

OF ARMS AND ALIENS

Anjali Motgi*

In December, the tragedy in Newtown, Connecticut, thrust the Second Amendment into the forefront of national media attention once again. The massacre of schoolchildren by assault rifle reignited a debate among pundits about the meaning of the right to bear arms, but it may surprise many Americans to learn that the Second Amendment continues to fuel debate over another topic of national importance: the rights of illegal immigrants.

* * *

On the day of the Newtown shooting, the Fourth Circuit joined three other circuit courts in upholding the constitutionality of a federal statute which bars those residing unlawfully in the United States from purchasing or possessing firearms.¹ The case revolved around the question of whether illegal immigrants are part of “the people,” the elastic phrase used in the Second Amendment to indicate who has the right to bear arms.

Nicolas Carpio-Leon, a Mexican citizen who had been living in South Carolina for thirteen years with his wife and three American-born children, pleaded guilty to unlawful firearm possession after Immigration and Customs Enforcement officers found a rifle, a pistol, and ammunition during a consensual search of his home. Carpio-Leon had no prior criminal record and had regularly filed federal income tax returns. He contended that “the Second Amendment could not have been intended to exclude illegal aliens from its scope” because, when the Bill of Rights was ratified in 1791, “attitudes toward immigration were the reverse of today’s attitudes [and] immigrants . . . were deemed absolutely necessary to the development and survival of the new nation.”² Judge Niemeyer wrote that the court’s analysis must begin not with the 1791 meaning of the Second Amendment but with the Supreme Court’s 2008 decision in *District of Columbia v. Heller*, which

*J.D. Candidate 2014, Yale Law School.

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

2. *Id.* at 976.

“does not make clear . . . whether illegal aliens can ever be part of the political community and therefore be included in the class of persons labeled ‘the people’ . . . [but *Heller*] does frequently connect arms-bearing and ‘citizenship.’”³ In an effort to avoid becoming “enmeshed in the question of whether ‘the people’ includes illegal aliens,” the Fourth Circuit confined its analysis to an application of *Heller*, which stressed that the “core right” of the Second Amendment “protects law-abiding members of the political community” to which “illegal aliens do not belong.”⁴

* * *

In this way, the Fourth Circuit squarely upheld the law against a Second Amendment challenge. Yet the *Carpio-Leon* holding was narrower than the Fifth Circuit’s 2011 decision to uphold this law in *United States v. Portillo-Munoz*, in which the court wrote that “[w]hatever else the term means or includes, the phrase ‘the people’ in the Second Amendment of the Constitution does not include aliens illegally in the United States”⁵ Armando Portillo-Munoz, a Mexican citizen, had purchased his handgun to protect chickens from coyotes while he worked as a ranch hand in Texas. He argued that the Supreme Court in *United States v. Verdugo-Urquidez* suggested that “the people” protected by the First, Second, and Fourth Amendments “refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community.”⁶ The Fifth Circuit was hesitant to ac-

3. *Id.* at 978 (citing *District of Columbia v. Heller*, 554 U.S. 570, 580-81 (2008)). *Heller* was the landmark case in which the Supreme Court held that the Second Amendment protects an individual’s right to possess a firearm for lawful purposes, including self-defense.

4. *Id.* at 978-79. The Fourth Circuit’s punting on the fraught task of identifying all those who are properly within the modern conception of “the people” was by design; a sole footnote in the *Carpio-Leon* opinion notes: “Were we to limit our analysis to the scope of the term ‘the people,’ we would also have to recognize that groups like women, Native Americans, and blacks may not have been part of the political community at the time of the founding but are today within the class that we refer to as ‘the people.’” *Id.* at 978 n.*.

5. 643 F.3d 437, 442 (5th Cir. 2011), *cert. denied*, 132 S. Ct. 1969 (2012).

6. *Id.* at 440 (quoting *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990)). Faced with the first Second Amendment challenge to this federal law and grasping for relevant precedent, the *Portillo-Munoz* court observed that the Second Circuit in 1984 had upheld a predecessor statute that barred illegal aliens from actual or constructive possession of firearms. *See id.* at 441; *see also* 18 U.S.C. app. § 1202 (1982), *repealed by* Firearms Owners’ Protection Act, Pub. L. 99-308, § 104(b), 100 Stat. 449, 459 (1986). That case, *United States v. Toner*, 728 F.2d 115 (2d Cir. 1984), affirmed a view of illegal immigrants that is at best anachronistic and at worst wholly offensive: because “one seeking to arrange an assassination would be especially eager to hire someone who had little commitment to this nation’s political institutions and who could disappear afterwards without a trace”—that is, because presumably illegal aliens make better hit men—the Second Circuit found that a statute prohibiting their possession of firearms could be rationally related to a legitimate governmental interest. *Id.* at 129.

cept this reading of *Verdugo-Urquidez*, the only case in which the Supreme Court has attempted to interpret the scope and meaning of “the people” in the Bill of Rights. The Fifth Circuit’s hesitation was natural given that Chief Justice Rehnquist wrote only for a plurality in his exposition of “the people”; Justice Kennedy concurred in the judgment, but he wrote separately, refusing to “place any weight on the reference to ‘the people’ in the Fourth Amendment as a source of restricting its protections.”⁷ But the Fifth Circuit channeled its discomfort with *Verdugo-Urquidez* into an uneasy compromise, holding that the Second and Fourth Amendments are distinct because the former “grants an affirmative right” whereas the latter “is at its core a protective right against abuses by the government.”⁸

By contrast, last year the Tenth Circuit dodged the Second Amendment question by assuming, for the sake of argument, that “at least some aliens unlawfully here” are entitled to Second Amendment protections, but finding that the law banning their gun ownership could survive intermediate scrutiny because of its legitimate relation to the government’s concerns for crime control and public safety.⁹

In a four-sentence per curiam opinion pointing to *Portillo-Munoz*, the Eighth Circuit also affirmed a conviction under 18 U.S.C. § 922(g)(5) on the grounds that the Second Amendment does not protect illegal aliens.¹⁰

7. *Verdugo-Urquidez*, 494 U.S. at 276 (Kennedy, J., concurring) (“[E]xplicit recognition of ‘the right of the people’ to Fourth Amendment protection may be interpreted to underscore the importance of the right, rather than to restrict the category of persons who may assert it. The restrictions that the United States must observe with reference to aliens . . . depend, as a consequence, on general principles of interpretation, not on . . . a construction that some rights are mentioned as being those of ‘the people.’”).

8. *Portillo-Munoz*, 643 F.3d at 441. Judge Dennis in dissent noted that this affirmative/protective distinction is at odds with Supreme Court and Fifth Circuit precedents holding that “the people” in the First, Second, and Fourth Amendments refers to the same class of individuals. *Id.* at 443 (Dennis, J., dissenting). See also Mathilda McGee-Tubb, *Sometimes You’re in, Sometimes You’re out: Undocumented Immigrants and the Fifth Circuit’s Definition of “The People” in United States v. Portillo-Munoz*, 53 B.C. L. REV. E-SUPPLEMENT 75, 87 (2012) (arguing that “*Portillo-Munoz* opens the door for arbitrary classifications of constitutional rights to achieve exclusions that may not otherwise have a basis in precedent”).

9. *United States v. Huitron-Guizar*, 678 F.3d 1164, 1168-70 (10th Cir. 2012) (refraining from determining the scope of the Second Amendment’s protections for illegal aliens “because the question in *Heller* was the amendment’s *raison d’être*—does it protect an individual or collective right?—and aliens were not part of the calculus. Nor can we say that the word ‘citizen’ was used deliberately to settle the question, not least because doing so . . . would require us to hold that the same ‘people’ who receive Fourth Amendment protections are denied Second Amendment protections, even though both rights seem at root concerned with guarding the sanctity of the home against invasion.”), *cert. denied*, 133 S. Ct. 289 (2012).

10. *United States v. Flores*, 663 F.3d 1022, 1022-23 (8th Cir. 2011), *cert. denied*, 133 S. Ct. 28 (2012).

* * *

The Supreme Court has denied petitions for writs of certiorari for all three of the previous circuit court decisions upholding the constitutionality of 18 U.S.C. § 922(g)(5), and *Carpio-Leon* is not likely to be heard by the Court.¹¹ No circuit has held that illegal aliens are members of “the people” and no circuit has questioned the constitutionality of the statute. Were another court to face a Second Amendment challenge to the statute, it would now have three discrete analytic options for upholding the statute, given by the Fourth, Fifth, and Tenth Circuits.

Still, the questions that compelled the Tenth Circuit not to touch the Second Amendment issue—including whether gun ownership is a “private right[] not generally denied aliens, like printing newspapers or tending a farm,”¹² or is, like voting, limited to citizens—must one day be answered. Meanwhile, district courts have offered their own analyses of the meaning of “the people.”¹³ And this issue is one that could potentially align normally opposed constituencies: conservatives who seek to prevent government abuse by supporting the fundamentality (and therefore the expansive scope) of the Second Amendment as an individual right, and progressives who seek to expand our notion of community by increasing the panoply of rights to which immigrants have access.

11. *Carpio-Leon* has already filed a petition for certiorari; the government’s brief in opposition is due on May 6. See *Carpio-Leon v. United States*, 701 F.3d 974 (4th Cir. 2012), petition for cert. filed, No. 12-9291 (U.S. March 14, 2012), available at <http://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/12-9291.htm>.

12. *Huitron-Guizar*, 678 F.3d at 1169. Another way to pose the question is to ask whether the concept of “national community” mentioned in *Verdugo-Urquidez* is different from the “political community” discussed in *Heller*. See *id.*

13. See, e.g., *United States v. Flores-Higuera*, No. 1:11-CR-182-TCB-CCH, 2011 WL 3329286, at *3 (N.D. Ga. July 6, 2011) (rejecting facial challenge to § 922(g)(5) “[b]ecause Defendant is not a citizen, or at the least, a lawful resident with ties to the community . . . [and therefore] not a member of the ‘political community’ whose rights are protected by the Second Amendment”); *United States v. Boffil-Rivera*, No. 08-20437-CR, 2008 WL 8853354, at *8 (S.D. Fla. Aug. 12, 2008), *aff’d*, 607 F.3d 736 (11th Cir. 2010) (“[Defendant’s facial challenge to § 922(g)(5) fails because he is] not someone who has any duty of allegiance to the United States. A person of his status could have been barred from possessing a firearm under English or Colonial American common law, and similarly could be precluded from doing so under the Second Amendment. His mere presence here does not entitle him to constitutional protection . . .”). Last year, one district court found that “the people” necessarily includes some aliens, though that opinion was limited to legal permanent residents. See *Fletcher v. Haas*, 851 F. Supp. 2d 287, 298-302 (D. Mass. 2012). A magistrate judge in Arkansas subsequently found that a lawfully admitted alien on a student visa “is 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” because “[h]e did not come to the United States with the intention of gaining citizenship and, thus, is not firmly on the path toward that goal.” *United States v. Alkhaldi*, No. 4:12CR00001-01 JLH, 2012 WL 5415787, at *4 (E.D. Ark. Sept. 17, 2012).

So the issue may very well crop up again, even if the Supreme Court opts not to weigh in on *Carpio-Leon*. Faced with a fresh challenge to this statute, a court ought to find that illegal aliens fall within “the people” protected by the Second Amendment for three reasons.

First, the post-*Heller* trend has been to interpret the Second Amendment right broadly. If *Heller* means anything, it stands for the proposition that the Constitution enshrines an individual right to self-defense. Although, as the Tenth Circuit noted, other provisions of this statute limiting the possession of firearms have withstood constitutional scrutiny even after *Heller*, the core of the individual right identified by the Supreme Court in 2008 has been repeatedly reaffirmed in subsequent lower-court decisions.¹⁴ If the right to self-defense is truly as prominent among the pantheon of individual rights protected by the Constitution as *Heller*’s progeny would have us believe, then Justice Kennedy’s point in *Verdugo-Urquidez* is persuasive: “the people” is best understood as an inclusive indicator of the scope of a right, rather than as grounds for exclusion, underscoring rather than circumscribing the protections afforded by the First, Second, and Fourth Amendments.¹⁵ Indeed, Justice Stevens’s dissent in *Heller* aptly observed that the majority opinion created conflicting pronouncements about the scope of “‘the people’”—by speaking of a right of the people belonging to “all members of the political community, not an unspecified subset” but then reading the Second Amendment “to protect a ‘subset’ significantly narrower than the class of persons protected by the First and Fourth Amendments.”¹⁶

Calls for new gun control legislation followed the Sandy Hook shooting, and continue to resound despite early setbacks in Congress; assuming future legislative efforts are successful, the NRA or those who share its interests are likely to bring Second Amendment challenges to these new or

14. Even when limits on the possession of firearms have survived Second Amendment challenges, courts have been careful to protect the individual right to self-defense as articulated in *Heller*. Just months ago, the Fifth Circuit upheld a separate provision of 18 U.S.C. § 922 prohibiting federally licensed firearms dealers from selling handguns to minors under the age of twenty-one. *See Nat’l Rifle Ass’n of Am. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 700 F.3d 185, 188 (5th Cir. 2012). The Fifth Circuit found the statute and attendant regulations permissible in part because “unlike bans on felons, the mentally ill, and domestic-violence misdemeanants, this ban does not severely burden the presumptive Second Amendment rights of the targeted class’s members”; rather than being a total ban on possession by a class of citizens, the age qualifications for handgun purchase have only a temporary effect on those subject to them, and they do not bar minors “from possessing and using handguns ‘in defense of hearth and home’” if the guns were purchased by parents or guardians, or if they are long-guns not subject to the regulations. *Id.* at 206.

15. *See* Pratheepan Gulasekaram, “*The People*” of the Second Amendment: *Citizenship and the Right to Bear Arms*, 85 N.Y.U. L. REV. 1521, 1530-31 (2010) (“[I]n 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.’”).

16. *District of Columbia v. Heller*, 554 U.S. 570, 644 (2008) (Stevens, J., dissenting).

amended statutes. When the Court clarifies the nature of the right as understood by *Heller*, any shoring up of the centrality of personal self-defense will ring hollow so long as 18 U.S.C. § 922(g)(5) remains on the books.

Second, although legislation may sometimes treat aliens differently from non-alien, the Supreme Court has suggested that the Constitution does offer at least some protection to illegal alien.¹⁷ The *Verdugo-Urquidez* plurality posited that the greater the connection to the United States, the greater the constitutional protections to which illegal alien are entitled—a view consistent with the Supreme Court’s trend toward treating those alien with greater connections to the United States as having greater constitutional protection. In *Plyler v. Doe*, for example, the Supreme Court concluded that a Texas law effectively barring illegal alien minor from receiving a public education was invalid because, even if not a fundamental right, education is a “matter[] of supreme importance” that has a “fundamental role in maintaining the fabric of our society.”¹⁸ If defending one’s home and family is as important as education, noncitizen must be entitled to at least some protections of the Second Amendment.

Third, even if illegal alien are members of the class designated as “the people,” the statute could nonetheless be constitutional, as the Tenth Circuit ruled. Applying intermediate scrutiny to the Second Amendment restriction, the court found that “[i]t is surely a generalization to suggest . . . that unlawfully present alien, as a group, pose a greater threat to public safety—but general laws deal in generalities.”¹⁹ Noting that nonviolent felon also fall within the statute’s ambit, the court seemed untroubled by the fact that

17. See, e.g., *Plyler v. Doe*, 457 U.S. 202, 210 (1982) (stating that all individuals within the United States are entitled to due process under the Fifth and Fourteenth Amendments and are covered by the Equal Protection Clause of the Fourteenth Amendment); *Wong Wing v. United States*, 163 U.S. 228, 238 (1896) (holding that all individuals physically within the United States are protected by the Fifth and Sixth Amendments); *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886) (all individuals physically within the U.S. are “persons” within the meaning of the Fourteenth Amendment’s “universal” provisions). Last Term, the Court reminded Americans that “as a general rule, it is not a crime for a removable alien to remain present in the United States.” *Arizona v. United States*, 132 S. Ct. 2492, 2505 (2012).

18. 457 U.S. at 221 (citations omitted).

19. *United States v. Huitron-Guizar*, 678 F.3d 1164, 1170 (citation omitted). But see *Patson v. Pennsylvania*, 232 U.S. 138, 143 (1913) (upholding against a Fourteenth Amendment challenge a Pennsylvania law that “ma[de] it unlawful for any unnaturalized foreign-born resident to kill any wild bird or animal *except in defense of person or property*, and ‘to that end’ ma[de] it unlawful for such foreign-born person to own or be possessed of a shotgun or rifle” (emphasis added)). Although Justice Holmes’s opinion in *Patson* made no mention of the Second Amendment—the case predates *Heller* by nearly a century—the Supreme Court found the Pennsylvania law permissible in part because its “prohibition does not extend to weapons such as pistols that may be . . . needed occasionally for self-defense.” *Id.* Note that the link between illegal immigrant and crime is a hotly contested one. See generally Steven A. Camarota & Jessica M. Vaughan, *Immigration and Crime: Assessing a Conflicted Issue*, CTR. FOR IMMIGRATION STUDIES (Nov. 2009), <http://www.cis.org/articles/2009/crime.pdf>.

the statute restricts possession by both newly arrived aliens and those who, like Huiton-Guizar, were brought to the country as toddlers.

The appropriate standard of review for Second Amendment regulations and the application of that standard are issues that the Supreme Court has yet to address, and *Carpio-Leon* or a case like it offers a fine vehicle to take on these questions. After *Heller*, in an examination of regulations mandating registration of handguns and prohibiting ownership of semiautomatic assault rifles, the D.C. Circuit applied intermediate scrutiny, a standard it described as requiring a “close fit” between these laws and the government interests they are intended to serve.²⁰ The level of deference afforded by the Tenth Circuit in *Huitron-Guizar*, although labeled intermediate scrutiny, seems more like a rational basis review—but perhaps rational basis review is all that is required for judicial review of firearm regulations. If intermediate scrutiny is indeed required, might it be the case that the statute represents a legitimate governmental objective gone awry with an overbroad restriction not substantially related to that objective? If the Second Amendment protects illegal aliens, restrictions on those protections would require either a precise designation of the subset of aliens whose arms-bearing is to be restricted, with a particularized justification for that restriction, or a more thorough legislative articulation of the case for treating all illegal aliens as a dangerous class. A more narrowly tailored statute—targeting, for instance, illegal aliens who are eligible for expedited removal, if such individuals are found to be more likely to commit crimes—might survive intermediate scrutiny, even if § 922(g)(5) does not. Presumptive Second Amendment protections for illegal aliens would, then, facilitate a more productive judicial dialogue about permissible crime-reduction legislation.

My point is simply this: if the Second Amendment protects a truly fundamental individual right, then barring any firearm possession by all illegal aliens cannot be upheld without more—a more robust judicial holding that its fundamental protections are categorically denied to a class of persons, or a more-than-cursory legislative justification for the restriction of these protections. If the statute can stand as is, then perhaps the right to bear arms is less central to the constitutional pantheon than its most zealous advocates would have us believe.

* * *

Behind all of this dwells the idea that we are a “people,” a notion that undergirds not just diverse areas of American jurisprudence but also our public imagination. Bracketing the controversy over what the Second Amendment protects—possession of semiautomatic assault rifles and large

20. See *Heller v. District of Columbia (Heller II)*, 670 F.3d 1244, 1258 (D.C. Cir. 2011).

stores of ammunition or something less—to consider the co-occurrence of the Fourth Circuit ruling in *Carpio-Leon* and the Sandy Hook tragedy raises a peculiar juxtaposition around the “who” of this right: is a father who keeps a rifle at home to protect his wife and three children, or a ranch hand who carries a gun to guard farm animals against predators, less a member of “the people” than a suburban divorcée with a passion for trips to the shooting range? Whatever the Founders meant in drafting the Second Amendment, it seems improbable that they foresaw that it would become a locus for public dialogue about the boundaries of the national community.