constitutional provisions); *see* Arnold, *supra* note 6, at 486–87 (discussing legislative intent regarding noncitizens' rights by noting that historically, noncitizens exercised various constitutional rights at the time of the founding, indicating that the term "people" in the Constitution was intended to include noncitizens). This is demonstrated by the government's historical allowance of noncitizen voting until the early twentieth century and continued noncitizen participation in certain forms of political speech. *Id.*

protect undocumented immigrants.[271] The terminology is slightly different in these provisions, referencing "persons" and "any person[s]."[272] However, the difference in language is not determinative given that the Supreme Court has been starkly clear that certain rights and privileges be extended to immigrants, regardless of their immigration status.[273]

The Fifth and Eighth Circuit's conclusions that undocumented immigrants are excluded from "the people" rest almost solely on *Heller*'s passing references to "law-abiding citizens" and "members of the political community."[274] However, the two circuits fail to address the reality that *Heller* was not a case that aimed to resolve the issue of to whom the Second Amendment applies.[275] Furthermore, the Fifth Circuit largely based its decision on asserting that no prior decision in its jurisdiction, nor by the Supreme Court, had expressly held that the Fourth Amendment applies to undocumented immigrants.[276] However, the court fails to acknowledge that the Supreme Court has never *excluded* undocumented immigrants from Fourth Amendment

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271. *See* Plyler v. Doe, 457 U.S. 202, 210 (1982) ("Aliens, even aliens whose presence in this country is unlawful, have long been recognized as 'persons' guaranteed due process of law by the Fifth and Fourteenth Amendments."); Mathews v. Diaz, 426 U.S. 67, 77 (1976); Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886).

272. U.S. CONST. amend. V; U.S. CONST. amend. XIV.

273. *See Plyler*, 457 U.S. at 210, 212 (ruling that immigration status does not determine whether the Fifth and Fourteenth Amendments protect an individual).

274. *See* United States v. Sitladeen, 64 F.4th 978, 984–85 (8th Cir. 2023) (holding that "the people" does not include undocumented immigrants); *Portillo-Munoz*, 643 F.3d at 440 (holding that an individual who is unlawfully present in the United States as a noncitizen does not possess any Second Amendment rights); United States v. Flores, 663 F.3d 1022, 1022–23 (8th Cir. 2011) (per curiam) (agreeing with the Fifth Circuit that Second Amendment privileges do not extend to illegal immigrants).

275. United States v. Huitron-Guizar, 678 F.3d 1164, 1168 (10th Cir. 2012) (noting that it "hesitate[s] to infer from *Heller* a rule that the right to bear arms is categorically inapplicable to non-citizens. . . . [W]e refrain because the question in *Heller* was the amendment's *raison d'être*—does it protect an individual or collective right?—and aliens were not part of the calculus"); *see also* Arnold, *supra* note 6, at 490–92, 498 (noting that the Supreme Court's decision in *Heller* fails to sufficiently articulate to whom the Second Amendment applies and arguing that the circuit split in lower courts was a result of the *Heller* majority misquoting the Court's own precedent in *Verdugo-Urquidez*, "recasting the limitations of the phrase from 'national community' to 'political community'").

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

protections.[277] Neither fact is conclusive as to whether "the people" extends to undocumented immigrants, yet the Fifth Circuit reached this conclusion based on passing references in *Heller*.[278]

The Fifth Circuit notably distinguishes between the Second and Fourth Amendments because of their opposite nature; the court characterizes the Second Amendment as an affirmative right providing the right to keep and bear arms while categorizing the Fourth Amendment as a protective right against intrusions by the government.[279] The court determines that this distinction justifies differential treatment of the term "the people," as affirmative rights are not extended as broadly as protective rights.[280] However, this claim lacks any basis in precedent, as the Supreme Court has never differentiated between rights in this way; this is noted by Judge Dennis's dissent in this very case, who rejected the affirmative versus protective rights dichotomy and argued that "the people" of the Second and Fourth Amendments necessarily refer to an identical group of persons.[281] While the Fifth Circuit relies on *Heller* in this assertion, *Heller* never characterized the Second Amendment as an affirmative right, indicating that the Supreme Court had no intention of "delineat[ing] between the purposes of the Second and Fourth Amendments."[282] Moreover, where the Court has addressed the meaning of the Second Amendment, it asserts that individuals are *free from* regulation and not positively entitled to engage in certain

277. *See* McNair Nichols, *supra* note 113, at 2117 (arguing that the "[r]eliance on *Heller* to resolve the precise scope of "the people" in the Second Amendment is unwarranted," as *Heller* did not address the question of whether undocumented individuals are included within "the people"; the focus was on the "what" aspect of the Second Amendment, and the Fifth Circuit itself concedes that *Heller* did not intend to address the issue of the scope of "the people").

278. *See Portillo-Munoz*, 643 F.3d at 440 (stating that "the Court's language in *Heller* invalidates Portillo's attempt to extend the protections of the Second Amendment to illegal aliens").

279. *Id.* at 440–41.

280. *Id.*

281. *See id.* at 442–48 (Dennis, J., dissenting) (noting that characterizing the Second and Fourth Amendments as dichotomous is inconsistent with *Heller* and *Plyler* and arguing that the Second Amendment should protect the respondent because he satisfied the substantial connections test outlined in *Verdugo-Urquidez*); *see also* McNair Nichols, *supra* note 113, at 2105, 2120 (discussing Judge Dennis' dissent).

282. McNair Nichols, *supra* note 113, at 2120.

conduct.[283] The Second Amendment carries an inherent protection against governmental regulation of firearm possession, and the Court's rulings in *Heller* and *Bruen* offer no support of the Second Amendment as an affirmative right.[284] The Fifth Circuit's attempt to differentiate between the nature of the two amendments and to whom those rights may apply is not rooted in precedent or scholarship.[285] The court did not provide justifications for its contention that affirmative rights have a less broad scope than protective rights, noting only that it was "reasonable" to come to this conclusion.[286] The Fifth Circuit's categorization of affirmative versus protective rights as a proxy for determining the beneficiaries of such rights "signals a departure from traditional approaches to defining 'the people' in the constitutional amendments."[287]

Additionally, the Fifth Circuit's justifications for excluding undocumented immigrants from "the people" to whom the Second Amendment applies are based primarily on conjecture and are bolstered by unclear and fabricated rationales.[288] *Heller*'s arbitrary,

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283. *See* District of Columbia v. Heller, 554 U.S. 570, 592 (2008) (noting that "[t]he very text of the Second Amendment implicitly recognizes the pre-existence of the right and declares only that it 'shall not be infringed.'" (quoting U.S. CONST. amend. II)); N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 20 (2022) (relying on *Heller*'s determination that the Second Amendment's operative clause, "the right of the people to keep and bear arms *shall not be infringed*," guarantees individuals' rights to possess firearms (emphasis added) (quoting *Heller*, 554 U.S. at 592)).

284. *See Heller*, 554 U.S. at 592 (holding that the Second Amendment's presumptive protection against governmental regulation of firearm possession raises questions about its classification as an affirmative right); *Bruen*, 597 U.S. at 19 (ruling that the categorizing the Second Amendment as an affirmative right is ambiguous).

285. *See* McNair Nichols, *supra* note 113, at 2126 (stating that "[c]ontrary to the affirmative versus protective rights dichotomy posited by the Fifth Circuit, Supreme Court precedent does not support the idea that 'the people' of the Second Amendment represents a narrower right than the Fourth Amendment").

286. *See Portillo-Munoz*, 643 F.3d at 441 (explaining that, because of the different purposes of the Second and Fourth Amendments, any attempt to liken the scope of the amendments would be unsound).

287. *See* Mathilda McGee-Tubb, Comment, *Sometimes You're In, Sometimes You're Out: Undocumented Immigrants and the Fifth Circuit's Definition of "The People" in* United States v. Portillo-Munoz, 53 B.C. L. REV. E. SUPP. 75, 86–87 (2012) (arguing that the Fifth Circuit's unclear differentiation between affirmative and protective rights, when used to narrow the application of these rights, can foster unchecked judicial activism and arbitrary categorizations which may result in exclusions not grounded in precedent).

288. *See* McNair Nichols, *supra* note 113, at 2116–21 (discussing the Fifth Circuit's stretch in determining that the *Heller* majority meant to exclude undocumented

passing references to "Americans" and "citizens" as well as the Court's non-consideration of the issue of undocumented immigrants in no way indicates the majority's intention to exclude undocumented immigrants from "the people."[289] Moreover, beyond its own assumptions, the Fifth Circuit offers no justification for distinguishing the Second and Fourth Amendments based on their affirmative versus protective natures.[290]

Based on the Supreme Court's decisions applying "the people" to undocumented immigrants in the Fourth, Fifth, and Fourteenth Amendment contexts, the Second Amendment should identically include undocumented immigrants under "the people."[291] A failure to uniformly apply the terms "the people" and "persons" covered by the Bill of Rights and the Fourteenth Amendment would not only open the door to stripping undocumented immigrants of rights already afforded to them but also call into question the authority and impartiality of the Supreme Court.[292] Additionally, such a practice "would violate a leading principle of interpretation, which provides that identical terms should be interpreted in an identical manner";[293] the framers intentionally distinguished between what rights are afforded to "the people" as opposed to "citizens."[294] The Constitution

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immigrants from "the people," criticizing the Fifth Circuit's use of the affirmative versus protective rights dichotomy without any justification or precedent for doing so, and calling the distinctions made "artificial, unclear, and misguided").

289. *See Heller*, 554 U.S. at 579–80, 635 (demonstrating that the Court refrained from making an explicit decision on the issue, leaving it unresolved).

290. *See Portillo-Munoz*, 643 F.3d at 440–41 (discussing the rationale for interpreting the meaning of "the people" differently for the Second Amendment and Fourth Amendment).

291. *See supra* Section I.C (analyzing the Supreme Court's historical interpretations of "the people").

292. *See* McNair Nichols, *supra* note 113, at 2121, 2123 (stating that the use of arbitrary distinctions to narrow the scope of "the people" "reflects the possibility that partisanship is shaping Second Amendment jurisprudence at the expense of consistent constitutional interpretation" and "well-defined precedent").

293. *See id.* at 2127 (citing Powerex Corp. v. Reliant Energy Servs., Inc., 551 U.S. 224, 232 (2007)) (emphasizing the need to afford identical meanings to identical phrases within the same body of law); *see also* Sorenson v. Sec'y of Treasury, 475 U.S. 851, 860 (1986) (recognizing that even when they are used in different areas of a particular law or the Constitution, identical words and phrases should be afforded the same meaning).

294. *See* Andrew Figueroa, Comment, *You Can Build a Wall or Deport Them, but You Can't Take Away Their Guns: An Analysis of Why Non-U.S. Citizens are "The People" Under*

very carefully uses the term "citizens" in certain provisions while using "the people" in others; only the former necessarily excludes undocumented immigrants.[295] The framers' consistent use of "the people" in the Second and Fourth Amendments demonstrates that they intended the two amendments to apply to the same groups of people.[296] Accordingly, the plain text of the Second Amendment covers undocumented immigrants' conduct, and the second part of the textual-historical test may be evaluated.[297]

B. The History and Tradition of U.S. Gun Regulations Is Not Consistent with a Blanket Prohibition on Undocumented Immigrants in Their Capacity to Possess Firearms

The second step of *Bruen*'s textual-historical test requires modern-day gun legislation to be "relevantly similar" to the Nation's historical gun regulations.[298] While gun regulations have been in place since before the inception of the United States, the majority in *Bruen* encourages originalist and progressive originalist interpretations of the Constitution that limit the scope of the historical gun regulations that should be considered as a part of this inquiry.[299] These interpretations caution against using regulations too far before or after the ratification of either the Second or Fourteenth Amendments

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the Second Amendment, 12 FIU L. REV. 151, 160 (2016) (noting that the framers used "the people" as a term of art, which they selectively incorporated into the Constitution and a deliberate use of the term that "contrasts with the phrases 'persons' and 'citizens' used in other clauses of the Constitution").

295. *See, e.g.*, U.S. CONST. art. IV, § 2 (containing the Privileges and Immunities Clause); U.S. CONST. amend. XIV, § 1 (containing the Citizenship Clause).

296. *See* Moore, *supra* note 5, at 807–08 (noting that the framers' "conscious avoidance of the word 'citizen'" indicates their intention to extend the Bill of Rights to noncitizens); *see also* Gulasekaram, *supra* note 11, at 1496 (explaining that the *Heller* and *Verdugo* majorities note that "the First, Second, and Fourth Amendments were written and ratified contemporaneously," and that the "ratification history and adjacent text suggest that 'the people' might" have been intended to cover the same group of people).

297. *See* Gulasekaram, *supra* note 11, at 1498 (noting that "under the assumption that the rightsholders of the three amendments are the same, noncitizens, including unlawfully present ones, would be a part of 'the people' in each").

298. N.Y. State Rifle & Pistol Ass'n. v. Bruen, 597 U.S. 1, 29 (2022).

299. *Id.* at 34–35.

because this history may not properly depict the scope of the right to keep and bear arms.[300]

Prior to the enactment of state laws directly referencing unnaturalized foreign-born noncitizens, the majority of the state regulations surrounding the ratification of the Second Amendment were aimed only at Native Americans, individuals disaffected to the state, or those who refused to swear loyalty to the United States.[301] Early colonial laws prohibiting the sale and trade of arms with Native Americans varied widely by state[302] and largely relaxed surrounding the ratification of the Second Amendment, with the last of these laws allowing individuals to trade arms with Native Americans, subject to some restrictions.[303] While it is true that Native Americans were not considered citizens at this time, they were by no means considered immigrants.[304] Moreover, the purposes behind these regulations—public safety and ease of dispossessing Native Americans of their land—were informed by the existing conflicts between citizens of the states and Native Americans; no such large-scale, violent conflicts

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300. *Id.*; *see* Saul Cornell, *Originalism on Trial: The Use and Abuse of History in* District of Columbia v. Heller, 69 OHIO STATE L.J. 625, 626–27 (2008) (criticizing originalists "cherry pick[ing] quotes" in their attempts to undergo a "systematic historical inquiry").

301. Blocher & Carberry, *supra* note 48, at 8. *See generally* Becky Little, *The Native American Government That Helped Inspire the US Constitution*, HISTORY, https://www.history.com/news/iroquois-confederacy-influence-us-constitution [https://perma.cc/H558-EBVK] (last updated July 12, 2023) (noting that Native Americans had their own independent governments during the founding of the United States in 1776). Therefore, Native Americans, while having a noncitizen status, did not have an analogous "immigrant" status to undocumented immigrants today. *See infra* notes 303–19 and accompanying text.

302. *See* Riley, *supra* note 59, at 1701 (stating that "no comprehensive gun policy developed to distinguish between the individual Indian and the Indian nation, with wide variance depending chiefly on the relevant governing body, its relationship to immediately neighboring tribes, and the extent to which guns could be employed to advance Indian land dispossession").

303. *See supra* notes 52–55, 74–75 and accompanying text (discussing the evolution of state gun legislation, from early seventeenth-century laws promulgating complete prohibitions on the trade or sale of firearms with Native Americans to late nineteenth-century laws, some of which maintained complete prohibitions, whereas others allowed this conduct and granted Native Americans the ability to obtain a gun license).

304. *See* Little, *supra* note 301 (explaining that the framers recognized the legitimacy and independence of separate Native governments); *see also* Riley, *supra* note 59, at 1697 (stating that "Indian nations were seen as sovereign, governmental entities . . . that had not been brought within the ambit of the federal system . . . [and i]ndividual Indians were not citizens of the United States and could not naturalize").

ensue between undocumented immigrants and today's U.S. citizens.[305] While public safety is an important governmental interest, *Bruen*'s disposal of means-end scrutiny renders this purpose moot when considering the incongruence of these historical laws and today's bar on undocumented immigrants' firearm possession.[306] The basic "public safety" purpose behind regulations prohibiting Native Americans from possessing firearms does not form the requisite "historical analogue" that *Bruen* prescribes, nor does the purpose of dispossessing Native individuals of their land.[307] Regarding the public safety purpose, several studies refute the idea that undocumented immigrants are in any way more dangerous or more likely to commit violent crimes than citizens.[308]

Additionally, because the inherent purpose of *all* firearm restrictions is presumably to preserve the general public safety, even if this

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305. *See* Blocher & Carberry, *supra* note 48, at 5 (commenting that "[h]istorical accounts provide two dominant rationales for [these] regulation[s]: (1) colonists were actively engaged in 'a project of expropriating Native American land,' a venture that was far more difficult when Native Americans were armed, and (2) disarmament was a way to protect against Native American attacks." (footnotes omitted) (quoting Alexander Gouzoules, *The Diverging Right(s) to Bear Arms: Private Armament and the Second and Fourteenth Amendments in Historical Context*, 10 ALA. C.R. & C.L. L. REV. 159, 166 (2019))); *see also supra* notes 57–58 and accompanying text.

306. N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 22–24 (2022).

307. *See* Bernabei, *supra* note 237, at 110, 121 (emphasis added) (highlighting that *Bruen* requires courts to determine whether a regulation burdening the right to self-defense is justified "based on the *purpose* of both the modern and historical regulations" to form a sufficient historical analogue).

308. While tracking data on undocumented immigrants and other noncitizens can be difficult, several studies have shown that undocumented immigrants are actually *less likely* than citizens to be incarcerated or commit violent and property crimes. *See* Michelangelo Landgrave & Alex Nowrasteh, *Criminal Immigrants: Their Numbers, Demographics, and Countries of Origin*, CATO INST. (Mar. 15, 2017) (observing that "[e]mpirical studies of immigrant criminality generally find that immigrants do not increase local crime rates and are less likely to cause crime than their native-born peers" and finding that "[l]egal and illegal immigrants are less likely to be incarcerated than natives"); Frances Bernat, *Immigration and Crime*, OXFORD RSCH. ENCYCLOPEDIA OF CRIMINOLOGY & CRIM. JUST. (Apr. 2017) (illustrating that "[r]esearch consistently shows that foreign-born individuals are less likely to commit crime than naturalized citizens in the United States and that immigration status may abate crime within a community"); Robert Adelman, Lesley Williams Reid, Gail Markle, Saskia Weiss & Charles Jaret, *Urban Crime Rates and the Changing Face of Immigration: Evidence Across Four Decades*, 15 J. ETHNICITY CRIM. JUST. 52, 70 (2017) (finding that, between 1970 to 2010, "our results are clear and overarching that immigration does *not* lead to increases in crime in American metropolitan areas").

justification was grounded in evidence, public safety *alone* would be insufficient to provide a historical analogue between firearm prohibitions concerning Native Americans and undocumented immigrants. To rely solely on this justification would allow essentially any gun regulation to be deemed constitutional if the proponent could show that the government intended the regulation for public safety. The second widely understood purpose of the gun regulations targeted at Native Americans was, in effect, to make it easier to seize their land.[309]

The justifications for gun regulations concerning Native Americans do not square with the asserted governmental purposes behind today's Statute. The Fifth Circuit provided the principal purpose behind the Statute as preventing "presumptively risky people" from possessing firearms and "suppressing armed violence."[310] This accords with the legislative history surrounding the Statute; Congress was primarily concerned with individuals who had a proven history of committing crime, indicating a likelihood of repeated criminal behavior should such individuals have a right to possess firearms.[311] Although undocumented immigrants were not mentioned in the Senate's discussion of the Statute, they were still included in this group of presumptively dangerous people.[312] But, as previously discussed, a multitude of studies disprove the notion that undocumented immigrants are presumptively dangerous or are more likely to commit crimes than the citizenry at large.[313]

Recent case law reveals more granular purposes behind the Statute, particularly the logistical ordeal that the government would face should the law permit undocumented immigrants to possess firearms.[314] These considerations include the difficulty of tracking undocumented immigrants and the weapons they possess because of their propensity to live below the law, as well as the difficulty this poses for preventing criminal activity.[315] Furthermore, these asserted

309. *See supra* notes 56–62 and accompanying text (discussing the purposes behind enacting legislation prohibiting Native Americans from possessing firearms).

310. United States v. Yancey, 621 F.3d 681, 683–84 (7th Cir. 2010) (per curiam) (citing S. REP. NO. 90-1501, at 22 (1968)).

311. *See supra* Sections I.A–B.

312. *Id.* at 14772–75.

313. *See supra* note 308 and accompanying text (discussing studies that show undocumented immigrants are less likely to commit crimes than U.S. citizens).

314. *See supra* notes 105, 213–15 and accompanying text.

315. *See supra* text accompanying notes 213–15.

purposes rely substantially on the illegal *status* of undocumented immigrants as a central factor, while ignoring the poor tracking of citizen gun ownership.[316]

Unlike similar provisions aimed at Native Americans, the purposes for the Statute are largely status-based. Although Native Americans' noncitizen status was a factor in prohibiting possession of firearms, the contemporaneous understanding was that the United States was attempting to seize their land and it was simply inconvenient for them to possess firearms.[317] Native Americans' status as noncitizens was not the determinative factor for enacting these regulations; rather, the purpose was unique to the Revolutionary War era wherein the Framers were attempting to establish a strong centralized government furthering the overarching goal of westward expansion at the expense of the rights of racial minorities, namely Native Americans, and states enacted laws bolstering these efforts.[318] While the nexus of both regulations, and all gun regulations, is public safety, the status-based nature of the Statute does not find a historical analogue in the Nation's historical laws banning Native Americans from firearm possession. Accordingly, the laws targeting Native Americans are not "relevantly similar" in their content or purpose to provide a sufficient historical analogue for a categorial ban on firearm possession by undocumented immigrants.[319]

The only regulations that could conceivably provide a sufficient analogue consistent with *Bruen*'s originalist and progressive originalist constitutional interpretations are those Revolutionary War era restrictions that targeted individuals who did not swear an oath of

316. *See supra* note 105 and accompanying text (noting that although the logistics argument suffices on its face, existing loopholes for citizens show that the government is not as concerned about tracking gun ownership as it may seem).

317. *See supra* notes 56–62 and accompanying text (highlighting the purposes behind enacting legislation prohibiting Native Americans from possessing firearms, specifically the purpose of facilitating the United States' ability to continue dispossessing Native Americans of their land).

318. Riley, *supra* note 59, at 1681–82, 1693–95. Riley continues by elucidating that colonial-era gun regulations were "inexorably tied to individualism, private property rights, and freedom from the tyranny of the state," goals which were "for the benefit of whites at the expense of nonwhites." *Id.* at 1696. Such regulations were rooted in the exclusion of rights for Native Americans as a racial class. *Id.*

319. *See* N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 29 (2022) (discussing the majority's standard for the "relevantly similar" test in the context of the Second Amendment).

loyalty to the United States.[320] Nevertheless, a bar on undocumented immigrants' possession of firearms cannot be sufficiently analogous to historical gun regulations because of the oath of allegiance element.[321]

There were several regulations in the late eighteenth century which required individuals to take an oath of allegiance to the United States to obtain a permit to possess firearms.[322] Other state regulations simply forbade the possession of firearms and ammunition unless an oath of allegiance to the United States was sworn.[323] Undocumented immigrants, also commonly referred to as unnaturalized foreign-born noncitizens, have taken no oath of loyalty to the United States until or unless they become naturalized citizens.[324] Despite this fact, there are three flaws in the contention that the late eighteenth-century loyalty oath requirements constitute a sufficient historical analogue for the modern-day federal prohibition on undocumented immigrants' firearm possession.[325]

First, there is a clear distinction in the Statute between unlawful and lawful immigrants residing in the United States: the former group is expressly prohibited from possessing weapons, while the latter is not mentioned.[326] Should there be any weight to the comparison of loyalty

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320. *See* Blocher & Carberry, *supra* note 48, at 8–9 (describing laws enacted by Massachusetts and Pennsylvania between 1776 and 1778 and noting a similar Virginian law enacted in 1777).

321. *See id.* at 5 (noting that, shortly after the Revolutionary War, several of the colonies enacted laws prohibiting those who refused to take a loyalty oath from possessing firearms). Some scholars have compared the late eighteenth-century gun laws' loyalty oath to the naturalization oath. *Id.* at 11 (comparing the Revolutionary War Era disarmament laws with England's efforts to disarm Catholics one century prior and finding that "[b]oth contexts . . . required a loyalty oath that 'was effectively a naturalization oath'" (quoting C. Kevin Marshall, *Why Can't Martha Stewart Have a Gun?*, 32 HARV. J.L. & PUB. POL'Y 695, 724 (2009))).

322. *See* Cornell & DeDino, *supra* note 72, at 506–08 (describing laws passed by Massachusetts and Pennsylvania).

323. *See supra* notes 63–67 and accompanying text (discussing state laws that prohibited the possession of firearms for those who did not swear oaths of loyalty, who were disaffected to the cause of the nation, or those who were deemed non-associators).

324. *Naturalization Oath of Allegiance to the United States of America*, U.S. CITIZENSHIP & IMMIGR. SERVS., [hereinafter *Naturalization Oath*], https://www.uscis.gov/citizenship/learn-about-citizenship/the-naturalization-interview-and-test/naturalization-oath-of-allegiance-to-the-united-states-of-america [https://perma.cc/K7XB-ZE2F].

325. *See infra* text accompanying notes 326–34.

326. *See* 18 U.S.C. § 922(g)(5)(A)–(B) (prohibiting undocumented immigrants from possessing firearms).

oath-requirements for firearm possession and the barring of undocumented immigrants' possession of firearms for a lack of pledging their allegiance to the United States, it does not logically follow that lawful permanent residents are not also barred from possessing firearms, as lawful immigrants who have not obtained citizenship also have not sworn any oath of loyalty to the United States.[327]

Second, following the same rationale, if the loyalty oath requirement is accepted by the Court as a basis for justifying the Statute, natural-born citizens should also be barred from firearm possession as they are not required to take a loyalty oath.[328] However, this reasoning is unsustainable when considering the Second Amendment's obvious application to U.S. citizens.[329]

The third and most substantial reason that loyalty oath requirements do not constitute a historical analogue to the Statute are their vastly different legislative purposes. The Statute was enacted for public safety and to prevent logistical issues with tracking undocumented immigrants' gun ownership, as they are allegedly difficult to track due to their status.[330] Statutes requiring loyalty oaths, however, were hyper-focused on preventing firearm possession by people with demonstrable disloyalty to the United States in wartime or the immediate aftermath of war.[331] These oath requirements as a prerequisite for firearm possession had nothing to do with noncitizen status, and were focused on disarming U.S. citizens, particularly suspected Loyalists, to prevent a potential armed rebellion or insurrection at the hands of Loyalists or British sympathizers.[332] While

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327. *See Naturalization Oath*, *supra* note 324 (providing the language of the Naturalization Oath).

328. *See* U.S. CONST. amend. XIV § 1 (granting birth-right citizenship and not requiring a loyalty oath); Audie Cornish & Wynne Davis, *How the U.S. Citizenship Oath Came to Be What It Is Today*, NPR (July 4, 2019, 10:44 AM), https://www.npr.org/2019/07/04/737844386/how-the-u-s-citizenship-oath-came-to-be-what-it-is-today [https://perma.cc/FU92-A5HA] (stating that "[i]f you are born in the United States, citizenship is a birthright, but if you immigrate to this country, the work of the citizenship process culminates in the reciting of an oath").

329. District of Columbia v. Heller, 554 U.S. 570, 635 (2008) ("The Second Amendment . . . surely elevates above all other interests the right of law-abiding, responsible *citizens* to use arms in defense of hearth and home."(emphasis added)).

330. *See supra* notes 213–14 and accompanying text.

331. *See supra* notes 68–73 and accompanying text (discussing the motivations behind requiring loyalty oaths as a requirement for firearm possession).

332. *See supra* text accompanying notes 72–73.

both types of regulations were premised on promoting public safety, the specific rationale for enacting the regulations were not related; oath requirements were meant to suppress potential rebellions by citizens and noncitizens alike, whereas the Statute is meant to prevent status-based logistical difficulties.[333] Because *Bruen* calls for historical regulations that are "relevantly similar" in both content and purpose,[334] the nation's historical regulations requiring a loyalty oath as a prerequisite for gun ownership cannot constitute the appropriate historical analogue required to find the Statute constitutional under the Second Amendment.

More recent prohibitions on the possession of firearms by undocumented immigrants do not provide adequate analogues for the Statute because they are not sufficiently contemporaneous to the enactment of the Second and Fourteenth Amendments. Federal laws, in particular, did not reference undocumented immigrants until the Alien Registration Act of 1940, which included a firearm possession as grounds for deportation.[335] However, given that they are too far post-enactment of the Second and Fourteenth Amendments, courts must rely on something other than federal regulations promulgated after 1940.[336] The *Bruen* majority was clear in "dismissing all twentieth century history as unpersuasive in determining the meaning of the Second Amendment."[337] One scholar notes that alienage-based firearm regulations were not remotely prevalent until the early to mid-twentieth century.[338] Even more compelling, there was no semblance of uniformity in the Nation's gun regulations until the mid-twentieth century.[339] Until then, firearm regulations across the country varied greatly at the state and local level.[340]

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333. *See supra* notes 68–73 and accompanying text.

334. N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 29 (2022).

335. Act of June 28, 1940, ch. 439, 54 Stat. 670, *repealed by* Act of June 27, 1952, ch. 477, 66 Stat. 280 (1952).

336. *See* Patrick J. Charles, *The Fugazi Second Amendment:* Bruen*'s Text, History, and Tradition Problem and How to Fix It*, 71 CLEV. STATE L. REV. 623, 682 (2023) (noting that the *Bruen* majority's history-in-law choice could call into question "all firearm regulatory categories post-1900").

337. *Id.* at 682.

338. *Id.* at 683.

339. *Id.* at 683–84 (arguing that *Bruen*'s strong reliance on historical inquiry is "preposterous . . . for gun rights litigants in the wake of *Bruen* to argue that any historical firearms regulation must be widespread, uniform, or meet some ad hoc census population test to pass constitutional muster").

340. *Id.*

State laws explicitly prohibiting unnaturalized foreign-born residents of the United States were passed between 1903 and 1933, well after the ratification of the Fourteenth Amendment in 1868.[341] The majority in *Bruen* was clear that regulations taking effect long before or after the ratification of the Second and Fourteenth Amendments, particularly laws enacted during the twentieth century, would not help guide the Supreme Court's interpretation of the Second Amendment.[342] If post-civil war laws taking effect seventy-five years after the ratification of the Second Amendment were deemed too far removed in time, the Court would likely determine that laws enacted thirty-five to sixty-five years after the ratification of the Fourteenth Amendment also present issues regarding the quality of insight into the original meaning of the Second Amendment.[343]

Moreover, like the Native American and loyalty oath regulations, the purposes behind state-specific prohibitions on undocumented immigrants' firearm possession do not constitute a sufficient historical analogue to the Statute. The Supreme Court of New Hampshire in *State v. Rheaume* supplies an all-encompassing rationale for its own state ban on firearm possession by undocumented immigrants.[344] In its opinion, the court provides a laundry list of purposes for barring undocumented immigrants from possessing arms, including their "capricious and uncertain" abodes; the inaccurate contention that undocumented immigrants do not pay taxes; and the assumption that only citizens can have a "natural" allegiance to the nation, whereas undocumented immigrants have "no obligation" to defend the United States.[345] Not only have these rationales largely been rejected today,[346] they are entirely dissimilar from the asserted governmental interests in

341. *See supra* notes 83–90 and accompanying text (discussing state gun regulations explicitly referencing unnaturalized foreign-born residents, some of which barred firearm possession completely while others contained exceptions for unnaturalized residents who obtained permits, owned certain types of property, or possessed firearms on private property).

342. N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 36–37 (2022); *see also* Charles, *supra* note 336, at 682 (noting that *Bruen* largely dismisses twentieth-century history in determining the meaning of the Second Amendment).

343. *See Bruen*, 596 U.S. at 35–36 (discussing the majority's rationale for excluding post-Civil War interpretations of the Second Amendment from its analysis).

344. *See supra* notes 87–88 and accompanying text (listing the reasons behind barring undocumented immigrants from the right to keep and bear arms, while noting that other courts have subsequently rejected this line of reasoning).

345. *See supra* note 88 and accompanying text.

346. *See* People v. Rappard, 104 Cal. Rptr. 535, 536 (Ct. App. 1972).

passing the Statute to prevent logistical difficulty.[347] Furthermore, they are squarely in conflict with the Supreme Court's holding in *United States v. Verdugo-Urquidez*, wherein the Court acknowledges that noncitizens may form substantial connections with the United States and, by doing so, this class of people receives at least some constitutional rights.[348] Simply put, the twentieth-century state regulations do not serve as a sufficient historical comparison because they were enacted long after the ratification of the Second and Fourteenth Amendments, and their objectives do not correspond with the rationale behind today's federal prohibition.

When applying an originalist or progressive originalist approach to interpreting the Second Amendment, the Statute lacks historical precedent. There is no evidence of gun regulations specifically targeting undocumented immigrants' rights under the Second and Fourteenth Amendments when they were enacted.[349] Additionally, the regulations in place surrounding the ratification of the Second Amendment, namely state laws prohibiting firearm possession by Native Americans and individuals who refused to perform a loyalty oath, are not "relevantly similar" in content or purpose to the Statute.[350] Consequently, these regulations do not provide a sufficient "historical analogue," and the government cannot meet its burden of demonstrating that the Statute is "consistent with this Nation's historical tradition of firearm regulation."[351] For these reasons, the Court should hold that the Statute is unconstitutional under the Second Amendment.

CONCLUSION

The Second Amendment's use of the term "the people" was never meant to exclude undocumented immigrants; undocumented immigrants have always been a part of "the people" to whom the

347. *See supra* note 214 and accompanying text.

348. United States v. Verdugo-Urquidez, 494 U.S. 259, 265 (1990). Whether the Fourth Amendment protects undocumented immigrants was a point of concern in Justice Brennan's dissent, wherein he criticizes the majority for laying out seemingly conflicting parameters for determining whether undocumented immigrants are included. *Id.* at 282–83 (Brennan, J., dissenting).

349. N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 29 (2022) (noting the need for at least "relevantly similar" regulations existing throughout the Nation's history).

350. *Id.*

351. *Id.* at 24, 30.

Second Amendment protects the right to keep and bear arms.[352] This is true for both the Second and Fourth Amendments.[353] The Supreme Court has enumerated a substantial connections test to determine whether a particular individual falls within the term "the people" and consequently finds his conduct within the scope of the Second Amendment.[354] While it may be unrealistic to expect the Court to dispose of its substantial connections test in favor of extending Second and Fourth Amendment protections to *all* undocumented immigrants, it is a logical next step for the Court to apply the substantial connections rationale to its interpretation of "the people" within the context of the Second Amendment, specifically.[355]

If the Supreme Court remains consistent with its precedent in *Verdugo-Urquidez* and opts to apply the substantial connections test to Second Amendment law, it is likely that the Court will find that the Second Amendment protects at least *some* undocumented immigrants, though it remains unclear whether the Court will explicitly include *all* undocumented immigrants in "the people." Nevertheless, the Statute's blanket prohibition against firearm possession by undocumented immigrants, solely based on their immigration status, constitutes a violation of the Second Amendment.[356]

Bruen requires a sufficient "historical analogue" for a modern gun regulation to be deemed constitutional.[357] No historical gun regulation in the United States provides such a basis for completely curtailing

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352. Arnold, *supra* note 6, at 486; *see also* Gulasekaram, *supra* note 11, at 1454 (arguing that "the phrase ['the people'] likely was never intended to identify specific rightsholders," and that, even if it was, the entities currently positing that interpretation have failed to provide a sufficient basis for excluding noncitizens from that list).

353. *See Verdugo-Urquidez*, 494 U.S. at 265 (indicating that "the people" should be given the same definition in both the Second and Fourth Amendment contexts).

354. *Id.* at 270–71.

355. *See* Gulasekaram, *supra* note 11, at 1453–54 (criticizing the *Heller* majority for failing to apply the substantial connections rationale in its definition of "the people"). Although the majority in *Bruen* altered the phrasing slightly, the Court's reliance on *Verdugo-Urquidez* in both *Heller* and *Bruen* indicate its intention to maintain its precedential value. *Id.* at 116 (noting the Court's adoption of the definition of "the people" provided in *Verdugo-Urquidez*).

356. *See supra* Sections II.A–B; *see also* Gulasekaram, *supra* note 11, at 1519 (noting that Congress will continue to engage in gun regulation, and suggesting regulations that Congress could implement under a definition of "the people" that includes noncitizens).

357. N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 30 (2022).

undocumented immigrants' right to keep and bear arms.[358] Gun regulations aimed at Native Americans, those who refused a loyalty oath, and even early twentieth-century state statutes banning noncitizens' possession of firearms are not "relevantly similar"[359] enough in content or purpose to justify today's federal prohibition. *Bruen* requires that the justifications of today's gun laws at least somewhat parallel the purposes of historical firearm regulations; in the case of the Statute, the justifications are almost perpendicular to one another.[360] Should the Supreme Court decide that the Statute is constitutional under the new *Bruen* textual-historical approach, it will not only undermine the rights previously afforded to undocumented immigrants but also call into question the Court's commitment to consistent constitutional interpretation and established precedent.[361]

Although the Court has denied certiorari for challenges to the Statute in six of the thirteen circuits, this issue will inevitably find its way into the Supreme Court's chambers.[362] In roughly the last decade, there has been a significant uptick in Second Amendment cases concerning undocumented immigrants in the circuit courts.[363] Other

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358. *See supra* Sections I.A, II.B (surveying the history of firearm regulations across the country and analyzing their viability under the *Bruen* majority's textual-historical approach).

359. *Bruen*, 597 U.S. at 29.

360. *See supra* Section II.B.

361. *See* McNair Nichols, *supra* note 113, at 2121, 2123 (explaining how excluding undocumented workers from "the people" would lead to inconsistent constitutional interpretation).

362. United States v. Perez, 6 F.4th 448 (2d Cir. 2021), *cert. denied*, 142 S. Ct. 1133 (2022); Meza-Rodriguez v. United States, 798 F.3d 664 (7th Cir. 2015), *cert. denied*, 578 U.S. 925 (2016); Huitron-Guizar v. United States, 678 F.3d 1164 (10th Cir. 2012), *cert denied*, 568 U.S. 893 (2012); Flores v. United States, 663 F.3d 1022 (8th Cir. 2011), *cert. denied*, 567 U.S. 938 (2012); Portillo-Munoz v. United States, 643 F.3d 437 (5th Cir. 2011), *cert. denied*, 566 U.S. 963 (2012); *see also* Marco Poggio, *Debate Over Immigrants' Gun Rights Ignites in 2nd Circ. Case*, LAW360 (Sept. 12, 2021, 8:02 PM), https://www.law360.com/articles/1396315/debate-over-immigrants-gun-rights-ignites-in-2nd-circ-case [https://perma.cc/8KEF-ZQ5Y] (analyzing how various courts have ruled on gun rights for immigrants post-*Heller*).

363. *E.g.*, United States v. Sitladeen, 64 F.4th 978 (8th Cir. 2023) (case regarding a noncitizen unlawfully present in the United States who was convicted of possession of a firearm); United States v. Jimenez-Shilon, 34 F.4th 1042 (11th Cir. 2022) (case involving unlawful possession of a firearm by a noncitizen); *Perez*, 6 F.4th at 448 (case concerning an undocumented immigrant possessing a firearm and ammunition); United States v. Torres, 911 F.3d 1253 (9th Cir. 2019) (case regarding unlawful possession of a firearm while being unlawfully present in the United States); *Meza-*

groups barred from firearm possession in § 922(g) also seek to plead their case before the nine justices.[364] On November 7, 2023, the Supreme Court heard the oral arguments for *United States v. Rahimi*, where the Petitioner/Respondent is arguing that § 922(g)(8), prohibiting the possession of firearms by persons subject to domestic violence restraining orders, is unconstitutional.[365] The Supreme Court's decision to hear a case concerning this provision, which is part and parcel of the same statute as the alien-in-possession prohibition, likely indicates its intention to continue shifting Second Amendment jurisprudence.[366] In its upcoming opinion, the Court will provide further guidance on how to apply its textual-historical approach to Second Amendment challenges.[367] The Court's guidance will be crucial for lower courts in understanding the Second Amendment's applicability to undocumented immigrants. Moreover, the Supreme Court's determination in *Rahimi* will indicate whether it intends to continue expanding the scope of the Second Amendment, likely resulting in a shift towards the inclusion of undocumented immigrants.

Rodriguez, 798 F.3d at 664 (case concerning whether unauthorized aliens are protected under the Second Amendment); United States v. Carpio-Leon, 701 F.3d 974 (4th Cir. 2012) (case involving possession of a firearm while being unlawfully present in the United States); *Huitron-Guizar*, 678 F.3d at 1169 (case regarding possession of a firearm by an undocumented immigrant).

364. *See, e.g.*, United States v. Rahimi, 59 F.4th 163 (5th Cir. 2023), *withdrawn and superseded by* 61 F.4th 443 (5th Cir. 2023), *cert. granted*, No. 21-11001 (U.S. argued Nov. 7, 2023) (involving an appeal from a Fifth Circuit decision holding a federal statute prohibiting possession of firearms by a person subject to a domestic violence restraining order unconstitutional for violating the Second Amendment).

365. *Id.*

366. *See* Gulasekaram, *supra* note 11, at 1456 ("Even those who have committed domestic abuse have had their day; in the wake of *Bruen*, the Fifth Circuit struck down [section] 922(g)(8)'s prohibition on firearm possession by those subject to civil domestic restraining orders.").

367. The Court heard oral arguments in *Rahimi* on Tuesday, November 7. *Supreme Court of the United States October Term 2023*, U.S. SUPREME COURT, https://www.supremecourt.gov/oral_arguments/argument_calendars/MonthlyArgumentCalNovember2023.pdf [https://perma.cc/RSX7-NE5B].