Boston College Law Review

Volume 53
Issue 6 *Electronic Supplement*

Article 7

2-16-2012

Sometimes You're in, Sometimes You're out: Undocumented Immigrants and the Fifth Circuit's Definition of "The People" in *United States v. Portillo-Muñoz*

Mathilda McGee-Tubb
Boston College Law School, mathilda.mcgee-tubb@bc.edu

SOMETIMES YOU'RE IN, SOMETIMES YOU'RE OUT: UNDOCUMENTED IMMIGRANTS AND THE FIFTH CIRCUIT'S DEFINITION OF "THE PEOPLE" IN *UNITED STATES v. PORTILLO-MUÑOZ*

Abstract: On June 29, 2011, the U.S. Court of Appeals for the Fifth Circuit, in *United States v. Portillo-Muñoz,* upheld a federal statute prohibiting firearms possession by undocumented immigrants by concluding that undocumented immigrants are not part of "the people" granted Second Amendment rights. In doing so, the Fifth Circuit created an unprecedented distinction between types of constitutional rights and used that distinction to determine those to whom the rights apply. This Comment argues that courts should be wary of creating categories of constitutional rights, since such categories invite arbitrary classifications and allow legislatures to grant benefits to some people and not others.

Introduction

The definition of "the people," a term used frequently in the Bill of Rights, shapes the rights of noncitizens living in the United States.[1] If noncitizens are included within the Constitution's definition of "the people," they receive the same protections of individual liberties and freedoms as citizens.[2] In 2011, in *United States v. Portillo-Muñoz,* a panel of the U.S. Court of Appeals for the Fifth Circuit upheld a federal statute prohibiting firearms possession by undocumented immigrants by concluding that undocumented immigrants are not part of "the people" granted Second Amendment rights.[3]

This Comment examines recent approaches to defining "the people" protected by the Bill of Rights and considers how the exclusion of undocumented immigrants from Second Amendment rights in *Portillo-*

---

[1] *See* Gerald L. Neuman, *Whose Constitution?,* 100 Yale L.J. 909, 910 (1991). For the purposes of this Comment, the terms "noncitizens" and "undocumented immigrants" describe people often referred to as "aliens" or "illegal aliens." *See* Victor C. Romero, *The Congruence Principle Applied: Rethinking Equal Protection Review of Federal Alienage Classifications After* Adarand Constructors, Inc. v. Peña, 76 Or. L. Rev. 425, 426 n.4 (1997) (discussing the propriety and implications of word choice).

[2] *See* Neuman, *supra* note 1, at 910–12.

[3] 643 F.3d 437, 442 (5th Cir. 2011).

Muñoz fits with those interpretations.[4] Part I provides an overview of the facts and procedural history of *Portillo-Muñoz* and introduces the Supreme Court's standard of review for undocumented immigrants' constitutional challenges to federal statutes.[5] Then, Part II outlines how the U.S. Supreme Court and the Fifth Circuit have used a "substantial connections" test to assess undocumented immigrants' constitutional rights and discusses recent lower court decisions denying Second Amendment rights to this population, before examining the Fifth Circuit's reasoning in *Portillo-Muñoz*.[6] Finally, Part III considers the Fifth Circuit's denial of Second Amendment rights to undocumented immigrants by classifying Second and Fourth Amendment rights as affirmative and protective rights, respectively.[7] It then situates this approach within dominant understandings of the Bill of Rights.[8] This Comment concludes that the Fifth Circuit's unprecedented distinction between affirmative and protective rights imposes a categorical approach to defining "the people" that creates arbitrary distinctions between constitutional rights and strips the Bill of Rights of its intended purposes.[9]

I. *Portillo-Muñoz* in Context

On July 10, 2010, in Castro County, Texas, law enforcement responded to a call, reporting that a person at a rodeo arena had a handgun in his waistband.[10] The responding officer arrested the man for unlawfully carrying a weapon.[11] Armando Portillo-Muñoz, a Mexican citizen, had been in the United States illegally for eighteen months, working, paying rent, and financially supporting his girlfriend and her child.[12] During the seven months prior, he had worked as a farmhand, maintaining the land and caring for the animals.[13] He carried the firearm to protect himself and the livestock from coyotes at the ranch.[14]

On August 31, 2010, Portillo-Muñoz was indicted by a grand jury for being an unlawfully present alien in possession of a firearm in viola-

---

[4] *See infra* notes 10–89 and accompanying text.
[5] *See infra* notes 10–31 and accompanying text.
[6] *See infra* notes 32–71 and accompanying text.
[7] *See infra* notes 72–82 and accompanying text.
[8] *See infra* notes 79–82 and accompanying text.
[9] *See infra* notes 72–89 and accompanying text.
[10] *Portillo-Muñoz*, 643 F.3d at 438.
[11] *Id.*
[12] *Id.* at 439; Petition for Rehearing En Banc, Criminal Appeal at 2, *Portillo-Muñoz*, 643 F.3d 437 (No. 11-10086) [hereinafter Petition].
[13] *See* Appellant's Initial Brief at 6, *Portillo-Muñoz*, 643 F.3d 437 (No. 11-10086).
[14] Petition, *supra* note 12, at 2.

tion of 18 U.S.C. § 922(g)(5).[15] Portillo-Muñoz filed a motion to dismiss, arguing that the conviction would violate his Second and Fifth Amendment rights, but the U.S. District Court for the Northern District of Texas denied the motion.[16] In his appeal to the Fifth Circuit, Portillo-Muñoz again argued that the statute violates the Second and Fifth Amendments.[17] Portillo-Muñoz challenged the portion of the Gun Control Act of 1968 that criminalizes possession of a firearm by an undocumented immigrant.[18] In challenging the federal statute's constitutionality, Portillo-Muñoz asked the court to find that Second Amendment rights extend to undocumented immigrants.[19] The court declined to do so, and a panel of the Fifth Circuit affirmed his conviction, with one judge dissenting.[20]

Noncitizens, like Portillo-Muñoz, may have standing to challenge federal laws making alienage classifications.[21] This right arose from the 1886 U.S. Supreme Court case, *Yick Wo v. Hopkins,* in which the Court held that the Fourteenth Amendment applies to undocumented immigrants, thereby granting them equal protection of the laws.[22] Nevertheless, the Court has exhibited great deference to alienage classifications, striking them down only when they are not rationally related to a legitimate government purpose.[23] For example, in 1976, in *Mathews v. Diaz,* the Supreme Court held that Congress may differentiate between citizens, noncitizens, and different subsets of noncitizens in the interest of foreign relations and "changing political and economic circum-

---

[15] *Portillo-Muñoz,* 643 F.3d at 439; Petition, *supra* note 12, at 2; *see* 18 U.S.C. § 922(g)(5) (2006).

[16] Appellant's Initial Brief, *supra* note 13, at 3–4. Portillo-Muñoz entered a conditional guilty plea subject to appeal of the denial, and the district court sentenced him without an opinion. *See* Petition, *supra* note 12, at 2–3.

[17] *Portillo-Muñoz,* 643 F.3d at 439. The court rejected Portillo-Muñoz's Fifth Amendment challenge, holding that his conditional guilty plea reserved his right to appeal only as it related to the federal statute's violation of his Second Amendment rights. *Id.* at 442.

[18] 18 U.S.C. § 922(g)(5). The statute specifically prohibits possession of any firearm or ammunition in interstate commerce by an "alien" who "is illegally or unlawfully in the United States; or . . . has been admitted to the United States under a nonimmigrant visa . . . ." *Id.* Section 922(g) also prohibits firearm possession by felons, fugitives from justice, unlawful users of a controlled substance, the mentally ill, dishonorably discharged veterans, individuals subject to a restraining order for representing a "credible threat" to an intimate partner or child's physical safety, convicted domestic violence perpetrators, or those who have renounced U.S. citizenship. *See id.* § 922(g)(1)–(9).

[19] *See Portillo-Muñoz,* 643 F.3d at 439.

[20] *Id.* at 441–42; *see id.* at 442–43 (Dennis, J., dissenting).

[21] *See* Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886).

[22] *See id.*

[23] *See infra* notes 24–26 and accompanying text.

stances."[24] As a result, since *Mathews,* courts have generally evaluated challenges to federal statutes' alienage classifications, like Portillo-Muñoz's challenge to section 922(g)(5), using rational basis review.[25]

In such inquiries, a statute's constitutionality often depends on whether noncitizens are protected by a constitutional amendment, thereby limiting the government's power to infringe on conferred rights.[26] It is unclear, however, whether the Framers intended "the people" to include anyone physically present in the United States.[27] Reflecting this uncertainty, the Supreme Court has granted Fifth, Sixth, Fourteenth, and some Fourth Amendment protections to both legal and undocumented immigrants in the United States,[28] but has granted

---

[24] *See* 426 U.S. 67, 81–83 (1976); *see also* Erwin Chemerinsky, Constitutional Law: Principles and Policies 793–94 (4th ed. 2011) (discussing *Mathews* as a defining case for the alienage classification standard of review).

[25] *See* Chemerinsky, *supra* note 24, at 793–94. In contrast, in equal protection challenges to alienage classifications in state laws, courts generally apply strict scrutiny. *See* Sugarman v. Dougall, 413 U.S. 634, 642, 643 (1973) (applying strict scrutiny to New York State's exclusion of aliens from public employment); Chemerinsky, *supra* note 24, at 790; Romero, *supra* note 1, at 434, 435. Rational basis review replaces strict scrutiny at the federal level because the federal government's interest in protecting national security and regulating borders trumps the interest in protecting noncitizens as a "discrete and insular minority" who lack voting power. *See Mathews,* 426 U.S. at 84–85; *Sugarman,* 413 U.S. at 642, 643; Graham v. Richardson, 403 U.S. 365, 371–72 (1971); Romero, *supra* note 1, at 435–36; Gerald M. Rosberg, *The Protection of Aliens from Discriminatory Treatment by the National Government,* 1977 Sup. Ct. Rev. 275, 278, 316.

[26] *See, e.g.*, United States v. Verdugo-Urquidez, 494 U.S. 259, 265 (1990); Plyler v. Doe, 457 U.S. 202, 214 (1982). The First, Second, and Fourth Amendments reference a "right of the people," and the Ninth and Tenth Amendments reference rights retained by or reserved to "the people," respectively. *See* U.S. Const. amends. I, II, IV, IX, X. The remaining amendments grant rights implicitly to those to whom the Constitution applies. *See, e.g., id.* amends. VII, VIII.

[27] *See* Pratheepan Gulasekaram, *"The People" of the Second Amendment: Citizenship and the Right to Bear Arms,* 85 N.Y.U. L. Rev. 1521, 1527, 1533 (2010); Neuman, *supra* note 1, at 912–13.

[28] *See* INS v. Lopez-Mendoza, 468 U.S. 1032, 1050–51 (1984) (implying that undocumented immigrants in the United States may have Fourth Amendment rights); *Plyler,* 457 U.S. at 211–12, 230 (affirming that undocumented immigrants are guaranteed Fifth and Fourteenth Amendment due process protections, and holding that they are protected by the Fourteenth Amendment equal protection clause); Almeida-Sanchez v. United States, 413 U.S. 266, 273 (1973) (holding that a noncitizen with a valid work permit had Fourth Amendment rights and noting tension between the federal interest in border protection and such constitutional rights); Kwong Hai Chew v. Colding, 344 U.S. 590, 596 (1953) (stating that a lawful permanent resident noncitizen is a "person" within meaning of Fifth Amendment); Wong Wing v. United States, 163 U.S. 228, 238 (1896) (holding that any person, including an undocumented immigrant within U.S. territorial jurisdiction is entitled to Fifth and Sixth Amendment protections); *Yick Wo,* 118 U.S. at 369 (holding that noncitizens within U.S. territorial jurisdiction are "persons" within the Fourteenth Amendment because its provisions are "universal").

First Amendment rights only to resident, documented immigrants.[29] Further, the Court has held that noncitizens need not receive the same federal benefits as citizens.[30] With regard to welfare benefits, for example, Congress may treat citizens, noncitizens, and subsets of noncitizens differently.[31]

II. Development of the Substantial Connections Test and its Application to the Second Amendment

A. *The Supreme Court's Substantial Connections Test*

In 1990, in *United States v. Verdugo-Urquidez,* the Supreme Court set forth a "substantial connections" test for determining whether a constitutional right extends to a noncitizen.[32] Although the case arose out of a Fourth Amendment challenge, the opinion noted that the term "the people" shares the same meaning across the First, Second, Fourth, Ninth, and Tenth Amendments.[33] The substantial connections test provides that noncitizens receive certain constitutional protections when they have entered the United States and have "developed substantial connections with this country."[34] Using this analytical framework, the Court held that a noncitizen who was apprehended in Mexico and transported to the United States for detention did not have Fourth Amendment rights to his property abroad because he had no voluntary attachment to the United States.[35] Although the Court employed the substantial connections test to reach its holding, the test did not command a majority of the justices.[36] Thus, *Verdugo-Urquidez* holds ambigu-

---

[29] *See* Bridges v. Wixon, 326 U.S. 135, 148 (1945) (holding that resident noncitizens have First Amendment rights); United States *ex rel.* Turner v. Williams, 194 U.S. 279, 292 (1904) (holding that an undocumented immigrant is not entitled to First Amendment speech and press rights because of illegal entry).

[30] *Mathews,* 426 U.S. at 78.

[31] *See id.* at 80; *see also* Linda A. Bosniak, *Exclusion and Membership: The Dual Identity of the Undocumented Worker Under United States Law,* 1988 Wis. L. Rev. 955, 984 (discussing the variability of rights afforded to undocumented immigrants).

[32] *See* 494 U.S. 259, 265, 271 (1990).

[33] *See id.* at 265. A plurality of the Court defined "the people" as "a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community." *Id.*

[34] *See id.* at 265, 271.

[35] *Id.* at 262, 274–75.

[36] *See id.* at 261 (listing the justices' votes and opinions). Justice Anthony Kennedy, who joined the plurality opinion, wrote separately to propose a broader view: that Fourth Amendment protections should extend to all people in the United States. *See id.* at 276 (Kennedy, J., concurring). Additionally, Justice John Paul Stevens, who concurred in the

ous precedential value.[37] Nevertheless, it limited the rights of noncitizens and detainees residing outside the United States; further, it established the substantial connections test, a potential tool for lower courts to employ when assessing the constitutional rights of noncitizens located in U.S. territory.[38]

In 2006, in *Martinez-Aguero v. Gonzalez,* the Fifth Circuit used *Verdugo-Urquidez* to protect a noncitizen's Fourth and Fifth Amendment rights against false imprisonment and use of excessive force.[39] The court noted that the substantial connections test may not be binding and declined to determine whether *Verdugo-Urquidez* controlled.[40] Instead, it concluded that the plaintiff would meet both the *Verdugo-Urquidez* plurality's substantial connections test and the *Verdugo-Urquidez* concurrence's broader definition encompassing all people within U.S. borders because the nature and duration of the plaintiff's contacts constituted sufficient connections and because the plaintiff was in the United States when she was stopped.[41]

B. *The Substantial Connection Test Applied to Second Amendment Analysis*

Both the Supreme Court and the Fifth Circuit have used the *Verdugo-Urquidez* analysis to define "the people" to whom Second Amendment rights apply.[42] In 2001, in *United States v. Emerson,* the Fifth Circuit addressed the meaning of "the people" in a U.S. citizen's Second Amendment challenge to the Gun Control Act.[43] The court first noted that the phrase "the people" shares the same meaning in the First, Sec-

---

judgment, contended that lawfully present noncitizens are among "the people" entitled to Bill of Rights protections. *See id.* at 279 (Stevens, J., concurring).

[37] *See* United States v. Esparza-Mendoza, 265 F. Supp. 2d 1254, 1260 (D. Utah 2003) (noting the confusion and treating the "substantial connections" test as binding).

[38] *See Verdugo-Urquidez,* 494 U.S. at 265, 272–73. The Court suggested that it might have extended Fourth Amendment protections had the respondent been an undocumented immigrant who was voluntarily in the United States and who had accepted some societal obligations and formed a voluntary attachment. *See id.* at 272–73.

[39] *See* 459 F.3d 618, 620, 625 (5th Cir. 2006). The plaintiff was a Mexican resident who visited the United States once a month to assist her aunt. *See id.* at 620. She normally held a valid visitor visa but was waiting for a new card and using an interim stamp when she was stopped by U.S. border patrol. *Id.*

[40] *See id.* at 624–25, 626.

[41] *See id.*

[42] *See* District of Columbia v. Heller, 554 U.S. 570, 579–81 (2008); United States v. Emerson, 270 F.3d 203, 227–29 (5th Cir. 2001).

[43] *See* 270 F.3d at 212, 228 (upholding 18 U.S.C. § 922(g)(8) (2006), which prohibits firearm possession by anyone subject to a court restraining order and who represents a credible physical threat to a child or intimate partner).

ond, and Fourth Amendments.[44] It then adopted the sufficient connections language in *Verdugo-Urquidez.*[45] But the Fifth Circuit also indicated that "the people" refers to "individual Americans," potentially limiting the group encompassed by the term.[46] Although the court defined "the people" to include the defendant, it nonetheless upheld the limitation on the defendant's Second Amendment rights.[47] In drawing this conclusion, the court reasoned that Second Amendment rights may be limited by "narrowly tailored" exceptions such as the one at issue.[48]

In 2008, in *District of Columbia v. Heller,* the Supreme Court clarified the scope of Second Amendment rights and addressed, in part, the group encompassed by "the people."[49] The Court held that a local statute banning handgun possession in the home violated the Second Amendment; further, it held that the Second Amendment confers an individual right to self-defense and to keep and bear arms.[50] Referencing *Verdugo-Urquidez,* the Court concluded that the term "the people" in the Second Amendment "unambiguously refers to all members of the political community, not an unspecified subset."[51]

Like the Fifth Circuit in *Emerson,* the Supreme Court in *Heller* made a "strong presumption" that Second Amendment rights "belong[] to all Americans"; the *Heller* Court also described the rights as applying to "law-abiding, responsible citizens."[52] Additionally, the Court recognized "longstanding" limitations on Second Amendment rights, such as the prohibition on granting these rights to felons and the mentally ill.[53] Further, the Court reasoned that statutory restrictions limiting

---

[44] *See id.* at 227–28.

[45] *See id.* at 228.

[46] *See id.* at 229; *see also Heller,* 554 U.S. at 581 (using the same terminology seven years later).

[47] *See Emerson,* 270 F.3d at 228, 260.

[48] *See id.* at 260, 261.

[49] *See* 554 U.S. at 579–81; *see also* Gulasekaram, *supra* note 27, at 1530–32 (noting the *Heller* Court's discussion of "the people" and the implications of its word choices).

[50] *Heller,* 554 U.S. at 635.

[51] *Id.* at 580; *see* Gulasekaram, *supra* note 27, at 1536 (suggesting that the *Heller* Court intended to limit *Verdugo-Urquidez*'s "community" by replacing "national" with "political"); *see also Verdugo-Urquidez,* 494 U.S. at 265 (defining "the people" as "a class of persons who are part of a national community").

[52] *Heller,* 554 U.S. at 581, 635. The dissent argued that the majority's definition of "the people" as "law-abiding, responsible citizens" narrowed the term such that it cannot share a meaning across the First, Second, and Fourth Amendments because this reading excludes people, such as felons, who are otherwise entitled to First and Fourth Amendment rights. *See id.* at 644 (Stevens, J., dissenting). In *Emerson,* the Fifth Circuit engaged in similar semantic narrowing. *See* 270 F.3d at 229; Gulasekaram, *supra* note 27, at 1530–31.

[53] *Heller,* 554 U.S. at 626–27.

Second Amendment rights are "presumptively lawful," but it did not define the category of constitutionally acceptable statutory measures.[54] Accordingly, *Heller* neither explicitly resolved whether "the people" in the Second Amendment encompasses noncitizens who may meet the *Verdugo-Urquidez* substantial connections test, nor defined the extent to which Second Amendment rights can be statutorily limited.[55]

C. *Lower Courts' Treatment of Section 922(g)(5)*

After *Verdugo-Urquidez* and *Heller,* a number of lower courts outside the Fifth Circuit addressed whether noncitizens in the United States have Second Amendment rights.[56] In challenges to the constitutionality of 18 U.S.C. § 922(g)(5), these courts consistently concluded that the statute is constitutional as applied to undocumented immigrants because they are not part of "the people" under the Second Amendment.[57] Even when courts have theorized that undocumented immigrants could have Second Amendment rights, these courts have found that section 922(g)(5) permissibly restricts these rights, given *Heller*'s presumption that longstanding or "historically justified" measures regulating firearms are lawful.[58] This issue did not appear before a federal appeals court until the Fifth Circuit addressed it in *Portillo-Muñoz*.[59]

D. *The Fifth Circuit's Novel Approach in* Portillo-Muñoz

In 2011, in *Portillo-Muñoz,* a Fifth Circuit panel upheld a portion of the Gun Control Act against an undocumented immigrant's Second

---

[54] *See id.* at 626–27 & n.26. Since *Heller,* no part of 18 U.S.C. § 922(g) has been held unconstitutional on Second Amendment grounds. United States v. Seay, 620 F.3d 919, 924 (8th Cir. 2010).

[55] *See Heller,* 554 U.S. at 626–27 & n.26; Gulasekaram, *supra* note 27, at 1532, 1536 (discussing the *Heller* Court's unclear use of the term "citizen" in relation to *Verdugo-Urquidez*).

[56] *See, e.g.*, United States v. Martinez-Guillen, No. 2:10cr192-MEF, 2011 WL 588350, at *2 (M.D. Ala. Jan. 12, 2011); United States v. Luviano-Vega, No. 5:10-CR-184-BO, 2010 WL 3732137, at *2, *3 (E.D.N.C. Sept. 20, 2010); United States v. Yanez-Vasquez, No. 09-40056-01-SAC, 2010 WL 411112, at *2 (D. Kan. Jan. 28, 2010).

[57] *See, e.g., Martinez-Guillen,* 2011 WL 588350, at *2 (concluding that Second Amendment rights extend only to citizens "comprising the American political community"); *Luviano-Vega,* 2010 WL 3732137, at *2, *3 (finding that no precedent recognizes undocumented immigrants' right to bear arms and that Congress has power to adopt policies affecting noncitizens differently than citizens); *Yanez-Vasquez,* 2010 WL 411112, at *2 (reasoning that undocumented immigrants are not among "the people" with Second Amendment rights).

[58] *See Martinez-Guillen,* 2011 WL 588350, at *2; *Yanez-Vasquez,* 2010 WL 411112, at *3.

[59] 643 F.3d 437, 439 (5th Cir. 2011); *see* Gulasekaram, *supra* note 27, at 1531.

Amendment challenge on four grounds.[60] First, like the lower courts that previously addressed the issue, the Fifth Circuit found that *Heller*'s definition of "the people" as "all Americans," "all members of the political community," and "law-abiding, responsible citizens" does not encompass undocumented immigrants.[61] Second, the court rejected the proposition that *Verdugo-Urquidez*'s definition of "the people" encompasses undocumented immigrants.[62] Third, the court stated that, even if Portillo-Muñoz met the *Verdugo-Urquidez* substantial connections test and therefore fit within "the people" granted Fourth Amendment rights, he still would not have Second Amendment rights because the phrase "the people" carries different meanings in the Second and Fourth Amendments.[63] Finally, the Fifth Circuit concluded that Congress has the authority to distinguish between noncitizens and citizens in lawmaking, and therefore the statute was constitutional.[64]

The Fifth Circuit's approach mirrored that of the district courts before it in reading the *Heller* language as excluding undocumented immigrants from "the people" afforded Second Amendment rights.[65] But, the Fifth Circuit diverged from the district courts in its subsequent arguments.[66] The lower courts, in accounting for the possibility that undocumented immigrants might have Second Amendment rights, looked to *Heller*'s open-ended affirmation of "presumptively lawful regulatory measures" to conclude that section 922(g)(5) is a valid restriction on Second Amendment rights.[67] In contrast, the Fifth Circuit discussed *Heller*'s definition of "the people" as "citizen[s]," but not whether section 922(g)(5) is presumptively lawful.[68] Instead, the court validated the statutory exclusion of undocumented immigrants from Second Amendment rights in part by creating a distinction between types of constitutional rights.[69] In describing this distinction, the court categorized the Fourth Amendment as granting *protective* rights against

---

[60] *See* 643 F.3d at 440–42.

[61] *See id.* at 440.

[62] *See id.*

[63] *See id.* at 440–41.

[64] *See id.* at 441, 442; *see also supra* text accompanying notes 24–25 (discussing the Supreme Court precedent permitting such distinctions).

[65] *See Portillo-Muñoz,* 643 F.3d at 440; *see also, e.g., Martinez-Guillen,* 2011 WL 588350, at *2 (relying on *Heller*'s language to exclude undocumented immigrants from "the people"); *Yanez-Vasquez,* 2010 WL 411112, at *2–3 (same).

[66] *See Portillo-Muñoz,* 643 F.3d at 440–42; *infra* notes 67–69 and accompanying text.

[67] *See Martinez-Guillen,* 2011 WL 588350, at *2 (quoting *Heller,* 554 U.S. at 627 n.26); *Yanez-Vasquez,* 2010 WL 411112, at *3.

[68] *See Portillo-Muñoz,* 643 F.3d at 440–41.

[69] *See id.* at 440–41, 442.

government abuses and the Second Amendment as granting *affirmative* rights which could be extended to fewer groups.[70] Reasoning that the purposes of some rights merit more limited application, the court concluded that who "the people" are depends on whether the types of rights at issue are affirmative or protective.[71]

III. Implications of the Fifth Circuit's Departure

The Fifth Circuit's approach of classifying constitutional rights as affirmative or protective represented a significant departure from precedent in two ways.[72] First, this approach was inconsistent with assumptions underpinning the Supreme Court's 2008 *District of Columbia v. Heller* and 1976 *United States v. Verdugo-Urquidez* decisions, and the Fifth Circuit's 2001 *United States v. Emerson* decision; each of those decisions concluded that the term "the people" shares the same meaning across the Second and Fourth Amendments.[73] Second, the approach changed the meaning of "the people" from a citizen-based to a rights-based definition.[74] This Part argues that the court's change in approach to defining "the people" not only narrows the rights of undocumented immigrants, but also could result in unintended consequences for other constitutional rights if further utilized to define beneficiaries of such rights.[75]

Heller advanced a broad, citizen-based definition of "the people" entitled to Second Amendment rights but acknowledged that those

---

[70] *Id.* at 441.

[71] *See id.* at 440–41. As its only source supporting this conclusion, the court cited a 1984 case from a sister circuit. *See id.* at 441 (citing United States v. Toner, 728 F.2d 115, 128–29 (2d Cir. 1984)). In 1984, in *United States v. Toner,* the U.S. Court of Appeals for the Second Circuit held that a predecessor statute to section 922(g)(5) did not violate an undocumented immigrant's Fifth Amendment equal protection rights. 728 F.2d at 128–29, 130. The court reasoned that undocumented immigrants, and particularly the defendant in the case, were within the category of untrustworthy people the statute intended to prohibit from possessing firearms because they "already liv[e] outside the law" and "resort to illegal activities to maintain a livelihood." *See id.* at 128–29 (internal citation omitted).

[72] *See* United States v. Portillo-Muñoz, 643 F.3d 437, 440–41 (5th Cir. 2011); Petition, *supra* note 12, at 8–9.

[73] *See* District of Columbia v. Heller, 554 U.S. 570, 580 (2008); United States v. Verdugo-Urquidez, 494 U.S. 259, 265 (1990); United States v. Emerson, 270 F.3d 203, 227–28 (5th Cir. 2001); *see also Portillo-Muñoz,* 643 F.3d at 444 (Dennis, J., dissenting) (noting that the Fifth Circuit majority failed to recognize its *Emerson* precedent); Brief of Amicus Curiae ACLU Foundation in Support of Petition for Rehearing En Banc at 1–3, *Portillo-Muñoz,* 643 F.3d 437 (No. 11-10086) [hereinafter ACLU Brief] (arguing that this departure merits en banc review); Petition, *supra* note 12, at 5, 13 (same).

[74] *See Portillo-Muñoz,* 643 F.3d at 440–41; *infra* notes 76–78 and accompanying text.

[75] *See infra* notes 83–89 and accompanying text.

rights could be limited by statute.[76] In contrast, the Fifth Circuit followed a rights-based approach that would exclude undocumented immigrants based on the nature of the rights themselves.[77] The rights-based approach contradicts *Heller* because it creates a framework which limits the constitutional rights' applicability according to the types of rights they grant rather than by the definition of "the people" shared by the constitutional amendments employing the term.[78]

Further, the dominant reading of the Bill of Rights fails to provide a basis for classifying the rights it contains as affirmative or protective.[79] Many scholars believe that the Bill of Rights codified pre-existing rights to protect "the people," whoever they may be, from government intrusion and from the political whims of a fluctuating majority.[80] The Supreme Court has largely adopted this reading as well.[81] Classifying rights as either affirmative or protective appears arbitrary in light of this understanding of the Bill of Rights as an affirmative codification with cautionary, protective purposes.[82]

---

[76] *See Heller,* 554 U.S. at 581, 635, 627 n.26; Kenneth A. Klukowski, *Citizen Gun Rights: Incorporating the Second Amendment Through the Privileges or Immunities Clause,* 39 N.M. L. Rev. 195, 247 (2009); *see also* Joseph Blocher, *Categoricalism and Balancing in First and Second Amendment Analysis,* 84 N.Y.U. L. Rev. 375, 405, 408, 413 (2009); Gulasekaram, *supra* note 27, at 1531, 1532.

[77] *See Portillo-Muñoz,* 643 F.3d at 441.

[78] *See* Petition, *supra* note 12, at 9–10; Blocher, *supra* note 76, at 414; Gulasekaram, *supra* note 27, at 1538. The Fifth Circuit's rejection of a shared definition across amendments further reinforced this approach. *See supra* note 73 and accompanying text.

[79] *See infra* notes 80–82 and accompanying text.

[80] *See* Sotirios A. Barber, *Fallacies of Negative Constitutionalism,* 75 Fordham L. Rev. 651, 651, 653 (2006) (explaining the dominant view of negative constitutionalism as protecting private interests); David P. Currie, *Positive and Negative Constitutional Rights,* 53 U. Chi. L. Rev. 864, 864, 865 (1986) (discussing the historical purposes of negative rights); *see also* Akhil Reed Amar, *The Bill of Rights as a Constitution,* 100 Yale L.J. 1131, 1132, 1133 (1991) (challenging the dominant approach).

[81] *See Heller,* 554 U.S. at 592; *Verdugo-Urquidez,* 494 U.S. at 288 (Brennan, J. dissenting) (arguing that the Bill of Rights focuses on what and how, not against or for whom, the government can act); W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943) (reasoning that the Bill of Rights meant to remove certain subjects from politics).

[82] *See* Amar, *supra* note 80, at 1201. The Fifth Circuit's particular parsing of Second Amendment rights as affirmative also contradicts some scholarly perspectives. *See Portillo-Muñoz,* 643 F.3d at 441. Forbidding the government from "infringing" on or "depriving" individuals of rights, as the Second Amendment does, confers what some scholars perceive as negative rights (limits to government's power) rather than positive rights (benefits, such as national security or the right to vote). *See* Barber, *supra* note 80, at 651; Currie, *supra* note 80, at 864–65; J.L. Hill, *The Five Faces of Freedom in American Political and Constitutional Thought,* 45 B.C. L. Rev. 499, 512 (2004). Following this reasoning, the Second Amendment should be categorized as conferring "negative" rights, as this definition more closely aligns with the Fifth Circuit's protective rights category. *See Portillo-Muñoz,* 643 F.3d at 441.

The implications of this departure from precedent and creation of a new differentiation mechanism are significant.[83] First, the Fifth Circuit's decision greatly narrows undocumented immigrants' constitutional rights by limiting the application of the *Verdugo-Urquidez* substantial connections test even more than *Heller* did.[84] Second, the *Portillo-Muñoz* court's categorization of rights as either affirmative or protective limits *Heller*'s definition of "the people" by offering an additional mechanism for narrowing the applicability of rights.[85] The Fifth Circuit's unclear distinction between affirmative and protective rights, when used as a tool for narrowing the application of rights, creates the opportunity for unfettered judicial activism and arbitrary classifications.[86] If the categories are mutually exclusive, courts will need to determine which constitutional rights fall into which categories.[87] Such a categorical view, in which the nature of particular constitutional rights could automatically determine their beneficiaries, could eventually render traditional judicial inquiry moot by pre-defining the rights.[88] The Fifth Circuit's conclusion—that constitutional rights can be categorized and that this grouping can determine those to whom a right applies—would require abandoning the dominant understanding that the Bill of Rights serves both affirmative and protective purposes and would define constitutional rights more narrowly than ever before.[89]

---

[83] *See Portillo-Muñoz*, 643 F.3d at 440–41.

[84] *See* Petition, *supra* note 12, at 10–11, 13 (describing how *Portillo-Muñoz* limits *Verdugo-Urquidez* and *Heller* by adopting *Heller*'s "citizen" language); Gulasekaram, *supra* note 27, at 1537–38 (describing how *Heller* limits *Verdugo-Urquidez* by using "citizen" language); *see also* ACLU Brief, *supra* note 73, at 6–7 (noting this narrowing).

[85] *See Heller*, 554 U.S. at 580, 581, 635; *Portillo-Muñoz*, 643 F.3d at 440–41.

[86] *See* Blocher, *supra* note 76, at 414–15, 437.

[87] *See Portillo-Muñoz*, 643 F.3d at 440–41; *see also* Blocher, *supra* note 76, at 382, 383 (noting that establishing categories of rights sets a rigid framework for how to evaluate those rights in the future).

[88] *See Portillo-Muñoz*, 643 F.3d at 440–41; Blocher, *supra* note 76, at 382, 431, 437.

[89] *See Portillo-Muñoz*, 643 F.3d at 440–41; *see also supra* notes 79–82 and accompanying text (discussing the dominant readings of the Bill of Rights). For example, if the Second Amendment is classified as affirmative but not protective, the propriety of the right of self-defense advanced in *Heller* may need reconsideration. *See Heller*, 554 U.S. at 635; *Portillo-Muñoz*, 643 F.3d at 440–41; Petition, *supra* note 12, at 12. This narrowing could also have implications for other constitutional rights if they must be categorized as either affirmative or protective. *See, e.g.*, Currie, *supra* note 80, at 873, 879 (implying that a number of constitutional provisions, such as the Sixth Amendment right to counsel and the First Amendment right to freedom of expression, serve both affirmative and protective purposes).

Conclusion

In *United States v. Portillo-Muñoz,* the Fifth Circuit took a novel approach in addressing whether undocumented immigrants are within "the people" protected by the Second Amendment. In contrast with *United States v. Verdugo-Urquidez,* a Supreme Court decision, and *United States v. Emerson,* its own precedent, a panel of the Fifth Circuit concluded that the Second and Fourth Amendments confer different types of rights and therefore apply to different people. The Fifth Circuit's categorization of constitutional amendments by the types of rights they grant and use of this categorization to determine the beneficiaries of those rights signals a departure from traditional approaches to defining "the people" in the constitutional amendments. As a result, *Portillo-Muñoz* opens the door for arbitrary classifications of constitutional rights to achieve exclusions that may not otherwise have a basis in precedent. Moving forward, courts should be cautious about attempting to define constitutional rights as affirmative or protective. Doing so dilutes the broad and protective purposes of the Bill of Rights and challenges the authority of courts to engage in reviewing the constitutionality of statutory measures.

Mathilda McGee-Tubb

Preferred citation: Mathilda McGee-Tubb, Comment, *Sometimes You're in, Sometimes You're out: Undocumented Immigrants and the Fifth Circuit's Definition of "The People" in* United States v. Portillo-Muñoz, 53 B.C. L. Rev. E. Supp. 75 (2012), http://bclawreview.org/e-supp/2012/06_mcgee-tubb.pdf.