DUKE CENTER FOR FIREARMS LAW

– Essays on Race and Guns in America –

"The People", Citizenship, and Firearms

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The relationship between citizenship and gun rights continues to vex federal courts.[1] In turn, the answer to whether gun rights are citizen-only rights implicates other core constitutional protections. Accordingly, courts and commentators must critically re-examine the alarming judicial trend towards excluding noncitizens from the ambit of the Second Amendment.

The Court's 2008 *District of Columbia v. Heller* opinion ignited this controversy when it – by fiat and without explanation – equated the "the people" protected by the second amendment with "law-abiding citizens", "Americans," and "members of the political community".[2] *Heller*'s simultaneous expansion of the scope of the substantive right, while narrowing the class to whom it inures, has generated opinions from seven separate courts of appeals over the past nine years.[3] In each, unlawfully present noncitizens or nonimmigrants challenged the constitutionality of 18 USC § 922(g)(5), which criminalizes firearm and ammunition possession by persons without lawful status as well as most classes of nonimmigrants.[4] And, in each, federal courts uniformly upheld the provision against constitutional challenges. Surveying those opinions, judges either replicated *Heller*'s untheorized limitations on "the people", or sidestepped it, only to accomplish the same result by trading on notions of immigrant criminality and lawlessness. Indeed, at least one appellate court rejected the noncitizen's claim under circumstances that implicate *Heller*'s paradigm firearms use-case: Brandishing a firearm in defense of others at a home.[5]

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[1] Here, I use the term citizenship in the legal sense, differentiating between "citizens" and "non-citizens" as a citizenship or immigration status. Citizenship may also be used in the broader sense, to connote full and complete forms of membership versus "second-class" citizenship, in which those with the status of citizenship are nevertheless treated as less than full members of a polity. Although my perspective here has implications for the latter, I am centrally concerned with the former.

[2] 554 U.S. 570, 580-81, 584, (2008).

[3] *United States v. Perez*, 6 F.4th 448 (2d Cir. July 29, 2021); *United States v. Torres*, 911 F.3d 1253 (9th Cir. 2019); *United States v. Meza-Rodriguez*, 798 F.3d 664 (7th Cir.2015); *United States v. Huitron-Guizar*, 678 F.3d 1164 (10th Cir. 2012); *United States v. Carpio-Leon*, 701 F.3d 974 (4th Cir. 2012); *United States v. Flores*, 663 F.3d 1022 (8th Cir. 2011); *United States v. Portillo-Munoz*, 643 F.3d 437 (5th Cir. 2011). These challenges all involved unlawfully present noncitizens. One other opinion from the Ninth Circuit Court of Appeals, *United States v. Singh*, 979 F.3d 697 (9th Cir. 2020), upheld the federal law against a challenge by a nonimmigrant.

[4] 18 U.S.C. § 922(g)(5) ("It shall be unlawful for any person, who, being an alien (A) is illegally or unlawfully in the United States; or (B) except as provided in subsection (y)(2), has been admitted to the United States under a nonimmigrant visa….."). The term "nonimmigrant" under federal immigration law means noncitizens lawfully present in the United States for limited duration and/or for a specific purpose; under the statute, "immigrant" refers to lawful permanent residents (green card holders). 8 U.S.C. § 1101(a)(15). The exception in 18 U.S.C. § 922(y)(2) referenced in § 922(g)(5)(B) exempts nonimmigrants who have been admitted for hunting or sporting purposes, or others with a permit for carrying a firearm.

[5] See, e.g., Perez, 6 F.4th at 449-50 (noting, in recitation of facts, that unlawfully present noncitizen borrowed a firearm to deter a group of armed individuals approaching a gathering at a private home).

This essay calls attention to the reasoning in the appellate court cases that have wrestled with *Heller*'s irresponsible citizenship talk.[6] By upholding § 922(g)(5), those courts permit the federal government to continue to bar several million people from exercising a right that *Heller* jealously guards for citizens. Moreover, if *Heller*'s rationale is taken to its limits, Congress could expand federal law's reach beyond unauthorized and temporary migrants, to exclude lawful permanent residents as well, thus making criminal prohibitions coterminous with current deportation law based on firearms violations.[7] To be clear, the stakes here are not just about gun rights; noncitizens likely are less interested in possessing guns than U.S. citizens, as most hail from countries with rules and norms against personal firearm possession. Beyond arms bearing, categorically excluding noncitizens from "the people" of the Second Amendment entrenches and normalizes the denial of other critical constitutional protections to noncitizens.

In some of these post-*Heller* cases, judges double-downed on *Heller*'s citizenship specification.[8] In other work, I have chronicled the textual, doctrinal, and historical concerns with equating "the people" in the constitution with citizens.[9] In brief, as a textual matter, such an interpretation is hard to square with the Constitution's explicit use of the word "citizen" and "citizenship" in various provisions, as well its grant of power to Congress to transition noncitizens into citizens through naturalization. The Second Amendment however – like the Preamble, and First, Fourth, Ninth, and Tenth Amendments – references a more nebulous "the people." Those references have generally been understood to be evocative of an unspecified collective, rather than denote citizenship status. Of course, it might be that the Second Amendment necessitates a different and more circumscribed definition than the phrase as used in other constitutional clauses. Yet, the campaign to divorce the right to bear arms from service to, or protection from, the state suggests exactly the opposite: That the Second Amendment is not to be interpreted differently than other constitutional protections.

As a doctrinal matter, *United States v. Verdugo-Urquidez* is the only modern case with an extended focus on "the people."[10] There, the Court declined to allow a noncitizen brought into the U.S. for criminal proceedings to raise a Fourth Amendment challenge to the search of his home in Mexico by U.S. and Mexican authorities. Even so, the majority declined to limit "the people" protected

[6] See Joseph Blocher, *United States v. Perez and Doctrinal Development*, Duke Center for Firearms Law Blog, Sep. 15, 2021.
[7] 8 U.S.C. § 1227(a)(2)(B) (classifying "any alien" convicted of any firearms law as potentially deportable).
[8] See *Portillo-Munoz*, 643 F.3d at 442 (holding that "the people" did not include unlawfully present noncitizens); accord, *Flores*, 663 F.3d at 1023 (citing *Portillo-Munoz*); *Perez*, 6 F.4th at 456 (Menashi, J., concurring) (concluding that unlawfully present noncitizen could not raise a Second Amendment claim).
[9] My prior work has critiqued this interpretative move as incompatible with an individual right/self-defense reading. I concluded that that either the amendment is connected to state defense or defense from the state, in which case courts may plausibly limit the right to bear arms to citizens, or the right is truly centered on individual self-defense, rendering categorical prohibitions based on immigration status difficult to justify. See Gulasekaram, *Guns and Membership in the American Polity*, 21 Wm. & Mary B Rights J. 619 (2012); *"The People" of the Second Amendment*, 85 N.Y.U. L. Rev. 101 (2010); *Aliens with Guns*, 92 Iowa L. Rev. 891 (2007).
[10] *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990) (denying, on the grounds that he was not part of "the people" of the Fourth Amendment, a Mexican national's right to raise a Fourth Amendment challenge to search of his residence in Mexico by U.S. and Mexican law enforcement during his prosecution in U.S. federal court).

against unreasonable searches and seizures to citizens. Instead, it described "the people" as referring to those with "who are part of a *national* community or who have otherwise developed sufficient connection with this country to be considered part of that community" (emphasis added). This nebulous and indeterminate formulation rejects the idea that constitutional rights turn on immigration status alone. *Heller* conspicuously substitutes the phrase "political" for "national", contradicting *Verdugo-Urquidez* while claiming to affirm it.

Finally, many historical exclusions of foreigners from gun rights were premised on loyalty concerns during wartime, or along expressly racial lines.[11] Indeed, the most prominent linkage of gun rights to citizenship finds voice in the anti-canonical case of *Dred Scott v. Sandford*. The *Dred Scott* Court narrowed several important constitutional protections to citizens, but only by conjuring the transitive relationship between citizenship, race, and constitutional rights (including gun rights).[12]

Perhaps because *Heller*'s narrowing of "the people" is so thinly or odiously supported, other appellate courts confronted with the constitutionality of § 922(g)(5) have instead assumed noncitizens (including unauthorized noncitizens) can raise Second Amendment challenges.[13] Nevertheless, they upheld the provision by purporting to apply the type of scrutiny courts have applied to other regulations in the wake of *Heller*. With various formulations, lower federal courts have evaluated firearms and ammunition regulations under heightened scrutiny, toggling between strict and intermediate scrutiny depending on the nature of the restriction.[14] Invoking those judicial

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[11] See, e.g., Angela R. Riley, *Indians and Guns*, 100 Geo. L. J. 1675 (2012); Robert Churchill, *Gun Regulation, the Police Power, and the Right to keep Arms in Early America*, 25 Law & Hist. Rev. 139 (2007); Saul Cornell & Nathan DeNino, *A Well Regulated Right: The Early American Origins of Gun Control*, 73 Fordham L. Rev.487 (2004) (noting firearms laws conditioned on loyalty oaths, and concerning possession by particular religious minorities); Saul Cornell, *Commonplace or Anachronism: The Standard Model, the Second Amendment, and the Problem of History in Contemporary Constitutional Theory*, 16 Const. Comment. 221 (1999); Akhil Reed Amar, The Bill of Rights: Creation and Reconstruction (1998); Lee Kennett & James LaVerne Anderson, The Gun in America: The Origins of a National Dilemma (1975)

[12] *Dred Scott v. Sandford*, 60 U.S. 393, 416-17 (1856):

> "For if ['members of the African race'] were so received, and entitled to the privileges and immunities of citizens, it would exempt them from the operation of the special laws and from the police regulations which they considered to be necessary for their own safety. It would give to persons of the negro race, who were recognized as citizens in any one State of the Union, the right to enter every other State whenever they pleased, singly or in companies, without pass or passport, and without obstruction, to sojourn there as long as they pleased, to go where they pleased at every hour of the day or night without molestation, unless they committed some violation of law for which a white man would be punished; and it would give them the full liberty of speech in public and in private upon all subjects upon which its own citizens might speak; to hold public meetings upon political affairs, and *to keep and carry arms wherever they went*." (emphasis added)

[13] Perez, 6 F.4th at 453 (opining that there was no definitive answer to whether unlawfully present noncitizens were excluded from "the people", and instead assuming, without deciding, that such noncitizens could raise Second Amendment challenges); accord, *Torres*, 911 F.3d at 1261; *Meza-Rodriguez*, 798 F.3d at 670; *Huitron-Guizar*, 678 F.3d at 1168.

[14] See, e.g., *Perez*, 6 F.4th at 453-54.

tests, these opinions held that because the noncitizens covered in 922(g)(5) were not "law-abiding", Congress could criminalize their possession of firearms or ammunition.

This alternate approach is beset by its own doctrinal and conceptual difficulties. Primarily, it allows the government to trade on innuendo about immigrant criminality and tendency to lawless behavior. Moreover, by defining millions of noncitizens as lawless, this tack amounts to the same as equating "the people" with "citizens" for purposes of assessing §922(g)(5). In sum, although these opinions purport to apply a more nuanced approach, they still categorically exclude the same millions of individuals from second amendment protection.

First, as a doctrinal matter, the type of ends-means fit in the courts' analyses does not resemble the heightened scrutiny used in other areas of constitutional analysis. Rather than require substantiation of the claim that unauthorized noncitizens are not – as a class – law-abiding in ways that relate to gun possession, these opinions indulge Congress' judgment about the dangerousness or tendency to lawlessness of persons lacking lawful or permanent immigration status.[15] But that form of deference, and its tendency to relieve the government of its burden, are precisely what heightened scrutiny is intended to reject. In an opinion concurring in judgment with the Second Circuit panel in *United States v. Perez*, Judge Menashi sharply critiqued the panel precisely for this slippage into deferential rationality review under the guise of heightened scrutiny.[16]

Indeed, a more faithful application of heightened scrutiny would have to contend with two concerns. First, available empirical evidence suggests that noncitizens – including unlawfully present noncitizens – are less likely to commit crimes, including violent crimes, than native born.[17] Second, unlawful presence, by itself, is legally distinct from the "long-standing" exclusions *Heller* purports to permit for "felons and the mentally-ill." Unlawful presence is not a criminal violation, let alone a felony. If the legal violation of unlawful presence is sufficient to make that connection, the government's ability to exclude several classes of persons – both citizens and noncitizens – with prior administrative or civil violations would be greatly expanded.[18] Other opinions avoid reliance on status alone, but suggest that the nature of unlawful presence makes those individuals more likely to evade detection and thus harder to identify and track.[19] While such justification is

[15] See, e.g., *Torres*, 911 F.3d at 1264.
[16] *Perez*, 6 F.4th at 457, 459 (Menashi, J. concurring in judgment) (arguing that the majority is "watering down" intermediate scrutiny, and critiquing the majority's deference to Congress' policy judgments and assumptions regarding a conclusion that may end up being false).
[17] Ruben Rumbaut, Katie Dingeman, Anthony Robles, *Immigration and Crime and the Criminalization of Immigration*, in Routledge International Handbook of Migration Studies (Gold & Nawyn, eds. 2018). Note that one does not need to rely on the particular conclusions of this research; for purposes of my critique, the critical question is whether such empirical evidence should matter to courts engaged in forms of heightened scrutiny.
[18] Of course, illegal entry can be charged as a misdemeanor, and illegal re-entry can be charged as a low-level felony. But even under those circumstances, Congress does not always consider those immigration crimes to be persistent legal disabilities. In the past, federal deportation law included a statute of limitations, such that unlawful entry could not be charged after five years and the person could not be removed. Even today, the immigration code provides several statutory basis for overcoming unlawful status, including through unlawful entry, and regularizing immigration status and later, naturalizing.
[19] See, e.g., *Torres*, 911 F.3d at 1264.

not implausible, heightened scrutiny requires more of the government than articulating any conceivable, post-hoc rationale. Further, treating unlawful status as dispositive fails to account for the potential fluidity of that status, including the multiple possibilities for an unauthorized noncitizen to obtain lawful permanent residency, and eventually, citizenship.

Perhaps recognizing the obvious frailty of equating unlawful presence with the type of lawlessness relevant to firearms possession, some appellate judges attempted to finesse the connection between immigrants and criminality by featuring the criminal background of the noncitizen-defendant. For example, some opinions mention possible prior gang affiliations or surface uncharged criminal allegations. But, if unlawful status itself triggers the exclusion (as these opinions suggest), such biographical details are extraneous, and appear designed solely to paint the noncitizens as inherently dangerous in ways relevant to firearms possession. In comparison, a noncitizen's lack of criminal history,[20] use of firearms for work purposes,[21] possession of minimal amounts of ammunition without a gun,[22] or use of a firearm in defense[23] failed to mitigate or overcome the deficit created by immigration status alone. This divergent treatment of defendants' prior history indicates that for noncitizens, criminal background is a one-way ratchet, only useful when it can help courts link immigrant status implicitly to violent criminality.

In sum, the current judicial approaches to this set of post-*Heller* cases – one that narrows "the people" and the other that hyperbolizes the lawlessness of unauthorized noncitizens – are blinkered interpretations of the Second Amendment.

To be clear, although I argue that these rationales are untenable, I do not approach this debate with a deregulatory agenda regarding firearms. My central concern is the way in which these interpretations facilitate the general degradation of constitutional rights for the tens of millions of noncitizens in our polity. *Heller*'s irresponsible talk of citizens, and the subsequent lower courts that have uncritically adopted it, threaten to widen that inequity if left unchecked. The narrowing of Second Amendment rights normalizes a decades long project by some federal judges, like Justice Alito, incrementally to strip noncitizens of other vital constitutional protections.[24] My

[20] See e.g., *Meza-Rodriguez*, 798 F.3d at 666 (not mentioning criminal history apart from incident giving rise to §922(g)(5) prosecution); Portillo-Munoz, 643 F.3d at 439 (noting that noncitizen's presentence report did not report any prior criminal history or arrests).
[21] *Portillo-Munoz*, 643 f.3d at 439 (prosecution of noncitizen working on ranch who stated that he possessed firearm to protect chickens from coyotes).
[22] *Meza-Rodriguez*, 798 F.3d at 666 (prosecution based on possession of a .22 caliber cartridge).
[23] *Perez*, 6 F.4th at 450 (prosecution of noncitizen brandishing firearm to deter armed intruders)
[24] *Thuraisiggiam v. Dep't of Homeland Security*, 140 S.Ct. 1959 (2020) (Alito, J.) (denying habeas and due process rights to unlawfully present person in expedited removal proceedings); *Kansas v. Garcia*, 140 S.Ct. 791 (2020) (Alito, J.) (upholding state criminal prosecution of noncitizens for fraud in employment procurement against preemption challenge); Hernandez v. Mesa, 140 S.Ct. 735 (2020) (Alito, J.) (refusing to extend *Bivens* to claim of parents of a Mexican child who shot and killed by U.S. Border Patrol agent who fired across the border at the child); *Jennings v. Rodriguez*, 138 S.Ct. 830 (2018) (Alito, J.) (casting doubt on due process challenges to immigrant detention without bond)

examination of this less-heralded set of post-*Heller* Second Amendment cases shines a light on that exclusionary campaign.

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