The Second Amendment and Citizenship: Why "The People" Does Not Include Noncitizens

*John Cicchitti**

Abstract. The Second Amendment protects "the right of the people to keep and bear Arms." But who are "the people" included in this right? One definition of "the people" could include anyone present in the United States. Another definition could distinguish between lawful permanent residents and temporary visitors to the United States. Finally, courts could adopt a definition that restricts Second Amendment rights to U.S. citizens only. This Comment will conclude that Supreme Court precedent and a traditional respect for the legislative and executive branches' power over alienage mean that only citizens have the Second Amendment right to keep and bear arms.

* J.D. Candidate 2023, George Mason University Antonin Scalia Law School; B.A. 2015, College of the Holy Cross; Vice President, Lexington Institute. Many thanks to the editors and professors who made this Comment possible.

Introduction

One evening in 1982, a terrorist pulled into a New York City parking lot.[1] Colm Murphy, an extremist associated with the Irish National Liberation Army ("INLA"),[2] planned to acquire twenty M-16 automatic rifles.[3] He was present in the United States illegally.[4] While he had hoped to buy "SAM-7 missiles or 'something that [had] the capability of taking down [a] helicopter'" for use in Northern Ireland, Murphy settled for the offered rifles and went to meet with the seller, ostensibly a member of the Italian-American Mafia.[5] His contact—actually an undercover FBI agent—exchanged the weapons for Murphy's money.[6] Once the terrorist signed the final check and took possession of the weapons, federal agents arrested him.[7]

Federal prosecutors charged Murphy with "being an illegal alien who received and possessed guns."[8] A jury convicted, and he was sentenced to two years on that charge.[9] On appeal, Murphy challenged his conviction, claiming the statute violated his Second Amendment rights, but the Second Circuit waved away this argument.[10] The court reasoned, "in the absence of evidence showing that [a] firearm has 'some reasonable relationship to the preservation or efficiency of a well regulated militia,' [the] Second Amendment does not guarantee [a] right to keep and bear such a weapon."[11] The Second Circuit upheld the statute banning illegal aliens from possessing firearms and affirmed Murphy's conviction.[12]

---

1 United States v. Toner, 728 F.2d 115, 118–19 (2d Cir. 1984).

2 According to the FBI, the INLA was "a violence[-]prone splinter group of the Provisional Irish Republican Army," a terrorist group of its own accord. *Two I.R.A. Suspects Arrested in New York*, N.Y. Times (July 22, 1982), https://perma.cc/G7U5-UGTW. UK law prohibits both the Irish Republican Army and the INLA as terrorist organizations. *Proscribed Terrorist Groups or Organisations*, HOME OFFICE (Nov. 26, 2021), https://perma.cc/Z48D-GEGE.

3 *Toner*, 728 F.2d at 118.

4 *Id.*

5 *Id.*

6 *Id.* at 118–19.

7 *Id.* at 119.

8 *Id.* at 118.

9 *Id.*

10 *Id.* at 128.

11 *Id.* (quoting United States v. Miller, 307 U.S. 174, 178 (1939)). Either way, the court wrote, "illegal aliens are not a suspect class" that would trigger strict scrutiny under an equal protection analysis. *Id.*

12 *Id.* at 130.

A quarter century later, in *District of Columbia v. Heller*,[13] the Supreme Court embraced a different Second Amendment theory.[14] Instead of focusing on the relationship between militia membership and firearms, the Supreme Court held that the Second Amendment protected "an individual right to keep and bear arms."[15] Yet, "the right secured by the Second Amendment is not unlimited."[16] Since the Supreme Court's decision in *Heller*, courts have wrestled with the boundaries of the *Heller*-recognized individual right to keep and bear arms.[17]

One of the most vexing questions left unanswered by *Heller* is whether noncitizens possess this right. The Second Amendment protects "the right of the people to keep and bear arms," but the text is unclear on who those people are.[18] Does the Second Amendment protect anyone physically present in the United States, regardless of citizenship status? Would a foreign terrorist like Murphy have the right to purchase a weapon? What about illegal aliens living in the United States? What about lawfully admitted non-immigrants? What about legal permanent residents? As the Supreme Court continues to consider the outer limits of the Second Amendment, it will likely have to decide whether "the people" includes noncitizens.[19]

A thorough examination of precedent and history reveals that the Second Amendment's use of "the people" does not include noncitizens.[20] A

---

13 554 U.S. 570 (2008).

14 *Id.* at 598.

15 *Id.*

16 *Id.* at 626.

17 *See, e.g.*, N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111 (2022) (holding that the Second Amendment protects the possession of firearms outside the home); United States v. Jimenez-Shilon, 34 F.4th 1042 (11th Cir. 2022) (discussing whether illegal aliens are a part of "the people").

18 U.S. CONST. amend. II.

19 One issue hanging over this discussion is the consequence of the Second Amendment's incorporation against the states through the Fourteenth Amendment. *See* McDonald v. City of Chicago, 561 U.S. 742 (2010). The decision to incorporate through the Due Process Clause may affect how the Supreme Court determines this question, but it does not affect this discussion of "the people." The Due Process and Equal Protection Clauses protect the rights of "any person," which may require a broader reading than "the people." U.S. CONST. amend. XIV, § 1; s*ee* Kenneth A. Klukowski, *Citizen Gun Rights: Incorporating the Second Amendment Through the Privileges or Immunities Clause*, 39 N.M. L. REV. 195, 236–39 (2009). Since the Fourteenth Amendment only applies to the states, courts might grant the federal government greater latitude in restricting the right to bear arms for noncitizens, as compared to states. *See* Hampton v. Mow Sun Wong, 426 U.S. 88, 95, 101 n.21 (1976). "It is important to note that the authority to control immigration is not only vested solely in the Federal Government, rather than the States, but also that the power over aliens is of a political character and therefore subject only to narrow judicial review," the Supreme Court wrote in 1976. *Id.* at 101 n.21 (citation omitted). Even if the Second Amendment does not protect noncitizens, Congress and the President may be the sole arbiters of their ability to bear arms, with states playing little to no role.

20 *See infra* Part I.

fundamentally different right from similarly worded provisions in the Bill of Rights, courts should recognize that the Second Amendment protects only citizens. This conclusion is supported by precedent.[21] The *Heller* Court itself emphasized the connection between citizenship, the "political community," and the right to bear arms.[22] Further, the Supreme Court has already upheld state-level restrictions on noncitizen gun ownership.[23] This should carry heavy weight in any future interpretation of "the people."

Questions of noncitizen constitutional rights have been a long-running issue throughout U.S. history.[24] Among many classifications of constitutional rights, one important distinction is that some apply to noncitizens, and some do not. For instance, Fourth Amendment protections from unwarranted searches and seizures largely apply regardless of citizenship.[25] On the other hand, states can limit the right to vote to citizens.[26]

The Supreme Court will eventually have to face this question. A circuit split on the Second Amendment rights of illegal aliens currently exists, driven by a federal law that prohibits them from owning firearms.[27] But the issue will eventually expand to include all noncitizens, legal or illegal. Several states have banned noncitizens from owning firearms, regardless of legal status, and aliens have brought challenges to these statutes.[28]

"The people" of the Second Amendment includes citizens and excludes noncitizens. A distinction between citizens and noncitizens makes legal sense and would respect the political branches' traditional preeminence on issues related to alienage. This Comment examines the Second Amendment in the context of other amendments and the history of firearm jurisprudence. Part I details the background and history of interpretation of the Second Amendment's "the people." First, Part I examines the basis of all modern Second Amendment analysis: *Heller*. Next, Part I traces "the people" before *Heller* and in other constitutional contexts. Finally, Part I surveys how federal courts have treated the Second Amendment rights of noncitizens following *Heller*. In Part II, this Comment argues that "the people" of the Second Amendment does not include noncitizens. Part II begins by discussing why "the people" of the Second Amendment only includes members of the political community. Next, Part II explains why the political

21 *See* Patsone v. Pennsylvania, 232 U.S. 138 (1914) (holding that state restrictions on alien firearm ownership are constitutional).

22 District of Columbia v. Heller, 554 U.S. 570, 580–81 (2008).

23 *Patsone*, 232 U.S. at 143–44.

24 *See id.*

25 *See* United States v. Verdugo-Urquidez, 494 U.S. 259, 265–66, 270–71 (1990).

26 Sugarman v. Dougall, 413 U.S. 634, 648–49 (1973).

27 18 U.S.C. § 922(g)(5); *see infra* Part II; United States v. Meza-Rodriguez, 798 F.3d 664 (7th Cir. 2015); United States v. Portillo-Munoz, 643 F.3d 437 (5th Cir. 2011).

28 *See, e.g.*, Fletcher v. Haas, 851 F. Supp. 2d 287 (D. Mass. 2012).

community does not include noncitizens. Finally, Part II discusses the importance of recognizing the plenary power of the political branches over the issue of firearm ownership by noncitizens.

I. A History of "The People"

The Second Amendment reads, "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."[29] But who are "the people" of the Second Amendment? The answer to this question dictates whether noncitizens can claim Second Amendment rights. To determine the definition of "the people," it is necessary to look to *Heller*—the seminal Supreme Court case on Second Amendment rights—as well as lower court musings on this definition. *Heller* offered its thoughts on the definition of "the people," though it did leave room for interpretation.[30] Ultimately, *Heller* did not explicitly explain who is included in that phrase, but it left clues.[31] Lower courts have used these clues, as well as the application of other constitutional rights to noncitizens, to interpret "the people" of the Second Amendment.[32] The tests some courts have developed are helpful guides in interpreting the exact meaning of "the people."[33] Most notably, a circuit split on the Second Amendment rights of illegal aliens and district court decisions on state restrictions have explored this question.[34] Some courts have held that illegal aliens are not a part of "the people" because they are not a part of the "political community."[35] Other courts have applied the same standard as for "the people" of the Fourth Amendment, which does include noncitizens (including many illegal aliens).[36]

A. *"The People" of* Heller

The Supreme Court officially recognized an individual's right to keep and bear arms in its 2008 *Heller* decision.[37] Justice Antonin Scalia, writing for the majority, wrote there was "no doubt . . . the Second Amendment conferred

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

30 District of Columbia v. Heller, 554 U.S. 570, 579–80 (2008).

31 *Id.*

32 *See Portillo-Munoz*, 643 F.3d at 440–41.

33 *See id.* at 440.

34 *See* United States v. Meza-Rodriguez, 798 F.3d 664, 669–72 (7th Cir. 2015); *Portillo-Munoz*, 643 F.3d at 440–41.

35 *See Portillo-Munoz*, 643 F.3d at 440–41.

36 *Meza-Rodriguez*, 798 F.3d at 669–71.

37 District of Columbia v. Heller, 554 U.S. 570, 595 (2008).

an individual right to keep and bear arms."[38] Examining the text of the amendment in conjunction with English and early American history, the Court concluded that the original intent of the Framers was to protect an individual's right to self-defense.[39] However, "the right secured by the Second Amendment is not unlimited."[40] The Supreme Court provided examples of proper limitations on gun ownership[41]: "longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms" are all permissible limitations.[42]

Heller left unresolved questions in its wake. One of the most pressing among these is defining the boundaries of "the people" in the Second Amendment. The Supreme Court's decision did not relieve the tension between two competing ideas: the broad individual right to self-defense versus the collective need for an armed citizenry. On one hand, the Court held that the Second Amendment protected an individual's right to keep and bear arms.[43] Rather than being solely a collective right for national defense, the Court emphasized defense of one's home.[44] This theme of a universal right to self-defense might suggest that the Second Amendment extends to all people.[45] On the other hand, the Supreme Court repeatedly discussed Second Amendment rights in the context of citizenship and "Americans."[46] Further, the Supreme Court connected the right to various notions of collective defense and sovereignty.[47]

So, who are "the people," according to the Supreme Court? The *Heller* Court looked at the additional uses of the phrase "right of the people" in the original Constitution, pointing to two other occasions: the First Amendment and the Fourth Amendment.[48] "[T]hese instances unambiguously refer to individual rights, not 'collective' rights, or rights that may be exercised only through participation in some corporate body," the Court wrote.[49] It downplayed the usefulness of examining other instances of "the people,"

38 *Id.*

39 *Id.* at 579–81, 584.

40 *Id.* at 626.

41 *Id.* at 626–27.

42 *Id.*

43 *Id.* at 579–80.

44 *E.g.*, *id.* at 635.

45 *See* Justine Farris, Note, *The Right of Non-Citizens to Bear Arms: Understanding "The People" of the Second Amendment*, 50 IND. L. REV. 943, 959–60 (2017).

46 *See Heller*, 554 U.S. at 581.

47 *Id.* at 597–99.

48 *Id.* at 579.

49 *Id.*

including the preamble and Article I,[50] in interpreting this phrase since those provisions discussed powers, not rights.[51]

The Supreme Court instead referenced *United States v. Verdugo-Urquidez*[52]—a case that examined the question in the context of the Fourth Amendment—to explain who "the people" are: "the term unambiguously refers to all members of the political community, not an unspecified subset."[53] But the Supreme Court did not elaborate on when an individual becomes a member of "the political community," and thus protected by the Second Amendment.[54] This Comment discusses *Verdugo-Urquidez* later in this Part.[55]

The *Heller* decision treated the Second Amendment as an "individual right" rather than a "collective right."[56] When the Supreme Court emphasized that the right does not depend on "participation in some corporate body," it seemed to be reinforcing this point.[57] The Court offered a "strong presumption" to begin its analysis: "[T]he Second Amendment right is exercised individually . . . ."[58] The "individual" theme in *Heller* seems to suggest that the Second Amendment right is a universal right untied to any citizenship status. Perhaps the analysis of the noncitizen question would have ended with the mention of individualism, but the Supreme Court's "strong presumption" did not end with the word "individually." Instead, the full sentence reads: "[T]he Second Amendment right is exercised individually *and belongs to all Americans*."[59] Throughout the opinion, the Court repeated a consistent connection to citizenship. When discussing potential limitations, the Court wrote, "we do not read the Second Amendment to protect the right of *citizens* to carry arms for any sort of confrontation . . . ."[60] It added that the right does not extend to all weapons, just those "typically possessed by law-abiding *citizens* for lawful purposes."[61] The opinion is

50 *Id.* at 579–80.

51 *Id.* at 579.

52 494 U.S. 259, 265 (1990).

53 *Heller*, 554 U.S. at 580 (citing *Verdugo-Urquidez*, 494 U.S. at 265).

54 *Id.*

55 *See infra* text accompanying notes 131–38. The *Verdugo-Urquidez* opinion also explains, "aliens receive constitutional protections when they have come within the territory of the United States and developed substantial connections with this country." 494 U.S. at 271. Perhaps notably, the Supreme Court did not cite this passage.

56 *Heller*, 554 U.S. at 579–80.

57 *Id.* at 579.

58 *Id.* at 581.

59 *Id.* (emphasis added).

60 *Id.* at 595 (emphasis added).

61 *Id.* at 625 (emphasis added).

littered with references to problematic restrictions on citizens, rather than persons generally.[62]

The Supreme Court repeated in *McDonald v. City of Chicago*[63] and *New York State Rifle & Pistol Ass'n v. Bruen*[64] that its *Heller* holding applied to citizens.[65] In *McDonald*, the Supreme Court held that a firearm restriction violated the Second Amendment because it infringed on the rights of "private citizens."[66] And in concurrence, Justice Thomas acknowledged that the Court might one day have to answer whether noncitizens are protected by the Second Amendment.[67] The Supreme Court repeated its emphasis on citizenship in *Bruen*.[68] When two U.S. citizens challenged a New York state firearm restriction, the *Bruen* Court noted it was "undisputed" that "law-abiding, adult citizens" were "part of 'the people'" under the Second Amendment.[69] Further, the Supreme Court wrote that when evaluating the validity of a Second Amendment restriction, courts should look at "how and why the regulations burden a law-abiding *citizen's* right to armed self-defense."[70] The Court's continued emphasis on citizenship suggests a reading of "the people" that is limited to American citizens.[71]

The *Heller* decision also acknowledged that the militia prefatory clause of the Second Amendment[72] indicated a collective need for citizen security.[73] Early sources cited in *Heller* conflict on whether the "militia" included

---

62 "For most of our history, the Bill of Rights was not thought applicable to the States, and the Federal Government did not significantly regulate the possession of firearms by law-abiding *citizens*." *Heller*, 554 U.S. at 625 (explaining why the Second Amendment had not been enshrined in Supreme Court precedent until now); "[T]he conception of the militia at the time of the Second Amendment's ratification was the body of all *citizens* capable of military service . . . ." *Id.* at 627; D.C.'s law "makes it impossible for *citizens* to use them for the core lawful purpose of self-defense and is hence unconstitutional." *Id.* at 630.

63 561 U.S. 742 (2010). The main holding of *McDonald* is that the Second Amendment is incorporated against the states through the Fourteenth Amendment's Due Process Clause. *Id.* at 791.

64 142 S. Ct. 2111 (2022).

65 *McDonald*, 561 U.S. at 767–68; *Bruen*, 142 S. Ct. at 2119.

66 *McDonald*, 561 U.S. at 750.

67 *Id.* at 850 n.19 (Thomas, J., concurring). Because the Supreme Court used the Due Process Clause of the Fourteenth Amendment to incorporate the Second Amendment, the right may apply to "any person" rather than just "the people." *Id.* at 759. Justice Thomas preferred incorporation through the Privileges or Immunities Clause, which applies only to "citizens of the United States." *Id.* at 806.

68 *Bruen*, 142 S. Ct. at 2119.

69 *Id.*

70 *Id.* at 2133 (emphasis added).

71 *But see id.* at 2157 (Alito, J., concurring) (indicating that he would prefer a broader reading of "the people" because "the key point that we decided [in *Heller*] was that 'the people,' not just members of the 'militia,' have the right to use a firearm to defend themselves").

72 "A well regulated Militia, being necessary to the security of a free State . . . ." U.S. CONST. amend. II.

73 District of Columbia v. Heller, 554 U.S. 570, 595–600 (2008).

citizens or all men in the country.[74] Thomas Jefferson defined the militia as "every man in [the state] able to bear arms,"[75] while James Madison in the Federalist Papers called the militia "citizens with arms in their hands."[76]

After the adoption of the Second Amendment, the Second Congress—largely consisting of the same members who approved the Second Amendment[77]—offered a powerful piece of evidence for equating the "militia" with citizenry.[78] In 1792, the Congress passed the Militia Act, defining the militia as "each and every free able-bodied white male *citizen* of the respective states, resident therein," aged between eighteen and forty-five years.[79] The Second Congress's close connection to the adoption of the Second Amendment indicates that this is the context of the original right.

The language "necessary to the security of a free State" suggested to the *Heller* Court that an armed citizenry "is useful in repelling invasions and suppressing insurrections" and is "better able to resist tyranny."[80] Does the collective aspect of the Second Amendment conflict with the individual right to self-defense? No, it does not, the Court wrote.[81] Instead, collective security is one important result of the right to bear arms, but it is not "the only reason Americans valued the ancient right; most undoubtedly thought it even more important for self-defense and hunting."[82] The *Heller* Court also wrote that around the time of the Founding, "some state constitutions used the term 'the people' to refer to the people collectively, in contrast to 'citizen,' which was used to invoke individual rights."[83] These findings suggest that the right to bear arms shares a common cause with citizenship and the preservation of the common good.

To summarize, the Supreme Court first determined that "the people" of the Second Amendment follows the *Verdugo-Urquidez* framework, a case in which the Supreme Court wrote that aliens do enjoy some constitutional protections.[84] Yet, the *Heller* Court also repeated over and over that the right belongs to "Americans" and "citizens."[85] Is this an oversight, or an

74 *Id.* at 595–96.

75 *Id.*

76 *Id.* at 595.

77 *See* OFF. OF THE HISTORIAN, U.S. HOUSE OF REPRESENTATIVES, Official Annotated Membership Roster by State with Vacancy and Special Election Information for the 2d Congress (1791), https://perma.cc/274R-3KM3.

78 *Heller*, 554 U.S. at 596.

79 *Id.* (emphasis added) (quoting Act of May 8, 1792, 1 Stat. 271).

80 *Id.* at 597–98.

81 *Id.* at 598.

82 *Id.* at 599.

83 *Id.* at 580 n.6.

84 *Id.* at 579–80; United States v. Verdugo-Urquidez, 494 U.S. 259, 265 (1990).

85 *See Heller*, 554 U.S. at 581, 625.

unintended contradiction in the Second Amendment's scope? After all, the ultimate holding of *Heller* did not depend on whether "the people" included noncitizens.[86] Or is this muddling of the *Verdugo-Urquidez* definition of "the people" a more deliberate practice? Additionally, the Supreme Court's reading of the prefatory clause inserted an element of collective security into a right *Heller* held to be individual.[87]

This tension has not escaped the notice of the legal community. Professor Pratheepan Gulasekaram, a leading scholar on the application of constitutional rights to noncitizens, writes that the Supreme Court's wavering definition of "the people" is unlikely to be a mistake:

> The lack of attention by litigants and academics to the "citizens" specified by the *Heller* majority makes sense if the reference was inadvertent or was a colloquial allusion to a general class of persons to whom all civil rights inure. Such a reading, however, imputes . . . sloppiness and imprecision into a profound pronouncement on the scope of a fundamental right.[88]

Instead, he suggests the Supreme Court might have hoped to narrow the definition of "the people" of the Second Amendment when compared with the Fourth Amendment[89]: "in deliberately trying to situate the right of armed self-defense in the pantheon of constitutional rights, Justice Scalia's opinion identifies the right-holders at different points as 'all members of the political community,' 'all Americans,' 'citizens,' 'Americans,' and 'law-abiding citizens.'"[90]

Professor Gulasekaram identifies another inconsistency that indicates a constricted definition: the Supreme Court's reformulation of the *Verdugo-Urquidez* standard.[91] The original standard includes everyone who is "part of a national community," but *Heller* only refers to "members of the political community."[92] Professor Gulasekaram explains, "[t]his misquotation of the prior opinion appears to be a sleight of hand intended to constrict the constitutional definition of 'the people.'"[93] Because "political community" might necessarily "impl[y] only those with political rights," the standard could exclude noncitizens.[94] The phrase "political community" does not appear in *Verdugo-Urquidez*.[95] It instead comes from *Sugarman v. Dougall*,[96]

---

86 *Id.* at 595.

87 *Id.* at 595–600.

88 Pratheepan Gulasekaram, *"The People" of the Second Amendment: Citizenship and the Right to Bear Arms*, 85 N.Y.U. L. REV. 1521, 1532 (2010).

89 *Id.* at 1536.

90 *Id.* at 1530.

91 *Id.* at 1536.

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

93 Gulasekaram, *supra* note 88, at 1536.

94 *Id.*

95 *See Verdugo-Urquidez*, 494 U.S. at 282 (referring instead to a "national community").

96 413 U.S. 634 (1973).

a case where the Supreme Court wrote that certain restrictions on rights for noncitizens, such as voting, are permissible when a government is defining its own "political community."[97]

Professor Gulasekaram does not approve of this development. He claims this potentially "restrictionist project" echoes the Supreme Court's infamous *Dred Scott v. Sandford*,[98] where Chief Justice Taney equated "the people" with citizenship en route to denying citizenship to Americans of African descent.[99] A restrictive interpretation of "the people," Gulasekaram argues, would "contradict *Heller*'s fundamental holding regarding the individualized and self-protective characteristics of the right to bear arms."[100] The Second Amendment's classification in *Heller* is critical in determining the rights of noncitizens:

> [C]itizenship distinctions in gun laws could . . . be understood like prohibitions in holding elected office, serving on juries, and certain types of political associations—when the Second Amendment is understood as a right related to protection of or from the sovereign. They make less sense when the Second Amendment is interpreted, as it was in *Heller*, as a right of personal self-defense.[101]

Heller'*s* tension between sovereignty and individual self-defense is one of the central issues for resolving the noncitizen question.

B. *Noncitizens as "The People" Pre-*Heller

Besides the Second Amendment, the Constitution uses "the people" (or "the People") in seven other contexts. The first words of the preamble are "We the People."[102] In the text of the original document itself, Article I says that "the People" shall choose the members of the House of Representatives.[103] The rest of the references appear in the Bill of Rights and the Seventeenth Amendment.[104] Most uses of "the people" in the

---

97 *Id.* at 643.

98 60 U.S. (19 How.) 393 (1857).

99 Gulasekaram, *supra* note 88, at 1537; *see also Dred Scott*, 60 U.S. at 404 (enslaved party) ("The words 'people of the United States' and 'citizens' are synonymous terms, and mean the same thing."), *superseded by constitutional amendment*, U.S. CONST. amend. XIV. The dissent in *Dred Scott* did not take issue with Justice Taney's equivalence between "the people" and "citizens," instead interchangeably arguing that Americans of African dissent were a part of "the people" and "citizens." *Dred Scott*, 60 U.S. at 576 (Curtis, J., dissenting).

100 Gulasekaram, *supra* note 88, at 1538.

101 Pratheepan Gulasekaram, *Guns and Membership in the American Polity*, 21 WM. & MARY BILL RTS. J. 619, 627 (2012).

102 U.S. CONST. pmbl.

103 U.S. CONST. art. I, § 2.

104 U.S. CONST. amends. I, IV, IX, X, XVII.

Constitution are relevant to a discussion of the Second Amendment, since most recognize a right or bestow a power.

Courts have held "the people" of the First and Fourth Amendments to include noncitizens, even including illegal aliens inside the country.[105] However, even these rights can be limited in ways that would be unconstitutional if applied to citizens.[106] The Constitution grants wide latitude to the political branches in regulating the conduct of noncitizens.[107] For instance, "Congress has the authority to make laws governing the conduct of aliens that would be unconstitutional if made to apply to citizens."[108] In both the First and Fourth Amendment contexts, this can result in curtailed rights.[109] The Supreme Court has established that all the freedoms of the First Amendment apply to aliens inside U.S. borders[110]: "[O]nce an alien lawfully enters and resides in this country he becomes invested with the rights guaranteed by the Constitution to all people within our borders. Such rights include those protected by the First [Amendment] . . . ."[111]

But this right is not absolute, especially when applied to aliens.[112] In *Harisiades v. Shaughnessy*[113] in 1952, the Supreme Court allowed the deportation of non-U.S. citizen Communist Party members despite their First Amendment claims.[114] Because statutes affecting aliens overlap with the foreign relations power of the "political branches of government," the Supreme Court afforded greater leniency to restrictions on their freedom to join the Communist Party.[115] Even though these noncitizens were engaged in activities in which citizens would be free to participate, the Court upheld their deportation.[116]

105 *See* Kwong Hai Chew v. Colding, 344 U.S. 590, 596–97 n.5 (1953) (quoting Bridges v. Wixon, 326 U.S. 135, 161 (1945) (Murphy, J., concurring)); United States v. Verdugo-Urquidez, 494 U.S. 259, 271 (1990) (holding that aliens receive constitutional protections when they enter the country and have "developed substantial connections").

106 United States v. Portillo-Munoz, 643 F.3d 437, 441 (5th Cir. 2011); *see* Mathews v. Diaz, 426 U.S. 67, 79–80 (1976).

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

108 *Id.*

109 *See* Harisiades v. Shaughnessy, 342 U.S. 580, 592 (1952); *Verdugo-Urquidez*, 494 U.S. at 273–74.

110 *Kwong Hai Chew*, 344 U.S. at 596–97 n.5 (quoting *Bridges*, 326 U.S. at 161 (Murphy, J., concurring)).

111 *Id.*

112 *Harisiades*, 342 U.S. at 592.

113 342 U.S. 580 (1952).

114 *Id.* at 592.

115 *Id.* at 588–90.

116 *Id.* at 596.

This was not the first time the Court had allowed Congress to take action against a noncitizen for exercising what would be inalienable First Amendment rights for a citizen.[117] In *United States ex rel. Turner v. Williams*,[118] the Supreme Court upheld a deportation order for an alien anarchist in the face of a First Amendment challenge.[119] The political branches are thus entrusted with appropriately restricting enumerated rights in the Constitution when it comes to noncitizens, because doing so would protect "a republican form of government."[120] When a noncitizen's First Amendment expressions threaten to "undermine American society or its political system," the noncitizen essentially loses the protection of that constitutional right.[121]

What these First Amendment cases demonstrate is that the Supreme Court has often given noncitizens fewer constitutional rights than citizens, even when those rights are enumerated and not explicitly reserved for citizens. Applied to the Second Amendment, this principle could suggest that noncitizens are not really a part of "the people." Instead, the constitutional rights of noncitizens are at the very least reduced, and in some contexts nonexistent. However, some courts have denied a connection between First Amendment restrictions and the Second Amendment.[122] As one district court said: "The aim of these restrictions is a general public good: maintaining public order and society's institutions from denigration by non-members. . . . *Heller*, by contrast, explicitly holds that the Second Amendment protects not a public good like self-governance, but the private right of self-defense."[123]

Generally, the Supreme Court has long left questions related to alienage to the political branches.[124] This deference recognizes that the federal

117 *See* United States *ex rel.* Turner v. Williams, 194 U.S. 279 (1904).

118 194 U.S. 279 (1904).

119 *Id.* at 292.

120 *Harisiades*, 342 U.S. at 588–89.

121 *See* Fletcher v. Haas, 851 F. Supp. 2d 287, 296 (D. Mass. 2012).

122 *Id.*

123 *Id.*

124 *See* Hampton v. Mow Sun Wong, 426 U.S. 88, 101 n.21 (1976) ("It is important to note that the authority to control immigration is not only vested solely in the Federal Government, rather than the States, but also that the power over aliens is of a political character and therefore subject only to narrow judicial review." (citation omitted)); Fong Yue Ting v. United States, 149 U.S. 698, 713 (1893) (recognizing that the political branches have plenary power over questions of alienage: "The power to exclude or to expel aliens, being a power affecting international relations, is vested in the political departments of the government, and is to be regulated by treaty or by act of Congress, and to be executed by the executive authority according to the regulations so established . . . ."); Chae Chan Ping v. United States, 130 U.S. 581, 609 (1889) (recognizing that the political branches have the plenary power to exclude noncitizens: "The power of exclusion of foreigners . . . belonging to the government of the United States as . . . those sovereign powers delegated by the Constitution, the right to its exercise at any time when, in the

government has the right to expel and exclude noncitizens.[125] The political branches may even exclude whole groups from entering the United States.[126] In exclusion cases for example, noncitizens are entitled only to the due process offered by Congress.[127] The broad powers of the political branches over noncitizens come from several provisions of the Constitution.[128] Several constitutional items give the president control over noncitizens: the executive power, his status as commander-in-chief, his foreign relations powers, and his duty to execute the laws of this country.[129] Meanwhile, its power to regulate foreign commerce, its power over naturalization, and its foreign affairs duties grant Congress the implicit power to regulate noncitizens.[130] The Supreme Court's decisions have recognized that these constitutional powers grant sweeping authority to the political branches on issues related to noncitizens.[131] Similarly, the judicial branch may find it prudent to defer to the political branches on the regulation of noncitizens and firearms, given this subject's political and national security implications.

One of the most relevant cases to "the people" and the Second Amendment is a 1990 Fourth Amendment case, *United States v. Verdugo-Urquidez*, where the Supreme Court defined "the people" in the Fourth Amendment context.[132] In holding the Fourth Amendment did not apply to an unwarranted search of a noncitizen's residence outside of the United States, the Supreme Court established a test to determine who "the people" are:

judgment of the government, the interests of the country require it, cannot be granted away or restrained . . . ."); Nishimura Ekiu v. United States, 142 U.S. 651, 663–64 (1892) (holding that noncitizens seeking to enter the United States are entitled only to the procedural protections that Congress affords them); *see also* Patel v. Garland, 142 S. Ct. 1614, 1618 (2022) ("Congress has comprehensively detailed the rules by which noncitizens may enter and live in the United States. When noncitizens violate those rules, Congress has provided procedures for their removal. . . . Federal courts have a very limited role to play in this process."); Trump v. Hawaii, 138 S. Ct. 2392, 2418–19 (2018) ("Because decisions in [immigration] matters may implicate 'relations with foreign powers,' or involve 'classifications defined in the light of changing political and economic circumstances,' such judgments 'are frequently of a character more appropriate to either the Legislature or the Executive.'" (quoting Mathews v. Diaz, 426 U.S. 67, 81 (1976))).

125 *Chae Chan Ping*, 130 U.S. at 609 (recognizing the power to exclude); *Fong Yue Ting*, 149 U.S. at 713 (recognizing the power to expel).

126 *Trump*, 138 S. Ct. at 2418–19.

127 *Nishimaru Ekiu*, 142 U.S. at 663–64.

128 *Fong Yue Ting*, 149 U.S. at 711–12.

129 *Id.*

130 *Id.*

131 *See, e.g., Trump*, 138 S. Ct. at 2418–19.

132 494 U.S. 259, 265, 273–74 (1990).

> "[T]he people" protected by the Fourth Amendment . . . 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.[133]

It added that the Fourth Amendment protects those who "have come within the territory of the United States and developed substantial connections with this country."[134] In an aside, the Court suggested the Second Amendment might include the same "people" as the Fourth Amendment.[135] So, under the *Verdugo-Urquidez* standard, for a noncitizen to be a part of "the people" for Fourth Amendment purposes, they must: (1) "come within the territory of the United States;" and either (2) be a part of the "national community;" or (3) "develop substantial connections with" the United States.[136] But like the First Amendment, a noncitizen's Fourth Amendment protection is not unlimited, even if he or she met this test.[137] In *Verdugo-Urquidez*, the Court held that the Fourth Amendment did not apply to searches of a noncitizen's property outside the United States, even if the subject was in the United States.[138]

Some commentators have advocated for "the people" of the Second Amendment to be interpreted according to the *Verdugo-Urquidez* definition. For example, Professor Eugene Volokh has written that the term "should be read in the Second Amendment the same way it has been read in the First and Fourth Amendments: as including the nation's lawful guests, though not applying to those who are largely unconnected with the country."[139] Because self-defense is useful to all people, not just citizens, in Volokh's view it is a right that should be just as expansive as the Fourth Amendment.[140]

When dealing with the right to vote, the Constitution uses "the people" and "citizen" interchangeably. Article I mandates that "the People" shall choose the members of the House of Representatives.[141] The Seventeenth Amendment, which establishes the same voting system for the Senate, also says that "the people" shall elect senators.[142] Meanwhile, the Fifteenth, Nineteenth, Twenty-fourth, and Twenty-sixth amendments all use the word

133 *Id.* at 265.

134 *Id.* at 271.

135 *Id.* at 265.

136 *Id.* at 265, 271.

137 *Id.* at 273–74.

138 *Id.*

139 Eugene Volokh, *Implementing the Right to Keep and Bear Arms for Self-Defense: An Analytical Framework and a Research Agenda*, 56 UCLA L. REV. 1443, 1514 (2009).

140 *Id.*

141 U.S. CONST. art. I, § 2.

142 U.S. CONST. amend. XVII.

"citizen" to discuss voting rights.[143] The Supreme Court has thus interpreted the Constitution to allow the exclusion of noncitizens from voting rights, even though "the people" select members of Congress.[144] The Court "has never held that aliens have a constitutional right to vote or to hold high public office . . . Indeed, implicit in many of this Court's voting rights decisions is the notion that citizenship is a permissible criterion for limiting such rights."[145] In *Sugarman v. Dougall*, the Supreme Court recognized that a state has the power to "exclude aliens from participation in its democratic political institutions."[146] Therefore, in some places in the Constitution, particularly those dealing with voting rights, the phrase "the people" excludes noncitizens.[147]

As discussed earlier, the *Heller* Court did not quote the *Verdugo-Urquidez* standard exactly, instead using the phrase "political community" from *Sugarman v. Dougall*.[148] This is consequential. The *Sugarman* Court emphasized the state's "interest in establishing its own form of government, and in limiting participation in that government to those who are within 'the basic conception of a political community.'"[149] Additionally, the Court acknowledged a "State's broad power to define its political community."[150] The "political community" is a narrower subset of protected individuals than the "national community" of the *Verdugo-Urquidez* standard.[151] This is a signal that the Supreme Court considers the Second Amendment closer to rights such as voting or other political privileges.[152]

Voting rights are an obvious area where governments can exclude noncitizens, but courts treat similar restrictions with reduced scrutiny when analyzing rights in a Fourteenth Amendment framework.[153] This is the "political function" test.[154] This exception to strict scrutiny review allows states to flexibly set citizenship requirements for certain aspects of

143 U.S. CONST. amends. XV, IXX, XXIV, XXVI.

144 Sugarman v. Dougall, 413 U.S. 634, 648–49 (1973).

145 *Id.*

146 *Id.*

147 *See id.*; U.S. CONST. art. I, § 2; U.S. CONST. amend. XVII.

148 District of Columbia v. Heller, 554 U.S. 570, 580 (2008) (citing United States v. Verdugo-Urquidez, 494 U.S. 259, 265 (1990)); *Sugarman*, 413 U.S. at 642–43.

149 *Sugarman*, 413 U.S. at 642.

150 *Id.* at 643.

151 However, in *Sugarman* the Supreme Court also wrote that restrictions on aliens would face at least some scrutiny from courts. *Id.*

152 Kristen M. Schuler, *Equal Protection and the Undocumented Immigrant: California's Proposition 187*, 16 B.C. THIRD WORLD L.J. 275, 303 (1996).

153 *Id.*

154 *Id.*

democratic government.[155] Essentially, if the government sets a classification based on citizenship for a "political function," courts will treat the alleged discrimination with much less scrutiny than the violation of a more individual-focused right.[156] While a full Fourteenth Amendment analysis is not particularly relevant to defining "the people," these examples of political functions help show what types of constitutional questions implicate sovereign interests of self-government.

On political functions, the Supreme Court has largely deferred to the legislature and executive on classifications that affect aliens[157]:

> Since decisions in these matters may implicate our relations with foreign powers and a wide variety of classifications must be defined in the light of changing political and economic circumstances, such decisions are frequently of a character more appropriate to either the Legislature or the Executive than to the Judiciary.[158]

The Supreme Court has said that the "political branches of the Federal Government" must be able to answer questions regarding aliens with "flexibility in policy choices rather than the rigidity often characteristic of constitutional adjudication."[159] On this rationale, the Supreme Court has upheld several statutes, at both the state and federal levels, that classify based on alienage, including a state bar on noncitizens serving as members of the state police force,[160] a state bar on noncitizens serving as public school teachers,[161] and a federal law that excluded noncitizens from certain statutory benefits.[162] While these were not necessarily "constitutional" rights, they were challenged and upheld on constitutional grounds.[163] Even in the face of constitutional claims, political flexibility in dealing with aliens is an important factor for the courts.

On the Second Amendment and noncitizens, pre-*Heller* litigation consisted of a Supreme Court opinion upholding alien restrictions and state court opinions discussing similar state constitutional rights. The Second Amendment itself did not factor into these decisions.[164] Instead, courts looked to the Fourteenth Amendment or state constitutions to see what rights noncitizens had.[165] Despite the lack of early explicit Second

155 *Id.* at 303–04.

156 *Id.*

157 Mathews v. Diaz, 426 U.S. 67, 81 (1976).

158 *Id.*

159 *Id.*

160 Foley v. Connelie, 435 U.S. 291, 299 (1978).

161 Ambach v. Norwick, 441 U.S. 68, 80–81 (1979).

162 *Mathews*, 426 U.S. at 87.

163 *See id.* at 69. *But see* Bernal v. Fainter, 467 U.S. 216, 228 (1984) (holding that a state law preventing an alien from obtaining a job as a notary public was unconstitutional).

164 *See, e.g.*, Patsone v. Pennsylvania, 232 U.S. 138 (1914).

165 *See id.* at 138; State v. Beorchia, 530 P.2d 813, 814–15 (Utah 1974).

Amendment interpretation, the cases are helpful in determining historical views leading up to the *Heller* decision.

In 1914, the Supreme Court denied noncitizens the same rights to firearms as citizens.[166] In *Patsone v. Pennsylvania*,[167] the Court considered a state prohibition on alien ownership of shotguns and rifles.[168] The challenger, a noncitizen resident of Pennsylvania, argued that the Fourteenth Amendment precluded disparate treatment of aliens and citizens.[169] He argued that the statute unconstitutionally "discriminat[ed] against aliens as a class."[170] Pennsylvania justified the ban as an effort to protect wildlife from poaching and overhunting.[171]

The Supreme Court upheld the statute.[172] Since the issue of whether aliens presented a danger to local wildlife "is one of local experience," the Court gave deference to the state legislature: "a state may classify with reference to the evil to be prevented, and that if the class discriminated against is or reasonably might be considered to define those from whom the evil mainly is to be feared, it properly may be picked out."[173] This precedent established that noncitizens have lesser rights to firearms than citizens.[174] *Patsone* has never been overturned, although courts have doubted its general theory of the Fourteenth Amendment in subsequent cases.[175]

State supreme courts are divided on the issue of firearm rights for noncitizens. Some states have upheld restrictions on noncitizens.[176] Others have struck down these restrictions on either state or federal constitutional grounds.[177] These cases were pre-*Heller*, but they analyzed similar state constitutional provisions as applied to noncitizens. In upholding restrictions on possession of firearms by noncitizens, some state supreme courts have

166 *Patsone*, 232 U.S. at 144.

167 232 U.S. 138 (1914).

168 *Id.* at 143.

169 *Id.*

170 *Id.*

171 *Id.* at 143–44.

172 *Id.* at 144–45.

173 *Id.* at 144.

174 The *Patsone* Court did not address the legality of a potential statute that would have prohibited alien ownership of firearms for self-defense, but it suggested this might be a separate issue. *Id.* at 143 ("The possession of rifles and shot guns is not necessary for other purposes within the statute. It is so peculiarly appropriated to the forbidden use that if such a use may be denied to this class, the possession of the instruments desired chiefly for that end also may be. The prohibition does not extend to weapons such as pistols that may be supposed to be needed occasionally for self-defense.").

175 Smith v. South Dakota, 781 F. Supp. 2d 879, 884–85 (D.S.D. 2011).

176 *See* State v. Beorchia, 530 P.2d 813, 814–15 (Utah 1974); State v. Rheaume, 116 A. 758, 763 (N.H. 1922).

177 *See* People v. Zerillo, 189 N.W. 927, 928 (Mich. 1922).

held the provisions valid under similar constitutional provisions to the Second Amendment.[178] Regulation of firearm ownership was a matter for state legislatures because of its "great inherent danger to the public," one of these courts reasoned.[179]

In a 1922 decision, the New Hampshire Supreme Court upheld a state statute prohibiting certain aliens from possessing weapons.[180] The court offered a series of rationales for dividing firearms rights between citizens and noncitizens.[181] First, citizens tend to "have more settled domiciles" and are "known to the local police," while noncitizens' domiciles tend to be "capricious and uncertain."[182] Second, citizens, at that time, paid taxes, while noncitizens did not necessarily support public funds.[183] Third, citizens are "imbued with a natural allegiance to their government which unnaturalized aliens do not possess."[184] Citizens have a "knowledge and reverence" for American institutions, and noncitizens "do not understand our customs or laws, or enter into the spirit of our social organization."[185] A citizen "has an obligation to defend the state, while the alien has none."[186] Citizens are likewise "required to assist in" other security activities like law enforcement, while noncitizens are not.[187] For these reasons, the court determined the classification was "reasonable."[188] However, much of this thinking is not as valid as it was in 1922. For instance, noncitizens are now subject to taxation,[189] and the Selective Service System requires noncitizens to register for military conscription.[190] But arguments about the transitory nature of migrants and the nature of noncitizens' loyalty to the United States may still be relevant questions for many in the twenty-first century.[191]

The Utah Supreme Court, evaluating a similar statute restricting alien ownership of firearms, held in 1974 that such a ban did not violate the state

178 *Beorchia*, 530 P.2d at 814–15.

179 *Rheaume*, 116 A. at 763.

180 *Id.* at 763.

181 *Id.*

182 *Id.*

183 *Id.*

184 *Id.*

185 *Id.*

186 *Id.*

187 *Id.*

188 *Id.*

189 *Taxation of Nonresident Aliens*, INTERNAL REVENUE SERV. (Dec. 27, 2021), https://perma.cc/E3XH-AWD7; *Taxation of U.S. Residents*, INTERNAL REVENUE SERV. (Nov. 29, 2022), https://perma.cc/DV2P-ERZB.

190 *Who Needs to Register*, SELECTIVE SERV. SYS., https://perma.cc/9FGB-39SN.

191 *See* David Cole, *Are Foreign Nationals Entitled to the Same Constitutional Rights as Citizens?*, 25 T. JEFFERSON L. REV. 367, 384 (2003) (summarizing the arguments many make about noncitizens in the United States in a post-9/11 world).

or federal constitutions.[192] The Utah state constitutional provision considered is similar in construction to the Second Amendment: "The people have the right to bear arms for their security and defense, but the Legislature may regulate the exercise of this right by law."[193] The Utah Supreme Court wrote that this provision made the legislature's power to prohibit noncitizens from owning a firearm "evident."[194] Since the Utah Constitution protected the right of "the people," Utah clearly did not consider noncitizens a part of this classification.[195]

Several state supreme courts have taken the opposite stance and struck down restrictions on noncitizen firearm ownership. The Michigan Supreme Court, for instance, held in 1922 that a restriction on noncitizen revolver ownership violated the state's constitution.[196] This question, it said, was out of the hands of the legislature: "while the Legislature has power . . . to regulate the carrying and use of firearms, that body has no power to constitute it a crime for a person, alien or citizen, to possess a revolver for the legitimate defense of himself and his property."[197] The relevant state constitutional provision mandated that "[e]very person has a right to bear arms for the defense of himself and the state."[198] The court reasoned that "every person" extended to noncitizens and citizens alike, and it considered the right to keep and bear arms to be an individual right, separate from citizenship.[199] Notably, this is a different, and likely more inclusive, formulation of the right than "the people" of the Second Amendment.[200] This case also distinguished *Patsone* on similar grounds, writing that the statute in *Patsone* only regulated hunting weapons and did not deprive noncitizens of a right to self-defense through other firearms.[201]

Other state courts have since joined Michigan in striking down firearm restrictions on aliens. The Supreme Court of Virginia in 1976 subjected a noncitizen firearm restriction to "close" judicial scrutiny and held it invalid.[202] The Supreme Court of Nevada in 1981 used strict scrutiny to examine a

192 State v. Beorchia, 530 P.2d 813, 814 (Utah 1974).

193 *Id*.

194 *Id.*

195 *Id.*

196 People v. Zerillo, 189 N.W. 927, 929 (Mich. 1922).

197 *Id.* at 928.

198 *Id.*

199 *Id.* at 928–29.

200 *See* United States v. Jimenez-Shilon, 34 F.4th 1042, 1045 (11th Cir. 2022) ("[T]he phrase 'the people' sits somewhere in between—it has 'broader content than "citizens," and . . . narrower content than persons.'").

201 *Zerillo*, 189 N.W. at 929.

202 Sandiford v. Virginia, 225 S.E.2d 409, 410 (Va. 1976) (quoting Graham v. Richardson, 403 U.S. 365, 372 (1971)) (using a Fourteenth Amendment framework).

statute prohibiting noncitizens from owning firearms and held it invalid.[203] Both courts cast doubt on the New Hampshire Supreme Court's rationale for alien restrictions. The Virginia court wrote that there was "no rational connection between a person's place of birth and his disposition to commit offensive or aggressive acts."[204] The Nevada court added:

> A person does not exhibit a tendency toward crime merely because he or she is a noncitizen. . . . [C]lassification based upon alienage "is the lingering vestige of a xenophobic attitude which . . . should now be allowed to join those [other] anachronistic classifications among the crumbled pedestals of history."[205]

Some academics have agreed with the Virginia court's approach. Volokh wrote that it "would be a mistake" to decide "disarming noncitizens is somehow necessary to materially reduce danger of crime or injury."[206] This concern over "xenophobic attitude[s]" is an animating feature of many of the arguments against restricting Second Amendment rights to citizenship.

C. *Noncitizens as "The People" Post*-Heller

Helpful to defining "the people" of the Second Amendment is the circuit split on a narrower debate of this larger topic: the right of illegal aliens to keep and bear arms. Under 18 U.S.C. § 922(g)(5), illegal aliens are barred from possessing firearms.[207] Post-*Heller* challenges to this law have divided courts on whether "the people" of the Second Amendment includes illegal aliens. The Fourth, Fifth, and Eighth Circuits have held that the Second Amendment did not apply to illegal aliens.[208] Conversely, the Seventh Circuit has said that "the people" does include illegal aliens in a Second Amendment context (though it ultimately upheld the restriction anyway).[209] The Eleventh Circuit supplemented the Seventh Circuit's argument with an analysis of "the people."[210] The Second, Ninth, and Tenth Circuits have

---

[203] State v. Chumphol, 634 P.2d 451, 451–52 (Nev. 1981) (using a Fourteenth Amendment framework).

[204] *Sandiford*, 225 S.E.2d at 411.

[205] *Chumphol*, 634 P.2d at 452 (alterations in original) (quoting Raffaelli v. Comm. of Bar Exam'rs, 496 P.2d 1264, 1266 (Cal. 1972)).

[206] Volokh, *supra* note 139, at 1515.

[207] 18 U.S.C. § 922(g)(5).

[208] United States v. Carpio-Leon, 701 F.3d 974, 975 (4th Cir. 2012); United States v. Flores, 663 F.3d 1022, 1023 (8th Cir. 2011) (per curiam); United States v. Portillo-Munoz, 643 F.3d 437, 442 (5th Cir. 2011).

[209] United States v. Torres, 911 F.3d 1253, 1261 (9th Cir. 2019); United States v. Meza-Rodriguez, 798 F.3d 664, 672 (7th Cir. 2015); United States v. Huitron-Guizar, 678 F.3d 1164, 1168–69 (10th Cir. 2012).

[210] United States v. Jimenez-Shilon, 34 F.4th 1042, 1044–46 (11th Cir. 2022) (holding that restrictions on illegal aliens possessing weapons do not violate the Second Amendment).

skipped deciding whether illegal aliens have Second Amendment rights but have upheld the restrictions based on government interest.[211]

To determine whether illegal aliens fall under the Second Amendment, the Fifth Circuit in *United States v. Portillo-Munoz*[212] engaged in a detailed examination of "the people."[213] While acknowledging that the Supreme Court recognized at least some noncitizens were included in "the people" of the Fourth Amendment, the court disputed that this required a similar construction of "the people" in the Second Amendment[214]: "The purposes of the Second and the Fourth Amendment are different. The Second Amendment grants an affirmative right to keep and bear arms, while the Fourth Amendment is at its core a protective right against abuses by the government."[215] The court explained the crucial difference between a protective right and an affirmative right is that "an affirmative right would be extended to fewer groups."[216]

The Fifth Circuit concluded that illegal aliens have no Second Amendment protections. Because illegal aliens "are likely to maintain no permanent address in this country, elude detection through an assumed identity, and—already living outside the law—resort to illegal activities to maintain a livelihood," the statute did not violate the Second Amendment[217]:

> The Court's language in *Heller* invalidates Portillo's attempt to extend the protections of the Second Amendment to illegal aliens. Illegal aliens are not "law-abiding, responsible citizens" or "members of the political community," and aliens who enter or remain in this country illegally and without authorization are not Americans as that word is commonly understood.[218]

On these rationales, the court upheld the federal prohibition.[219]

---

211 United States v. Perez, 6 F.4th 448, 453 (2d Cir. 2021); *Torres*, 911 F.3d at 1261 (assuming that an illegal alien is included in the people of the Second Amendment but finding § 922(g)(5) is an appropriate restriction); *Huitron-Guizar*, 678 F.3d at 1169 (assuming that an illegal alien is included in the people of the Second Amendment). Relatedly, the Ninth Circuit has taken the same approach to nonimmigrant visa holders on the question of firearm restrictions. United States v. Singh, 979 F.3d 697, 725 (9th Cir. 2020) (bypassing the question of whether nonimmigrant visa holders are protected under the Second Amendment but remarking that the government's contention that nonimmigrant visa holders are not included holds "force").

212 643 F.3d 437 (5th Cir. 2011).

213 *Id.* at 440–41.

214 *Id.*

215 *Id.*

216 *Id.* at 441.

217 *Id.* (quoting United States v. Toner, 728 F.2d 115, 128–29 (2d Cir. 1984)).

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

219 *Id.* at 441–42.

On the other side of the split, the Seventh Circuit in *United States v. Meza-Rodriguez*[220] concluded that illegal aliens were a part of "the people" of the Second Amendment.[221] Discussing *Heller*, the court noted the tension between the decision's focus on citizenship and its respect for individual rights[222]: "While some of *Heller*'s language does link Second Amendment rights with the notions of 'law-abiding citizens' and 'members of the political community,' those passages did not reflect an attempt to define the term 'people.'"[223] Instead, "language in *Heller* supports the opposite result: that all people, including non-U.S. citizens, whether or not they are authorized to be in the country, enjoy at least some rights under the Second Amendment."[224] The court noted that the *Heller* Court drew parallels to other uses of "the people" in the Constitution and that each of these provisions "codified a pre-existing right."[225] The identical language should be treated the same for consistency's sake, the court reasoned.[226] However, the court also admitted that several other provisions in the Constitution referred to "the people" in the context of rights that have been limited to citizens.[227]

Under the *Verdugo-Urquidez* reasoning, the Seventh Circuit held that illegal aliens were protected by the Second Amendment.[228] That test required noncitizens to show "substantial connections" to the United States.[229] Because the alien in *Meza-Rodriguez* had resided in the United States for nearly his entire life, attended school in the United States, and "developed close relationships with family members and other acquaintances," the court determined that he was included in "the people" of the Second Amendment.[230] The court expressed concern that siding with

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

221 *Id.* at 672.

222 *Id.* at 669 (citation omitted).

223 *Id.*

224 *Id.*

225 *Id.* at 669–70 (quoting District of Columbia v. Heller, 554 U.S. 570, 592 (2008)).

226 *Meza-Rodriguez*, 798 F.3d at 670.

227 *Id.* at 670; *see* U.S. CONST. art. I, § 2 ("The House of Representatives shall be composed of Members chosen every second Year by *the People* of the several States . . . ." (emphasis added)); U.S. CONST. amend. XVII ("The Senate of the United States shall be composed of two Senators from each State, elected by *the people* thereof . . . . [A]ny State may empower the executive thereof to make temporary appointments until *the people* fill the vacancies by election . . . ." (emphasis added)).

228 *Meza-Rodriguez*, 798 F.3d at 670. *But see* Reed Sawyers, *For Geofences: An Originalist Approach to the Fourth Amendment*, 29 GEO. MASON L. REV. 787, 796 n.55 (2022) ("There are also questions of the [Fourth] Amendment's . . . applicability to non-citizens . . . Notably, the Second Amendment uses the same phrase, 'the people,' but has not been found to bar prosecution of aliens for the unlawful possession of a firearm . . . suggesting that the Fourth Amendment rights of aliens could be similarly curtailed.").

229 *Id.* at 670.

230 *Id.* at 670–72.

the government would threaten the rights of all noncitizens: "[i]n the post-*Heller* world, where . . . the Second Amendment . . . 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."[231]

However, even though it held that illegal aliens have a Second Amendment right, the court upheld § 922(g)(5), the federal provision banning illegal aliens from owning weapons, as an appropriate restriction on that right.[232] Some commentators have criticized this decision as a potential threat to the Second Amendment rights of all other persons in the United States, including citizens.[233] Since the court found illegal aliens to be part of "the people" yet upheld a total ban on their ownership of firearms, this decision suggests that the government might be able to restrict firearm ownership of everyone else who is a part of "the people."[234]

While not ultimately deciding whether illegal aliens are a part of "the people," the Eleventh Circuit suggested that at least some noncitizens are a part of "the people."[235] The court did not "see any textual, contextual, or historical reason to think that the Framers understood the meaning of ['the people'] to vary from one provision of the Bill of Rights to another."[236] Instead, the court reasoned, citizenship limitations or universal inclusion were explicit in the Constitution[237]: "[i]t appears, then, at least as a general matter, that the phrase 'the people' sits somewhere in between—it has 'broader content than citizens, and . . . narrower content than persons.'"[238] Yet, the Eleventh Circuit recognized that at the founding, the right to bear arms was limited to "the American political community."[239]

---

231 *Id.* at 672.

232 *Id.* at 673.

233 Andrew Kloster, *Appeals Court Ruling Could Threaten the Second Amendment Rights of American Citizens*, HERITAGE FOUND. (Mar. 16, 2016), https://perma.cc/C4JU-GRMF.

234 *Id.* ("Such a holding could risk Second Amendment freedoms. For example, the President has recently suggested that those on the 'no fly' list . . . should also not be permitted to purchase a gun. If the . . . holding in *Meza-Rodriguez* was followed, one could arguably justify this position: Persons on the list, even if they are mistakenly on the list and even if they are citizens, have 'an interest in eluding law enforcement.' Indeed, that interest could be perfectly justified: Law enforcement might have targeted them unreasonably, and this could serve as a smoke screen for justifying the policy as constitutional." (footnote omitted)).

235 United States v. Jimenez-Shilon, 34 F.4th 1042, 1045 (11th Cir. 2022).

236 *Id.* (citing United States v. Emerson, 270 F.3d 203, 227–28 (5th Cir. 2001), a pre-*Heller* case on the Second Amendment). *But see Emerson,* 270 F.3d at 229 ("It appears clear that 'the people,' as used in the Constitution, including the Second Amendment, refers to individual Americans.").

237 *Jimenez-Shilon*, 34 F.4th at 1045.

238 *Id.* (quoting United States v. Huitron-Guizar, 678 F.3d 1164, 1168 (10th Cir. 2012)).

239 *Id.* at 1048 ("By refusing to take an oath of allegiance to the state, those associated with foreign governments renounced their membership in the American political community and, in doing so, forfeited the state's protection of their right to arms—even if they continued to live on American soil.");

Though the other circuit courts have discussed the applicability of *Heller* to § 922(g)(5), the Eleventh, Seventh, and Fifth Circuits' decisions best exemplify the battle lines over Second Amendment rights for noncitizens. The Fifth Circuit's reasoning focuses on the Supreme Court's use of "political community" rather than its citation of the *Verdugo-Urquidez* standard.[240] The Seventh Circuit dismisses the use of "citizen" and "political community" in the *Heller* decision, saying "those passages did not reflect an attempt to define the term 'people.'"[241] The Seventh Circuit's dismissal is confusing, since *Heller* explicitly uses "political community" to interpret "the people."[242] The Seventh Circuit instead substitutes its own judgement for the Supreme Court's and employs the raw *Verdugo-Urquidez* standard.[243] Likewise, the Eleventh Circuit cites significant evidence pointing to the exclusion of noncitizens, yet muses that at least some enjoy Second Amendment rights.[244] In a potential decision on the Second Amendment's application to noncitizens, a future Court will likely have to choose between one of these two paths. It can either follow the *Heller* Court's emphasis on "political community" and citizenship (the Fifth Circuit approach) or ignore that emphasis and apply its own standards (the Seventh and Eleventh Circuits' approaches).

At the district court level, post-*Heller* litigation still tries to define the boundaries of the Second Amendment. District courts have done much of the work in attempting to define "the people" as applied to noncitizens. A thread of cases suggests that permanent lawful noncitizen residents might be protected under the Second Amendment, but any status less than that (temporary residents, illegal aliens) is not protected.[245]

see also id. at 1047 ("[A]liens didn't share in the right to bear arms that Englishmen enjoyed."); *id.* at 1049 ("But just as it was in both England and colonial America, [the Second Amendment] did not extend in the same fashion to persons outside the national polity. For them, the ability to keep and bear arms remained subject to governmental regulation. That is Congress could lawfully restrict the privilege for those who—like illegal aliens today—did not owe or swear allegiance to the United States."). Despite the Eleventh Circuit's suggestion that "the people" includes some noncitizens, the cited evidence from the founding indicates otherwise. Ultimately, the court said that it was not deciding the issue of whether the government could ban noncitizens from owning firearms. *Id.* at 1049 n.3.

240 United States v. Portillo-Munoz, 643 F.3d 437, 440 (5th Cir. 2011) (quoting District of Columbia v. Heller, 554 U.S. 570, 580 (2008)).

241 United States v. Meza-Rodriguez, 798 F.3d 664, 669 (7th Cir. 2015).

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

243 *Meza-Rodriguez*, 798 F.3d at 671–72.

244 *Jimenez-Shilon*, 34 F.4th at 1045–49.

245 *See* United States v. Alkhaldi, No. 12CR00001-01, 2012 WL 5415787, *4 (E.D. Ark. Sept. 17, 2012) (holding that temporary residents are not protected by the Second Amendment); Fletcher v. Haas, 851 F. Supp. 2d, 287, 302, 305 (D. Mass. 2012) (holding that permanent residents are protected by the Second Amendment); Smith v. South Dakota, 781 F. Supp. 2d 879, 887 (D.S.D. 2011) (holding that a state statute barring all noncitizens from purchasing firearms violates the Equal Protection Clause).

These cases are potentially consequential because several states distinguish between noncitizens and citizens in firearm laws. For instance, New York state explicitly prohibits noncitizens from possessing firearms.[246] Illinois prohibits a noncitizen from obtaining a firearms license if he or she is an "alien who has been admitted to the United States under a non-immigrant visa," with only a few exceptions.[247] Virginia bans anyone who is not a citizen or permanent resident from carrying an assault firearm,[248] and Minnesota prohibits nonresident aliens from possessing firearms.[249] Louisiana prohibits "enemy alien[s]" from possessing firearms.[250] Additionally, a number of states limit concealed carry permits to citizens and permanent residents.[251] A significant number of states clearly believe they can distinguish between citizens and noncitizens in firearm regulations.

Some firearm restrictions on noncitizens, especially on lawful permanent residents, have been struck down in district courts. The District of Massachusetts, in *Fletcher v. Haas*,[252] ruled a state law unconstitutional because it categorically excluded noncitizens from firearm ownership.[253] The court found "no justification for refusing to extend the Second Amendment to lawful permanent residents" because they have "developed sufficient connection" with the United States.[254] The court denied that the Second Amendment applied only to citizens, saying this interpretation was "unsupported by the historical meaning of the term 'the people,' the structure of the Constitution, and the Supreme Court caselaw *Heller* reaffirmed and relied on."[255] According to the court, there was a distinct difference between citizen-only rights and rights belonging to all people in the United States.[256] On one hand, rights associated with "the protection of the public good" (like voting and political speech) apply only to citizens,

246 N.Y. PENAL LAW § 265.01(5) (McKinney 2017) ("A person is guilty of criminal possession of a weapon in the fourth degree when . . . [h]e possesses any dangerous or deadly weapon and is not a citizen of the United States . . . ."). This statute goes beyond just firearms. In addition to guns, the section lists items such as switchblade knives, bludgeons, slingshots, machetes, and blackjacks as examples of dangerous weapons.

247 430 ILL. COMP. STAT. 65 / 4(a)(2)(xi) (2020).

248 VA. CODE ANN. § 18.2-308.2:01 (West 2012).

249 MINN. STAT. ANN. § 624.719 (West 2020).

250 LA. STAT. ANN. § 14:95(A)(2) (2018).

251 *See* MO. ANN. STAT. § 571.101.2(1) (West 2018) (limiting concealed carry permits to citizens and permanent residents); MONT. CODE ANN. § 45-8-321(1) (West 2009) (same); TENN. CODE ANN. § 39-17-1366(a) (West 2011) (same).

252 851 F. Supp. 2d 287 (D. Mass. 2012).

253 *Id.* at 303.

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

255 *Id.* at 298.

256 *Id.* at 296.

while "private right[s]" apply more widely.[257] The Second Amendment thus fell within the second category, as the *Heller* court emphasized the individual nature of the right.[258]

Other district courts have taken a similar approach to *Fletcher*. The District of Hawaii enjoined the City and County of Honolulu from enforcing a statute that prevented noncitizens from applying for a firearm license.[259] Denying a noncitizen a firearm permit was "neither 'substantially related' nor 'narrowly tailored'" to any government interest, the court ruled.[260] The court relied on language from *Fletcher* to argue that noncitizens were entitled to Second Amendment protections.[261] In another noncitizen firearm case, the District of South Dakota held a similar statute to violate constitutional equal protection.[262] Notably, the District of South Dakota explicitly disregarded *Patsone* as a precedent, arguing that subsequent Fourteenth Amendment cases had superseded the holding.[263]

At least one district court has been willing to uphold restrictions on noncitizens owning firearms in a post-*Heller* world. In 2012, the Eastern District of Arkansas ruled that a state statute barring temporary visa holders from purchasing weapons was valid.[264] The court distinguished *Fletcher* on the grounds that it applied only to permanent legal residents, and an open question existed as to Second Amendment protections for temporary residents.[265] It ruled that those protections did not extend to temporary visa holders.[266] Nonpermanent noncitizens are "not in the class of persons who are part of the national community or who have otherwise developed sufficient connection with this country to be considered part of that community for purposes of the Second Amendment."[267] Further, the court suggested that the Second Amendment might protect only those immigrants who seek to one day achieve U.S. citizenship.[268]

257 *Id.*

258 *Id.* at 296–97.

259 Fotoudis v. Honolulu, 54 F. Supp. 3d 1136, 1145 (D. Haw. 2014).

260 *Id.* at 1144.

261 *Id.*

262 Smith v. South Dakota, 781 F. Supp. 2d 879, 887 (D.S.D. 2011).

263 *Id.* at 884–85.

264 United States v. Alkhaldi, No. 12CR00001-01, 2012 WL 5415787 at *4 (E.D. Ark. Sept. 17, 2012).

265 *Id.* at *3.

266 *Id.* at *4.

267 *Id.*

268 *Id.*

II. "The People" of the Second Amendment Only Includes U.S. Citizens

Heller's tension between "public good" rights and "private rights" might betray an uncomfortable reality for those who prefer consistency in constitutional interpretation: the Second Amendment is unique among rights and privileges in the Constitution. It contains aspects of both citizen-only "public good" rights and "private rights." *Heller*'s tension then may be better understood as the Second Amendment's inherent tension, not some conflict the Supreme Court inadvertently inserted. The Court's opinion is riddled with references to citizenship, "Americans," and the "political community."[269] These references, combined with traditional political supremacy over noncitizen policy and textual constitutional interpretation, show that noncitizens are not a part of "the people" of the Second Amendment.

A. *Second Amendment Rights Belong Only to the "Political Community"*

To answer whether noncitizens are included under the Second Amendment, it is necessary to decide whether *Heller*'s references to citizenship and "political community" supersede the *Verdugo-Urquidez* standard. Between the tests enunciated in the Fifth Circuit[270] and the Seventh Circuit,[271] the Fifth Circuit better captures the spirit of *Heller*. There is a clear limitation on who constitutes "the people" in *Heller*. The Supreme Court lays out a clear connection between the individual right to bear arms and a collective political need for defense in its discussion of the Second Amendment's prefatory clause.[272]

The language in *Heller* and *McDonald* demonstrates that the Supreme Court has indicated that "the people" of the Second Amendment includes a smaller circle of persons than other rights in the Constitution. Professor Gulasekaram's analysis on this subject is correct.[273] The alteration of prior standards and the emphasis on citizenship suggest the Supreme Court is uncomfortable with recognizing a universal right to firearm possession that applies to everyone in the country. Instead, the Court might be leaving space to respect the traditional domain of the political branches in regulating noncitizen affairs. Perhaps if the *Heller* court had made a passing reference

269 *See, e.g.*, District of Columbia v. Heller, 554 U.S. 570, 580, 584, 644 (2008).

270 United States v. Portillo-Munoz, 643 F.3d 437, 440 (5th Cir. 2011); *see supra* text accompanying notes 212–19.

271 United States v. Meza-Rodriguez, 798 F.3d 664, 672 (7th Cir. 2015); *see supra* text accompanying notes 220–32.

272 *Heller*, 554 U.S. at 595–600.

273 Gulasekaram, *supra* note 88, at 1536.

to citizenship in a rhetorical flourish, the Supreme Court's language could be ignored in favor of the *Verdugo-Urquidez* test. However, these are not off-the-cuff remarks. The references to citizenship are so pervasive in the *Heller* opinion that the language should be treated with great weight, not as some off-hand dicta.[274] The *Heller* language should supersede *Verdugo-Urquidez* in Second Amendment cases since *Heller* is the definitive case on Second Amendment rights.[275]

A test much like the Fifth Circuit's test for illegal aliens would work to define "the people" of the Second Amendment in a broader context. Though some courts have a preference for the *Verdugo-Urquidez* Fourth Amendment standard, these courts ignore the fact that the two amendments are fundamentally different. They protect different kinds of rights, and "the people" of each should thus be read differently. The Fourth Amendment protects people in the United States from government abuses.[276] The First Amendment allows people to express themselves freely.[277] But the Second Amendment allows "the people" to possess weapons designed to kill other humans.[278] While the right to bear arms is not explicitly reserved as a right for citizens in the Constitution, it is also unlike the other rights of "the people"—such as the rights to assemble peaceably and to be free from unreasonable government searches.[279] The Second Amendment carries with it an inherent danger to human life. No other right or privilege of "the people" does. Courts should therefore treat the amendment differently. They must ensure that it does not spread so far that it threatens American life and liberty on its own accord.

The *Heller* court recognizes the political importance of an armed populace to democratic government.[280] *Heller*'s interpretation of the prefatory clause of the Second Amendment inserts a political element into

---

274 *Heller*, 554 U.S. at 581 (emphasis added) ("[T]he Second Amendment right is exercised individually *and belongs to all Americans*."); *id.* at 595 ("[W]e do not read the Second Amendment to protect the right of *citizens* to carry arms for any sort of confrontation . . . ." (emphasis added)); *id.* at 625 ("For most of our history, the Bill of Rights was not thought applicable to the States, and the Federal Government did not significantly regulate the possession of firearms by law-abiding *citizens*." (emphasis added)); *id.* at 627 ("[T]he conception of the militia at the time of the Second Amendment's ratification was the body of all *citizens* capable of military service . . . ." (emphasis added)); *id.* at 630 ("[D.C.'s law] makes it impossible for *citizens* to use them for the core lawful purpose of self-defense and is hence unconstitutional." (emphasis added)).

275 *Id.* at 580.

276 U.S. CONST. amend. IV.

277 U.S. CONST. amend. I.

278 U.S. CONST. amend. II.

279 *See* United States v. Portillo-Munoz, 643 F.3d 437, 440–41 (5th Cir. 2011).

280 District of Columbia v. Heller, 554 U.S. 570, 595–600 (2008).

this individual right.[281] The amendment's operation in "repelling invasions and suppressing insurrections," as well as "resist[ing] tyranny,"[282] means that the goal of the right goes beyond mere self-defense. While *Heller* is undoubtedly correct that the Second Amendment protects an individual right to self-defense,[283] it also recognizes a political goal of collective defense—both of land and form of government.[284] In this way, it would make more sense to protect the right to bear arms only for those who are a part of the "political community." It is the "political community" that joins together in resistance to tyranny, foreign invasion, and insurrection.

The *Verdugo-Urquidez* test is too open ended and ill defined to determine who should have the right to wield weapons as a part of "the people."[285] The two final prongs of the test—be a part of the "national community" or "develop[] substantial connections with" the United States—are mushy and malleable.[286] When does someone join the "national community?" What "substantial connections" are sufficient? This test seems to operate on a case-by-case basis and requires an examination of each individual's circumstances before determining if he or she is a part of "the people."[287] *Verdugo-Urquidez* is unsuited to properly govern a right involving the possession of deadly weapons. The true makeup of "the people" would be unclear, and regulation of dangerous weapons would become unreasonably difficult. The "political community" test offers a clearer standard because the political community is limited to those who 'participat[e] in . . . government."[288] Membership in the political community is functionally equivalent to citizenship, offering the government a clear picture of who "the people" are.

Further, the Eleventh Circuit's evidence for inclusion of noncitizens was not as strong as it asserted. While the court claimed that the original meaning of "the people" might have included noncitizens, much of its evidence supported the opposite conclusion.[289] The original English ancestor

281 *See id.*

282 *Id.* at 597–98.

283 *Id.* at 584–85.

284 *Id.* at 597–99.

285 As a reminder, to become one of "the people" under the Fourth Amendment standard, a person must (1) "come within the territory of the United States;" and either (2) be a part of the "national community;" or (3) "develop[] substantial connections with" the United States. United States v. Verdugo-Urquidez, 494 U.S. 259, 273, 282 (1990).

286 *Id.* at 282.

287 *See* United States v. Meza-Rodriguez, 789 F.3d 664, 672 (7th Cir. 2015).

288 Sugarman v. Dougall, 413 U.S. 634, 642 (1973).

289 United States v. Jimenez-Shilon, 34 F.4th 1042, 1045 (11th Cir. 2022).

right to bear arms excluded foreigners.[290] This principle "carried across the Atlantic" where the colonies did not extend the right to bear arms to noncitizens.[291] "[A]n individual's 'undivided allegiance to the sovereign'—his 'membership in the political community'—was regarded as 'a precondition to the right to keep and bear arms.'"[292] The court wrote that the Federalist Papers also connected citizenship with the right to keep and bear arms.[293] All of these examples point to the opposite of the Eleventh Circuit's conclusion: the Framers never intended to give noncitizens the right to keep and bear arms.

B. *Noncitizens Are Not a Part of the "Political Community"*

Applying *Heller*'s "political community" standard, rather than *Verdugo-Urquidez*, reveals that noncitizens should not be considered part of the "political community." First, *Heller*'s emphasis on citizenship and the American nature of the right suggests the Supreme Court only considers citizens a part of the political community, and thus, "the people." Second, the Fifth Circuit has already determined that illegal aliens are not a part of the "political community" with an analysis of *Heller* that could extend to all noncitizens.[294] Finally, there are fundamental considerations of sovereignty that go hand-in-hand with Second Amendment rights.

Heller's emphasis on citizenship is compelling evidence that the Second Amendment only includes citizens. The Supreme Court ends its interpretation of the Second Amendment's "the people" by endorsing "a strong presumption that the Second Amendment right is exercised individually and belongs to all Americans."[295] As evidence of the original intention of the amendment, the Supreme Court says that "at least seven [states] unequivocally protected an individual citizen's right to self-defense is strong evidence that that is how the founding generation conceived of the right."[296] Throughout its summary of the right, the Supreme Court uses the term "citizen" and "American" repeatedly.[297] The broader term "person" is

290 *Id.* at 1047 ("All of this suggests that aliens didn't share in the right to bear arms that Englishmen enjoyed.").

291 *Id.*

292 *Id.* at 1048 (quoting United States v. Perez, 6 F.4th 448, 462 (2d Cir. 2021)).

293 *Id.* (quoting THE FEDERALIST NO. 46, at 296 (James Madison) (Clinton Rossiter ed., 1961)) ("To take one example, the Federalist Papers explained that one of the bulwarks of personal liberty was the prospect of 'citizens with arms in their hands.'").

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

295 District of Columbia v. Heller, 554 U.S. 570, 581 (2008).

296 *Id.* at 603.

297 *Id.* at 581, 595, 625, 627, 630.

used only in contexts irrelevant to defining "the people."[298] The overwhelming focus on citizenship demonstrates a Supreme Court view that the Second Amendment's umbrella is limited to citizenship. Professor Gulasekaram, who professes a preference to resolve this conflict in favor of equal rights regardless of citizenship status,[299] acknowledges that this reading of *Heller* is probably correct.[300] Discussing the view that the Second Amendment does not protect certain classes of people, Professor Gulasekaram writes, "*Heller* . . . does exactly that, excluding . . . noncitizens from the Second Amendment."[301]

The Fifth Circuit in *Portillo-Munoz*, correctly emphasizing the Supreme Court's citizenship limitations, provides a compelling argument in favor of limiting noncitizen rights.[302] The Second Amendment's protections extend to "law-abiding, responsible citizens," "members of the political community," and "Americans," the court writes, citing *Heller*.[303] Because these terms "commonly understood" do not include noncitizens (in the Fifth Circuit's case, illegal aliens), the Second Amendment's protections do not extend to them.[304] A partial dissent in that case expresses the view that holding that a noncitizen—albeit an illegal alien—does not fall under the Second Amendment's protections could affect the constitutional rights of "millions."[305] The dissent overstates the effect however, worrying about the consequences for Fourth Amendment rights, even though the court clearly distinguishes "the people" of the Second Amendment from "the people" of the Fourth.[306] Separating the two amendments, as the Fifth Circuit does, protects the Fourth Amendment rights of noncitizens while ensuring a reasonable interpretation of the right to bear arms.

There are also fundamental issues of sovereignty inherent to the question of whether the right to bear arms is reserved for citizens. Indeed, the *Heller* Court wrestles with the implications.[307] Even though the *Heller* Court emphasizes the right's individual nature,[308] it recognizes the right as belonging to the "political community" who can repel foreign invasion and tyranny.[309] If George Washington's army had been armed with petitions

298 *Id.*

299 Gulasekaram, *supra* note 88, at 651.

300 *Id.* at 635.

301 *Id.*

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

303 *Id.*

304 *Id.*

305 *Id.* at 443 (Dennis, J., concurring in part and dissenting in part).

306 *Id*.

307 District of Columbia v. Heller, 554 U.S. 570, 579–80 (2008).

308 *Id.* at 579.

309 *Id.* at 580, 597–98.

rather than French muskets, the Second Amendment (and all other provisions of the Constitution) would probably not exist today. It is important for the sovereign to be armed so that it may defend its sovereignty. In the United States, the citizenry—we the people—is sovereign, through both federal and state governments.[310] The "political community" phrasing in *Heller* limits the right to keep and bear arms to those who exercise some sovereignty in the United States. Even though noncitizens may pay taxes, serve in the military, or be subject to selective service, they are not sovereign in the United States.

Because of the inherently political nature of the right to bear arms, courts should compare the right to the political functions that states can regulate. States may constitutionally restrict noncitizens' ability to vote and participation in democratic government.[311] Similarly, legislatures should be free to restrict their right to own weapons. Even though the political functions standard is used in Fourteenth Amendment analysis, it offers a helpful parallel to a broader Second Amendment interpretation. Fourteenth Amendment political functions bear a strong relationship with self-government, a key component of the Second Amendment.[312] The Supreme Court's discussion of the prefatory clause of the Second Amendment establishes this connection between the Second Amendment and maintaining the American way of life.[313] Bearing arms is part of an individual's right to self-defense. But it is also a means by which "the people" can collectively defend themselves and their democracy.[314]

Perhaps the Seventh and Eleventh Circuits' strongest argument is their insistence on consistent interpretation with other provisions of the Constitution.[315] But this ignores the fact that interpretations of "the people" in the Constitution are already inconsistent. The provisions of the Constitution dealing with voting in congressional elections reserve that power to "the people."[316] Yet, the Supreme Court recognizes that voting is not a right belonging to noncitizens.[317] On the other hand, the Supreme Court recognizes that "the people" of the Fourth Amendment includes many

310 The *Heller* Court referenced the preamble's language in interpreting "the people" but did not dwell on its potential relationship to the Second Amendment. *Id.* at 579. However, the theme of the preamble is echoed in much of the *Heller* Court's emphasis on citizenship and "political community."

311 *See* Sugarman v. Dougall, 413 U.S. 634, 648–49 (1973); Ambach v. Norwick, 441 U.S. 68, 80–81 (1979); Foley v. Connelie, 435 U.S. 291, 296 (1978); Mathews v. Diaz, 426 U.S. 67, 80 (1976).

312 *See Heller*, 554 U.S. at 598–600.

313 *Id.* at 599.

314 *Id.*

315 United States v. Meza-Rodriguez, 798 F.3d 664, 670 (7th Cir. 2015); United States v. Jimenez-Shilon, 34 F.4th 1042, 1045 (11th Cir. 2022).

316 U.S. CONST. art. I, § 2; U.S. CONST. amend. XVII.

317 Sugarman v. Dougall, 413 U.S. 634, 648–49 (1973).

noncitizens.[318] Since the constitutional definition of "the people" is already inconsistent, these circuits are holding onto a fiction. There is no reason to maintain consistency when consistency has already been discarded.

The common-good features of the Second Amendment discussed above[319] further separate it from the Fourth Amendment. The Fourth Amendment serves no higher political purpose in perpetuating American democratic government; it merely secures an individual right against government intrusion.[320] As the *Heller* Court repeatedly makes clear, the right to bear arms is important to maintaining self-government, and its "political community" are those entrusted with preserving the government, the citizenry.

Even if the political community standard were disregarded and the Second Amendment was equated with provisions like the First Amendment, the right would not necessarily extend to noncitizens. The analysis used to limit the First Amendment rights of noncitizens supports strong limits on any Second Amendment right they might claim. American courts have found some noncitizen speech too dangerous to republican government to merit protection.[321] Yet if courts hold that the Second Amendment protects noncitizens, those with views too dangerous to voice would be permitted to possess weapons in the United States if they simply kept quiet. This is topsy turvy. By this rationale, an outspoken extremist with a pamphlet would be more dangerous than a silent extremist with a rifle. The violent use of firearms poses a much more serious threat to American society than some foreign rabble-rouser. Courts are clear-sighted when it comes to the First and Fourth Amendments: it is too problematic to extend the full protection of these amendments to noncitizens.[322] They should similarly recognize that the Second Amendment, more deadly in nature, ought to be read even more restrictively.

C. *The Citizen-Noncitizen Line Preserves the Traditional Role of the Political Branches*

The Supreme Court's preference for leaving issues involving noncitizens to the legislative and executive branches also supports limiting "the people" of the Second Amendment to citizens.[323] The Supreme Court recognized a

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

319 *See supra* text accompanying notes 307–14.

320 U.S. CONST. amend. IV.

321 *See* Harisiades v. Shaughnessy, 342 U.S. 580, 589 n.16 (1952); *see also supra* notes 112–21 and accompanying text.

322 *See Verdugo-Urquidez*, 494 U.S. at 273–74; *Harisiades,* 342 U.S. at 589.

323 *See* Mathews v. Diaz, 426 U.S. 67, 81 (1976).

state's power to flexibly respond to perceived threats by noncitizen firearm ownership in *Patsone*.[324] Additionally, a consistent argument (given great weight by some courts) revolves around policy disagreements alleging xenophobia and unfair targeting of noncitizens.[325] These arguments are political in nature, and the judiciary is ill-suited to balance these considerations against public safety and sovereignty. Those concerned about diverging standards for citizens and noncitizens should instead take their policy arguments to the political branches.

The Supreme Court has a long history of deferring to the political branches on noncitizen issues. As discussed above, the Court has written that "flexibility in policy choices rather than the rigidity often characteristic of constitutional adjudication" is important in dealing with noncitizens.[326] This has led to the Court upholding restrictions on noncitizens that would be unconstitutional if applied to citizens.[327] Legislative or executive flexibility is nowhere more important than in situations involving public safety or national security. Thus, it is important for the Supreme Court to limit "the people" of the Second Amendment to citizens. Expanding this definition would throw obstacles in front of the political branches and discard their traditional role in regulating a potentially dangerous right.

Correctly, the Supreme Court has already recognized that political flexibility is important in regulating the relationship between noncitizens and firearms in the *Patsone* decision.[328] "[A] state may classify with reference to the evil to be prevented, and that if the class discriminated against is or reasonably might be considered to define those from whom the evil mainly is to be feared, it properly may be picked out," the court wrote in upholding a restriction on firearm ownership by noncitizens.[329] This precedent has never been overturned, though the district court ignored it in *Smith v. South Dakota*.[330] So, holding that noncitizens are a part of "the people" under the Second Amendment would require overturning a century-old precedent, in addition to ignoring the traditional realm of legislative and executive supremacy over alienage issues.

Advocates of extending the Second Amendment's umbrella often argue that noncitizens do not present a greater threat to public safety than citizens. Therefore, the argument goes, noncitizens should fall under the Second Amendment's protections. The U.S. District Court for the District of

---

324 Patsone v. Pennsylvania, 232 U.S. 138, 144 (1914).

325 *See, e.g.*, Sandiford v. Virginia, 225 S.E.2d 409, 411 (Va. 1976).

326 *Mathews*, 426 U.S. at 81.

327 *See* Ambach v. Norwick, 441 U.S. 68, 80–81 (1979); Foley v. Connelie, 435 U.S. 291, 296 (1978); *Mathews*, 426 U.S. at 80.

328 *Patsone*, 232 U.S. at 144.

329 *Id.*

330 781 F. Supp. 2d 879, 884–85 (D.S.D. 2011).

Massachusetts,[331] the Virginia Supreme Court,[332] and Professor Volokh[333] have all echoed these sentiments. But this argument fails to consider a scope in time beyond the present.

The United States in the past century has faced an existential threat from no less than four foreign powers.[334] Throughout most of the twentieth century, the United States had to survive an ideological onslaught from the Soviet Union.[335] And for a harrowing period, the United States was simultaneously at war with three major powers.[336] Thousands of aliens from Japan, Germany, and Italy were present in the United States at the outbreak of World War II.[337] In all these cases, the U.S. government required flexibility in denying privileges to aliens to ensure the safety of the homeland. Noncitizens from enemy powers were detained as "enemy aliens" to prevent any acts of sabotage of the war effort.[338] Contrary to some actions taken against American citizens,[339] these detentions were generally legal.[340] Additionally, the U.S. government worked to prevent communist and anarchist agents from toppling the government, and this campaign included deportations on the basis of aliens' political expressions.[341] To this day, the immigration and nationality code prohibits anyone associated with the Communist Party from entering the United States or becoming a U.S. citizen.[342]

---

331 Fletcher v. Haas, 851 F. Supp. 2d 287, 303 (D. Mass. 2012).

332 Sandiford v. Virginia, 225 S.E.2d 409, 411 (Va. 1976).

333 Volokh, *supra* note 139, at 1515.

334 SUSAN-MARY GRANT, A CONCISE HISTORY OF THE UNITED STATES OF AMERICA 233, 265 (2012).

335 *Id.* at 280, 283.

336 *Id.* at 265.

337 *World War II Enemy Alien Control Program Overview*, NATIONAL ARCHIVES (Jan. 7, 2021), https://perma.cc/3MNQ-WHPG.

338 *Id.*

339 *See* Ex parte Endo, 323 U.S. 283, 302–04 (1944).

340 *See* Citizens Protective League v. Clark, 155 F.2d 290, 295–96 (D.C. Cir. 1946). One key factor in the World War II cases was that the United States was actually at war, and enemy alien rights are reduced in times of war. United States *ex rel*. Schlueter v. Watkins, 67 F. Supp. 556, 565 (S.D.N.Y. 1946) ("The sovereign state may take against alien enemies whatever steps it deems necessary for national security . . . . The American courts, obedient to precedents running back to the early days of English law, have steadfastly maintained that the alien enemy has no rights other than those which the sovereign chooses to grant."). However, conflict has evolved since the end of World War II to include undeclared cold wars, asymmetric tactics like terrorism, and grey area operations in an ambiguous zone between peace and war. Alice Friend & Joseph Kiernan, *The U.S. Government in the Cold War*, CTR. FOR STRATEGIC & INT'L STUD. (Aug. 13, 2019), https://perma.cc/8PWP-HVXK. One individual can do a lot of damage with modern weaponry. In this era of ambiguous conflict, a holding that the Second Amendment protects noncitizens might prevent the political branches from doing their utmost to keep this country safe.

341 Harisiades v. Shaughnessy, 342 U.S. 580, 592 (1952).

342 8 U.S.C. §§ 1182(a)(3)(D)(i), 1424(a)(2).

Thus, the issue of the danger of noncitizens is not just a crime and safety conversation, but also a discussion about national security. Noncitizens still have loyalties and connections to home countries. Many of these countries are currently friendly with the United States, but alliances shift, and attitudes change. For example, almost immediately after joining forces to defeat the Axis powers, the United States and the Soviet Union entered a decades-long Cold War.[343] It may be true that noncitizens at the current time present no larger threat to U.S. safety than citizens. But state and federal governments may need to take swift action in a future crisis. Holding that noncitizens are protected under the Second Amendment might prevent a future government from confiscating weapons from armed enemy aliens. The argument that governments need to have the flexibility to respond to threats should not be so flippantly disregarded. Instead, courts should respect legislative and executive prerogatives in dealing with noncitizens and firearms.

Finally, the security reasons for potential restrictions on firearm ownership by noncitizens go beyond protecting the U.S. homeland. As the facts of *Toner* demonstrate, foreign bad actors may try to take advantage of America's abundant gun supply to obtain weapons for extremist or criminal purposes in their home countries.[344] This practice is not some relic of the 1980s. An estimated 200,000 American weapons each year pass over the southern border to Mexico and Central America.[345] One journalist reports following an arms trafficker who would purchase approximately a dozen assault rifles in a trip and smuggle them back into Mexico.[346] Given Central America's generally strict gun regulations, it is often easier to obtain guns from the United States and smuggle them over the border.[347] This flow of guns, often bought legally in the United States, into Central America "fuels the violence" in that region.[348] The gun violence in turn creates a humanitarian crisis with many migrants fleeing northward and exacerbating the problems the United States faces on its southern border.[349] Noncitizens by their very nature, no matter their immigration status, have strong connections to another country. These connections could make it easier for them to facilitate the smuggling of arms compared to someone who is solely a U.S. citizen.

---

343 *See The Cold War*, JOHN F. KENNEDY PRESIDENTIAL LIBR. AND MUSEUM, https://perma.cc/56X4-WQYF.

344 United States v. Toner, 728 F.2d 115, 118–119 (2d Cir. 1984); *see supra* text accompanying notes 1–12.

345 *Morning Edition: Much of Firearms Traffic from the U.S. to Mexico Happens Illegally*, NPR (June 7, 2022), https://perma.cc/ST6M-2X2T.

346 *Id.*

347 *Id.*

348 *Id.*

349 *Id.*

The plenary power of the political branches over alienage was made for issues such as this. The relationship between noncitizens and firearms implicates public safety, national security, foreign affairs, and political sovereignty. The Constitution reserves these powers for the legislature and the executive.[350] These are questions best resolved by those branches, and the political branches require flexibility in addressing these issues. Defining "the people" of the Second Amendment as citizens would preserve that flexibility. Expanding its definition beyond citizenship would throw a hurdle in front of the political branches' efforts to perform their constitutional duties.

Conclusion

The Second Amendment does not provide a right to keep and bear arms to noncitizens. From the Supreme Court's metamorphosis of the *Verdugo-Urquidez* standard to its emphasis on citizenship throughout *Heller*, the decision offered convincing evidence that the right is limited to citizens only. The right guaranteed in the Second Amendment should be limited to members of the "political community," as *Heller* mandates. Failing to exclude noncitizens may restrict legitimate legislative and executive action in dealing with noncitizens and foreign affairs. This critical question will require reasoned consideration of Supreme Court precedent, the separation of powers, and complex constitutional rights. All point toward equating "the people" of the Second Amendment with citizenship.

350 *See generally* U.S. CONST. arts. I, II.