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THE SECOND AMENDMENT, UNDOCUMENTED IMMIGRANTS,
AND THE SHIFTING DEFINITION OF “PEOPLE”: HOW THE
FEDERAL GUN CONTROL ACT OF 1968 PREVENTS
UNDOCUMENTED IMMIGRANTS FROM EXERCISING SECOND
AMENDMENT RIGHTS

Justin Hay

I. INTRODUCTION

After being brought to the United States by your family over two decades ago, you decide to purchase a firearm to exercise your Second Amendment right to bear arms. Learning about the Bill of Rights has inspired you with a sense of patriotism and you believe that the Second Amendment provides a right that all *people* should be free to exercise. While not an outspoken advocate of the Second Amendment, you do believe that firearms should be able to be used for protection. Unfortunately, on a night out on the town, you get caught up in a confrontation with another patron of a local establishment. After the confrontation, the police search your car and find the firearm you previously purchased in the glove compartment. Initially, the possession of a weapon does not seem to be problematic.

During the police interrogation, it becomes apparent that you do not possess the requisite documents to live and work in the United States. In addition to becoming concerned about possible deportation, you are informed by law enforcement that the mere possession of a firearm by an undocumented alien is a violation of the Federal Gun Control Act of 1968 (“Act”).¹ Confused, you ask how the Act is permitted to restrict your rights under the Second Amendment. After inquiring further, you begin to realize that the *people* referred to in the Second Amendment does not apply to you. Although you have contributed to your local community for years, the country that you call home considers you an uninvited guest.

There are two issues that provide an ongoing debate among American citizens regardless of the sitting President, or the composition of Congress. The legislation of firearms and the legislation regulating the presence of undocumented immigrants that reside in the United States are two issues that are perpetually entrenched in the minds of many Americans. The increased frequency of mass shootings, contrasted by forces resistant to any legislation regarding ammunition provide the

1. 18 U.S.C. §922 (g)(5).

framework for an intense conversation.² Similarly, poor economic conditions and the lack of sufficient employment opportunities for American citizens have caused many to blame immigrants, specifically undocumented immigrants, for the lack of opportunities.³

Congress seemingly had both topics in mind upon introducing the Act in 1968.⁴ While the prohibition of firearm possession within the Act is not limited to undocumented immigrants, 18 U.S.C. 922 (g)(5) (“922 (g)(5)”) of the Act specifically targets undocumented immigrants.⁵ Enacted with the purpose of “keep[ing] guns out of the hands of presumptively risky people[,]”⁶ 922 (g)(5) provides, in pertinent part, that:

[i]t shall be unlawful for any person who, being an alien is illegally or unlawfully in the United States . . . to . . . *possess* in or affecting commerce, any firearm or ammunition; or to *receive* any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.⁷

The underlying premise of the Act is pitted directly against the Second Amendment, which provides that:

“A well regulated Militia, being necessary to the security of a free State, the right of the *people* to keep and bear Arms, shall not be infringed.”⁸

In *District of Columbia v. Heller*, the Supreme Court held that the Second Amendment guarantees an individual right to possess and carry

2. Bonnie Berkowitz, Denise Lu, and Chris Alcantara, *The Terrible Numbers That Grow with Each Mass Shooting*, WASHINGTON POST, https://www.washingtonpost.com/graphics/2018/national/mass-shootings-in-america/?utm_term=.17672ebe39bd (last visited Feb. 16, 2018); Leigh Ann Caldwell and Andrew Rafferty, *Familiar Responses from Congress in Wake of the Latest Mass Shooting*, NBC NEWS, <https://www.nbcnews.com/politics/congress/familiar-responses-congress-wake-latest-mass-shooting-n848326> (last visited Feb. 16, 2018).

3. Stuart Anderson, *With 6 Million Job Openings, Will Critics Still Blame Immigrants for Taking Jobs From Americans?*, FORBES, <https://www.forbes.com/sites/stuartanderson/2017/06/24/with-6-million-job-openings-will-critics-still-blame-immigrants-for-taking-jobs-from-americans/#21f8ed3a53da> (last visited Feb. 16, 2018).

4. 18 U.S.C. §922 (g)(5) (1968) (the Act is enforced by the Bureau of Alcohol, Tobacco, Firearms and Explosives (“ATF”).

5. 18 U.S.C. §922 (g) (the Act also prohibits felons, the mentally ill, and individuals with a history of committing domestic violence).

6. *U.S. v. Meza-Rodriguez*, 798 F.3d 664, 673 (7th Cir. 2015).

7. 18 U.S.C. § 922 (g)(5) (1968) (alien is defined in 8 USC 1101 (a)(3) as “any person not a citizen or national of the United States”).

8. U.S. Const. amend. II.

weapons.⁹ In issuing its decision in *Heller*, the Court did not specify whether or not the “people” referenced in the Second Amendment included immigrants residing in the United States without documentation.¹⁰ Unlike the First, Fourth, and Fifth Amendments, it remains unclear whether or not the Second Amendment applies to undocumented immigrants in the United States.

Prior to assessing the tests that should be applied in determining whether the Second Amendment applies to undocumented immigrants, this article briefly reviews the history of the Second Amendment. Throughout the analysis of the Second Amendment, this article will contemplate the meaning of “people” within the context of the Constitution. The article will then analyze the most recent decisions of the Fifth and Seventh Circuits that have created a circuit split related to 922 (g)(5)’s prohibition of the possession of firearms by undocumented immigrants. After analyzing the circuit split, this article then analyzes the impact of the level of scrutiny applied to the Act in addition to analyzing the relationship between the Commerce Clause and the Act.

This article does not seek to address any of the policy concerns or issues regarding the constitutionality of the Second Amendment; rather, this article addresses the constitutional issues surrounding the Act’s application to individuals residing in the United States without documentation. Additionally, this article does not intend to address or analyze the effectiveness of any immigration policy.

II. BACKGROUND

The definition of people in the Constitution is disputed within the context of the Second Amendment. This section of the article will discuss the source of the confusion as to which individuals belong to the “people” in addition to providing background to the relevant cases in analyzing the circuit split between the Fifth and Seventh Circuits. Next, this section will discuss the background regarding the level of scrutiny to be applied in analyzing the Act. Finally, this section will present an alternative view of the Act, as a whole, within the scope of the Commerce Clause.

9. *See* District of Columbia v. Heller, 128 S.Ct. 2783 (U.S. 2008).

10. *See id.*

A. Undocumented Immigrants as “Non-people”

i. The Second Amendment

The Supreme Court’s most recent interpretation of the Second Amendment in *Heller* provides a framework for the application of 922 (g)(5) to undocumented immigrants.¹¹ *Heller*, a police officer in the District of Columbia (“D.C.”), attempted to register a handgun to be kept at home, but was prohibited from doing so by a D.C. law that required residents to keep lawfully owned firearms unloaded and disassembled or bound by a trigger lock.¹² *Heller* sued D.C., claiming that the law violated the Second Amendment by essentially banning the use of handguns within the home.¹³ *Heller* argued that the requirement—that handguns be kept unloaded while in the home—was fundamentally a handgun ban within the homes of D.C. residents.¹⁴

The Court famously held that the District of Columbia law was a violation of the Second Amendment.¹⁵ The Court stated that the “Second Amendment protects an individual right to possess a firearm unconnected with service in a militia, and to use that arm for a traditionally lawful purpose, such as self-defense within the home.”¹⁶ The Court, perhaps predicting over-zealous reactions to the central holding, also provided that the Second Amendment right was not unlimited; “[i]t is not a right to keep and carry any weapon whatsoever and for whatever purpose.”¹⁷ Foreshadowing the uncertainty of its decision, the Court qualified its holding by stating that the opinion does not “cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill”¹⁸

While the Court provided tight parameters on its *Heller* decision, the Court neglected to narrowly define the application of the Second Amendment to undocumented immigrants.¹⁹ In an attempt to qualify its holding, the Court hinted that laws prohibiting felons and the mentally ill from possessing firearms would not be a violation of the Second Amendment.²⁰ Unfortunately, the application of the qualifying statements to undocumented immigrants is also unclear. Under 8 U.S.C

11. *See id.*

12. *See id.* at 2875.

13. *See id.*

14. *See id.*

15. *See id.* at 2821.

16. *See id.*

17. *Id.*

18. *Id.*

19. *See id.*

20. *See id.*

§ 1325 (a), aliens who unlawfully enter the United States are not subject to more than six months imprisonment, otherwise characterized as a misdemeanor.²¹ Without more, undocumented immigrants have committed a misdemeanor by entering the United States unlawfully. Unless an undocumented immigrant commits other crimes while in the United States, the Court’s qualifying language in *Heller* does not expressly apply to immigrants whose only crime was remaining in the United States unlawfully. To summarize the impact of the *Heller* decision on 922 (g)(5), the Court did not expressly restrict the Second Amendment rights of undocumented immigrants.

ii. The Fourth Amendment

The Supreme Court’s decision in *Verdugo-Urquidez* clarifies the definition of the “people” as meant within the Fourth Amendment.²² In *Verdugo-Urquidez*, the Court held that the Fourth Amendment did not protect a non-citizen brought involuntarily to the United States against a search of foreign property.²³ Rene Martin Verdugo-Urquidez, a citizen and resident of Mexico, was suspected by the United States Drug Enforcement Agency (“DEA”) of being a leader of an organization known to smuggle narcotics into the United States.²⁴ After obtaining a warrant for Mr. Verdugo-Urquidez’ arrest, the DEA requested Mexican officials aid in apprehending Mr. Verdugo-Urquidez in Mexico.²⁵ Mexican officials complied with the request and transported Mr. Verdugo-Urquidez to the California border where Mr. Verdugo-Urquidez was arrested by United States officials.²⁶ Subsequent to Mr. Verdugo-Urquidez’ arrest, the DEA worked with Mexican officials to search Mr. Verdugo-Urquidez’ residence in Mexico.²⁷ Mr. Verdugo-Urquidez sought to suppress the evidence discovered in the search of the residence based on the fact that the DEA completed the search without a warrant as required by the Fourth Amendment.²⁸

The Court rejected Mr. Verdugo-Urquidez’ argument, holding that “the people” protected by the Fourth Amendment, and by the First and Second Amendments, . . . refers to a class of persons who are part of a national community or who have otherwise developed a *substantial*

21. 8 U.S.C § 1325 (a).

22. *See* U.S. v. Verdugo-Urquidez, 494 U.S. 259 (1990).

23. *See id.* at 259.

24. *See id.*

25. *See id.*

26. *See id.*

27. *See id.*

28. *See id.*

connection with this country to be considered part of that community.”²⁹ In the Court’s opinion, Mr. Verdugo-Urquidez did not develop a substantial connection with the United States to be protected by the Fourth Amendment because Mr. Verdugo-Urquidez did not reside in the United States or accept any societal obligations in the United States.³⁰ In order to be protected by the Fourth Amendment, Mr. Verdugo-Urquidez must have shown “substantial connections” to the United States.³¹

Verdugo-Urquidez provided a clear rule in the application of the Fourth Amendment to undocumented immigrants. Undocumented immigrants must have substantial connections to the community to be protected by the Fourth Amendment.³² *Verdugo-Urquidez* also implicitly provided the understanding that the “people” under the Fourth Amendment refers to the same class of people that are afforded the rights of the Second Amendment.³³

iii. Circuit Split: Fifth Circuit – *United States v. Portillo-Munoz*³⁴

The Fifth Circuit’s decision in *United States v. Portillo-Munoz* excluded undocumented immigrants from the definition of “people” within the Second Amendment.³⁵ On July 10, 2010, the Castro County Sheriff’s department was informed of a person riding around on a motorcycle with a handgun in his waistband.³⁶ Upon arrival, police discovered Armando Portillo-Munoz, an undocumented immigrant working and living in Dimmit, Texas, on a motorcycle.³⁷ Police arrested Mr. Portillo-Munoz after discovering a handgun in his motorcycle.³⁸ Following the arrest, Mr. Portillo-Munoz admitted to being in the United States unlawfully and was indicted under 922 (g)(5).³⁹

Prior to the arrest, Mr. Portillo-Munoz had been in the United States for eighteen months working as a ranch hand.⁴⁰ Although Mr. Portillo-Munoz admitted to possessing a firearm that had been transported in

29. *See id.* at 265.

30. *See id.*

31. *Martinez-Ageuro v. Gonzalez*, 459 F.3d 618, 625 (2008) (the Court defined “substantial connections” as whether or not the person i) is in the United States on their own accord; and ii) has accepted some societal obligations).

32. *See Verdugo-Urquidez* at 265.

33. *See id.*

34. *U.S. v. Portillo-Munoz*, 643 F.3d 437 (5th Cir. 2011).

35. *See id.*

36. *See id.* at 439.

37. *See id.*

38. *See id.*

39. *See id.*

40. *See id.*

interstate commerce, Mr. Portillo-Munoz stated that the handgun was obtained solely to protect the chickens on the ranch from coyotes.⁴¹ After being sentenced to ten months in prison followed by three years of supervised release, Mr. Portillo-Munoz appealed the decision, arguing that the Act violated the Second Amendment.⁴² While there is no doubt that Mr. Portillo-Munoz was in violation of 922 (g)(5) as written, Mr. Portillo-Munoz argued that the Act itself was unconstitutional.⁴³

The Fifth Circuit applied the *Heller* and *Verdugo-Urquidez* decisions to come to the holding that 922 (g)(5) does not violate the Constitution.⁴⁴ The court reasoned that undocumented immigrants were not “law-abiding” citizens to which the *Heller* decision provided an individual right to possess firearms.⁴⁵ Furthermore, the majority held that the “people” did not have the same meaning in the Second and Fourth Amendments.⁴⁶ The majority likened the “untraceable” quality of undocumented immigrants to criminals that could disappear without a trace after committing a crime.⁴⁷ After concluding that the Constitution does not prevent Congress from distinguishing “between citizens and aliens and between lawful and illegal aliens,” the majority held that 922 (g)(5) did not violate the Second Amendment.⁴⁸

Notably in *Portillo-Munoz*, Judge Dennis wrote a fiery dissent. The dissent criticized the majority’s conclusion that the “people” referenced in the Second and Fourth Amendments are dissimilar.⁴⁹ The precedent that “non-persons” do not have the right to be free from unreasonable searches and seizures under the Fourth Amendment would leave millions of undocumented immigrants vulnerable to abuse from law enforcement or other members of society.⁵⁰

Importantly, Judge Dennis’ dissent notes that both the *Martinez-Aguero* and *Verdugo-Urquidez* standards were satisfied by Mr. Portillo-Munoz, who had been in the United States for eighteen months, had a job, and supported a family.⁵¹ In *Martinez-Aguero*, the Fifth Circuit held that an undocumented immigrant that frequently crossed the border had a substantial connection to the United States in order to be protected by

41. *See id.*

42. *See id.*

43. *See id.*

44. *See id.* at 442.

45. *See id.* at 440.

46. *See id.*

47. *See id.*

48. *See id.* at 442.

49. *See id.* at 443.

50. *See id.* at 448.

51. *See id.* at 447.

the Fourth Amendment.⁵² The *Martinez-Aguero* court further stated that the “standard for establishing substantial connections is not high and that there would be few, if any, cases where an alien who was voluntarily within the United States would be unable to establish such connections.”⁵³ Under the *Martinez-Aguero* test, Mr. Portillo-Munoz established substantial connections by (i) voluntarily remaining in the United States and (ii) accepting societal obligations.⁵⁴

Judge Dennis’ dissent crucially highlights that the majority’s opinion effectively implies that American citizens that have committed serious crimes are afforded the rights of the Second Amendment while undocumented immigrants with substantial connections to the community who have only committed a misdemeanor are left in the cold by the Second Amendment.⁵⁵

In another prosecution of an undocumented immigrant under 922 (g)(5), Mariano Meza challenged the constitutionality of the Act under two categories: a facial challenge and an as-applied challenge.⁵⁶ Mr. Meza’s facial challenge to the constitutionality of the statute argued that the “people” referenced in the Second Amendment are in fact the same “people” referenced in the First, Fourth, and Fifth Amendments.⁵⁷ Unfortunately for Mr. Meza, the court cited *Portillo-Munoz* noting that “[t]he courts have made clear that the Constitution does not prohibit Congress from making laws that distinguish between citizens and aliens and between lawful and illegal aliens.”⁵⁸ Crucially, the court highlighted that there is no reason to believe that the prohibition on the possession of firearms by undocumented immigrants would be interpreted any differently than other provisions found in 18 USC 922 (g) (“922 (g)”) that, inter alia, prohibit felons and the mentally ill from possessing firearms.

In arguing that 922 (g)(5) is unconstitutional as-applied to undocumented immigrants, Mr. Meza pleaded the court to analyze the constitutionality of the Act under heightened scrutiny. Understanding that heightened scrutiny was required, the court applied intermediate scrutiny, which requires that “the government has the burden of demonstrating that its objective is an important one and that its objective is advanced by means substantially related to that objective.”⁵⁹

52. *See id.* at 446.

53. *See id.* at 446-7.

54. *See id.* at 443.

55. *See id.* at 447.

56. *U.S. v. Meza*, 2014 US Dist. LEXIS 50485 (E.D. Wis. 2014).

57. *Id.* (it is well settled that the First and Fourth Amendments utilize a broad definition of “people” that includes undocumented immigrants).

58. *Id.* at 12-13.

59. *Id.* at 16.

Reasoning that the government’s objective of “keeping guns out of the hands of presumptively risky people” was important, the court held that a prohibition on Mr. Meza’s possession of firearms was substantially related to the government’s important objective of suppressing armed violence.⁶⁰

B. Undocumented Immigrants as “People”

i. Circuit Split: Seventh Circuit – *United States v. Meza-Rodriguez*⁶¹

Mariano Meza-Rodriguez was brought to the United States by his family when he was roughly five years old.⁶² Approximately two decades after arriving in the United States, on August 24, 2013, Mr. Meza-Rodriguez was arrested by Milwaukee Police after allegedly pointing a handgun at a patron of a neighborhood bar.⁶³ Similar to Mr. Portillo-Munoz, Mr. Meza-Rodriguez was later indicted for a violation of 922 (g)(5).⁶⁴ After pleading guilty pursuant to an agreement with the government, Mr. Meza-Rodriguez was promptly removed to Mexico.⁶⁵ Since Mr. Meza-Rodriguez was removed to Mexico, the case adds an additional dimension: determining whether or not Mr. Meza-Rodriguez’ violation of the Act was a crime involving moral turpitude, which would result in a permanent bar from the United States.⁶⁶ Mr. Meza-Rodriguez appealed to the Seventh Circuit with an argument substantially similar to Mr. Portillo-Munoz; the basis of Mr. Meza-Rodriguez’ appeal argued that 922 (g)(5) infringes on rights available under the Second Amendment.⁶⁷

The Seventh Circuit also relied on *Verdugo-Urquidez* to establish that the “people” protected by the Second and Fourth Amendments means persons that have established a substantial connection to the United States.⁶⁸ The Seventh Circuit also relied on *Martinez-Aguero*’s two part test to determine if Mr. Meza-Rodriguez established a substantial connection by (i) remaining in the United States voluntarily and (ii) accepting some societal obligations.⁶⁹ In applying the first prong of the

60. 18 U.S.C. §922 (g).

61. *U.S. v. Meza-Rodriguez*, 798 F.3d 664 (7th Cir. 2015).

62. *See id.* at 666.

63. *See id.*

64. *See id.*

65. *See id.* at 667.

66. *See id.* at 667-78; 8 U.S.C. § 1182(a)(2)(A)(i)(I).

67. *See id.* at 667.

68. *See id.* at 670.

69. *See id.*

Martinez-Aguero test, the court confidently held that Mr. Meza-Rodriguez was clearly in the United States voluntarily after residing in the United States for over twenty years.⁷⁰ The court also determined the second prong of the *Martinez-Aguero* test was satisfied due to Mr. Meza-Rodriguez' deep connections as a resident of the United States.⁷¹ The fact that Mr. Meza-Rodriguez' past left a lot to be desired did not sway the court in determining that the substantial connections standard was met.⁷²

The Seventh Circuit's opinion, as it relates to the application of the Second and Fourth Amendments to undocumented immigrants, provides a liberal, inclusive definition of "the people."⁷³ Since the Second and Fourth Amendments use "people" in the same manner, the Seventh Circuit found that there is no carve-out for the non-application of the Second Amendment to undocumented immigrants; this "on-again, off-again protection" is surely not what the Framers of the Constitution intended.⁷⁴

While the Seventh Circuit found that Mr. Meza-Rodriguez was definitely afforded the protection of the Second and Fourth Amendments, the court conceded that the *Heller* decision dictated that the availability of the Second Amendment was "not unlimited."⁷⁵ The Court in *Heller* left the door open for future courts to find against "people" in Mr. Meza-Rodriguez' position without removing the constitutional rights of undocumented immigrants.⁷⁶ The Seventh Circuit reviewed the constitutionality of 922 (g)(5) through the lens of intermediate scrutiny. To re-iterate, intermediate scrutiny requires that all provisions of the Act serve an important governmental objective and have a substantial relation to the specified governmental objective.⁷⁷ Therefore, the stated purpose of the Act, "keep[ing] guns out of the hands of presumptively risky people," must have a substantial relation to the governmental objective of protecting the public from gun violence by maintaining the ability to track guns.⁷⁸

The Seventh Circuit accepted the government's argument that the Act is related to the objective of tracking the movement of guns because undocumented immigrants are able to easily evade detection by law

70. *See id.* at 670-1.

71. *See id.* at 671.

72. *See id.* at 672.

73. *See id.* at 671-2.

74. *See id.* at 671.

75. *See Heller* at 2876.

76. *See id.*

77. *See Meza-Rodriguez* at 672.

78. *See id.* at 673.

enforcement.⁷⁹ The court added to the argument by reasoning that undocumented immigrants have evaded law enforcement by entering the United States illegally, therefore undocumented immigrants have “already disrespected the law.”⁸⁰

ii. The Fourteenth Amendment

The long-standing holding reached by the Court in *Yick-Wo v. Hopkins*⁸¹ provides the relevant analysis to determine whether or not certain legislation *as-applied* to a certain group requires a heightened level of scrutiny. In *Yick-Wo*, Chinese natives seeking to operate laundry businesses in California complied with all fire safety and health regulations, yet were still found to have violated city ordinances. In seeking waivers to operate in violation of the ordinances, over two-hundred Chinese business owners had petitions denied, while only one petition by a non-Chinese business owner was denied. This clear discriminatory impact prompted the Court to state that while the city ordinances did not facially violate the Fourteenth Amendment rights of the Chinese business owners, the application of the ordinances was carried out “with a mind so unequal and oppressive as to amount to a practical denial by the State of equal protection of the laws.”⁸² By holding that “the Fourteenth Amendment . . . is not confined to the protection of citizens,” the Court confirmed the application of the Fourteenth Amendment to all *people* within the United States.

Both the Fifth and Seventh Circuits have applied the central tenet of *Yick-Wo* that requires laws to be equal facially and as-applied.⁸³ The fear of “selective enforcement” drives the decision in *Yick-Wo* and all courts that require the equal application of the laws. Crucially, the Seventh Circuit highlighted the main concern behind the *Yick-Wo* decision in *Abcarian v. McDonald* by affirming that equal protection claims are allowed in scenarios where laws are not applied equally because of the fear that “individuals with discretion in law enforcement will take advantage of that discretion to *oppress unpopular groups*.”⁸⁴

79. *See id.*

80. *See id.* at 673; *Tyler v. Hillsdale County Sheriff's Dep't*, 775 F.3d 308 (6th Cir. 2014)(while this decision has received negative treatment from subsequent cases, the argument to apply strict scrutiny for undocumented immigrants is stronger because the Act facially discriminates based on national origin).

81. *Yick Wo v. Hopkins*, 118 US 356 (1886).

82. *Yick Wo*, 118 US at 373.

83. *Mahone v. Addicks Utility Dist.*, 836 F.2d 921, 932 (5th Cir. 1988); *Abcarian v. McDonald*, 617 F.3d 931, 940 (7th Cir. 2010).

84. *Abcarian*, 617 F.3d at 940.

C. The Commerce Clause

In both *Portillo-Munoz* and *Meza-Rodriguez*, the defendants did not take advantage of the opportunity to test the constitutionality of the Act under the Commerce Clause. Under the Commerce Clause, Congress is granted the power “to regulate commerce with foreign nations, and among the several states, and with the Indian tribes.”⁸⁵ Modern Commerce Clause doctrine derives from the Supreme Court’s analysis of the Gun-Free School Zones Act of 1990 (“GFSZA”) in *United States v. Lopez*.⁸⁶ In *Lopez*, the Court held that the GFSZA was a violation of Congress’ power under the Commerce Clause. Strikingly similar to 922 (g)(5), the Gun-Free School Zones Act “prohibit[ed] any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone”⁸⁷ Alfonso Lopez Jr., then a 12th grade student, was arrested for carrying a concealed firearm within a school zone subsequent to the police receiving an anonymous tip.⁸⁸ Mr. Lopez was charged with violating the Gun-Free School Zones Act after similar state law charges were dismissed.⁸⁹

With the majority opinion for the Court, Chief Justice Rehnquist outlined a three part test to determine if the GFSZA was a violation of Congress’ power under the Commerce Clause.⁹⁰ Under the three part test, Congress’ is permitted to use its Commerce Clause powers in order to regulate (i) the use of the channels of interstate commerce; (ii) the instrumentalities of interstate commerce; and (iii) activities having a *substantial* relation to interstate commerce.⁹¹ The third prong of the test outlined by Chief Justice Rehnquist dictated the outcome of *Lopez*.⁹² The Court found that the mere possession of a firearm within a school zone did not have a *substantial* relation to interstate commerce.⁹³ The government in *Lopez* adopted the “costs of crime” theory that required many inferences to connect the possession of firearms to economic activity.⁹⁴ In short, the government’s theory provided that firearms within school zones will make the community as a whole less attractive, leading to lower interest in the properties surrounding the school, which

85. US Constitution Article 1, Section 8, Clause 3.

86. *US v. Lopez*, 514 US 549; 18 U.S.C. 921(a)(25)(interestingly enough, Congress decided to amend the Act and include the amended section within the same section as the Act).

87. *Id.* at 551.

88. *Id.* at 551.

89. *Id.*

90. *Id.* at 558-559.

91. *Id.*

92. *See id.*

93. *Id.* at 561.

94. *Id.* at 564.

would in turn lead to the property values of the homes in the surrounding area to decrease.⁹⁵

The Court did not find a sufficient nexus between the possession of a firearm within a school zone and economic activity.⁹⁶ Chief Justice Rehnquist rejected that the government's argument that the mere possession of a firearm within a school zone substantially affected the economic activity of the surrounding area or interstate commerce.⁹⁷ In applying the third prong of the three part test outlined by Chief Justice Rehnquist held that "[t]he possession of a gun in a local school zone is in no sense an economic activity that might . . . *substantially* affect any sort of interstate commerce."⁹⁸

The Court specifically noted that 922 (g) of the Act does not have a strong enough connection to economic activity to fall within the scope of Congress' Commerce Clause power.⁹⁹ Foreshadowing other applications of 922 (g), the Court stated that "the statute contained no express jurisdictional element which might limit its reach to a discrete set of firearm possessions that additionally have an explicit connection with or effect on interstate commerce."¹⁰⁰

922 (g) is a criminal statute that by its terms has nothing to do with "commerce" or any sort of economic enterprise, however broadly one might define those terms. . . . It cannot, therefore, be sustained under our cases upholding regulations of activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, *substantially* affects interstate commerce.¹⁰¹

United States v. Morrison provided another opportunity for the Court to implement Chief Justice Rehnquist's three part test in analyzing Congress' power under the Commerce Clause.¹⁰² *Morrison* required the Court to interpret a provision of the Violence Against Women Act ("VAWA") that provided a civil remedy to the victims of gender motivated violence.¹⁰³ The underlying facts, while tragic, provide the foundation for the Courts analysis of Congress' Commerce Clause

95. *Id.*

96. *See id.* at 561.

97. *See id.*

98. *Id.* at 567 (emphasis added).

99. *See id.* at 562.

100. *Id.* at 562.

101. *Id.* at 561 (Section 922 is the same section as the Act).

102. *See US v. Morrison*, 529 US 598 (2000).

103. *Id.*; 42 U.S.C. 13981 ("[a] person . . . who commits a crime of violence motivated by gender . . . shall be liable to the party injured, in an action for the recovery of compensatory and punitive damages, injunctive and declaratory relief, and such other relief as a court may deem appropriate.").

power under the circumstances. Christy Brzonkala, a former student enrolled at Virginia Tech University (“Tech”) was sexually assaulted by Antonio Morrison and James Crawford, members of the varsity football team.¹⁰⁴ After failing to obtain justice through the disciplinary process at Tech, Ms. Brzonkala sued Morrison, Crawford, and Tech under VAWA § 13981.¹⁰⁵ Morrison and Crawford moved to dismiss the suit based on the theory that the civil remedy provided under VAWA was unconstitutional as a violation of Congress’ Commerce Clause power.¹⁰⁶

Ms. Brzonkala’s claim quickly elevated through the courts with both the district court and court of appeals holding that Congress did not have the authority to enact VAWA § 13981; the Supreme Court granted certiorari to determine if VAWA § 13981 should be invalidated.¹⁰⁷ Chief Justice Rehnquist analyzed the pertinent section of VAWA using the same three part test applied in *Lopez*.¹⁰⁸ Once again, Chief Justice Rehnquist emphasized that the behavior Congress attempts to regulate must *substantially* affect interstate commerce.¹⁰⁹ Similar to the “costs of crime” theory in *Lopez*, the government in *Morrison* argued that the aggregation of gender motivated crimes across the country has an impact on economic activity.¹¹⁰ The thrust of the government’s argument relied on the assumption that the cumulative impact of gender motivated crimes around the country would have an economic impact on interstate commerce in many indirect ways. The Court flatly rejected the government’s argument in holding that “[g]ender-motivated crimes of violence are not, in any sense of the phrase, economic activity.”¹¹¹ Although Chief Justice Rehnquist did not establish a bright-line rule to be applied in Commerce Clause cases, the Court stipulated that Congress cannot regulate non-economic activity based on a cumulative substantial effect on interstate commerce.¹¹²

III. DISCUSSION

This section will provide a solution to the divergence on the definition of “people” between the Fifth and Seventh Circuits. This section will also argue that the analysis of 922 (g)(5) should be

104. *Morrison*, 529 US at 602.

105. *Id.* at 604.

106. *Id.*

107. *See id.* at 605.

108. *See id.* at 608-609.

109. *See id.* at 610.

110. *See id.* at 613.

111. *Id.* at 613.

112. *See id.* at 617.

completed under the highest level of judicial scrutiny, strict scrutiny. Finally, this section contends that Congress has abused its power under the Commerce Clause in legislating criminal activity that does not have a substantial effect on interstate commerce.

A. Who are the “People?”

The Fifth and Seventh Circuits disagree as to whether or not the Act violates the Second Amendment rights of undocumented immigrants. Notably, the dissent in the Fifth Circuit’s *Portillo-Munoz* decision foreshadowed the outcome of the Seventh Circuit’s decision in *Meza-Rodriguez*.¹¹³ Underlying the decisions of the Fifth and Seventh Circuits is the central question of whether or not undocumented immigrants are to be included in the definition of “people” within the Second Amendment. The dissent in *Portillo-Munoz* and the majority in *Meza-Rodriguez* agree that the *Martinez-Aguero* two-part test should be used to determine if an undocumented immigrant has established the requisite substantial connection to the United States as required by *Verdugo-Urquidez*.¹¹⁴ The *Martinez-Aguero* two-part test requires courts to answer the following two questions:

- (1) Was the undocumented immigrant in the United States voluntarily?
- (2) Has the undocumented immigrant accepted some societal obligations?¹¹⁵

Although the *Martinez-Aguero* test was initially created for the application of the Fourth Amendment to undocumented immigrants, the test outlines the two main areas that govern the applicability of the Constitution to undocumented immigrants in general. While not as liberal as the test to determine if the Equal Protection Clause of the Fourteenth Amendment applies to a certain individual,¹¹⁶ the *Martinez-Aguero* test addresses the concerns of government, establishing an undocumented immigrant’s sufficient connections to the United States, in analyzing the applicability of the Second Amendment to undocumented immigrants.

The first question of the *Martinez-Aguero* test relates to the will of the undocumented immigrant in question. If the answer is affirmative, the

113. See *Portillo-Munoz*, 643 F.3d at 443.

114. See *id.* at 440; *Meza-Rodriguez*, 798 F.3d at 670.

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

116. *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003) (The Equal Protection Clause provides that no State shall “deny to any person within its jurisdictions the equal protection of the laws.”).

undocumented immigrant is viewed as an individual willing to contribute to the United States. As in *Martinez-Aguero*, even if an individual frequently crosses the border into the United States, it is more likely that the intent of the individual is to contribute to society within the United States rather than commit crimes. The second question of the *Martinez-Aguero* test seeks to connect the undocumented immigrant's willingness to be in the United States with the willingness of the United States to make the Constitution available to the undocumented immigrant. In short, if the individual is willing to invest in the United States, the United States is willing to invest in the individual.

The Seventh Circuit's decision in *Meza-Rodriguez* should be applied by future courts faced with the decision of applying the Second Amendment to undocumented immigrants. Not only is the Seventh Circuit's decision a fair result considering the application of the First, Fourth, Fifth, and Fourteenth Amendments to undocumented immigrants, but the application of the *Martinez-Aguero* test allows for a more predictable test for courts to apply in the future.

B. Strict Scrutiny – National Origin

After confidently holding that Mr. Meza-Rodriguez should be included within the scope of “people” provided a Second Amendment right to bear arms, the Seventh Circuit missed a great opportunity to apply strict scrutiny to the Act.¹¹⁷ It is well settled that any “classification based upon . . . race, alienage, and national origin are inherently suspect and must therefore be subjected to close judicial scrutiny.”¹¹⁸ Strict scrutiny has been routinely referred to as “strict in theory, but fatal in fact,” with the government failing to meet the standard on multiple occasions.¹¹⁹ In order to survive a strict scrutiny analysis, the government must prove that the legislation under analysis is “narrowly tailored to further compelling governmental interests.”¹²⁰ Therefore, the government must prove that any legislation challenged as unconstitutional under strict scrutiny analysis must directly further a *compelling* governmental interest. The fundamental question that needs to be answered in this scenario is whether the Second Amendment rights of undocumented immigrants may be infringed in order for the government to further its interest in keeping track of firearms within the United States.

Although the text of 922 (g)(5) does not facially discriminate against

117. See *Meza-Rodriguez*, 798 F.3d at 664.

118. *Frontiero v. Richardson*, 411 U.S. 677, 682 (1973).

119. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995).

120. *Grutter*, 539 U.S. at 326 (2003).

a particular race, alienage, or national origin, 922 (g)(5) clearly has a disparate impact on undocumented immigrants, particularly nationals of Mexico, Guatemala, Honduras, and El Salvador. To tighten the connection between the application of strict scrutiny and 922 (g)(5)'s treatment of undocumented immigrants, the only difference between those who the Act applies and those who 922 (g)(5) does not apply, is national origin. Thus, as it is well-settled that national origin is a classification that requires the use of strict scrutiny, the Act's impact upon undocumented immigrants should be analyzed under the high standard of strict scrutiny.

The government would assert that the compelling governmental interest served by the Act as a whole is the ability of the government to keep track of firearms within the United States. Additionally, the government would also assert that the ability to keep track of firearms in this scenario is vital to its ability to prevent criminal activity due to the fact that undocumented immigrants are not easily tracked. At first blush, the government's argument seems credible. However, a deeper analysis of the government's interest reveals a much different underlying purpose behind the Act. Considering the light restrictions that must be satisfied for a United States citizen to purchase a firearm in the United States, it appears that tracking firearms is not much of a priority.¹²¹ With several loopholes available to United States citizens that would like to remain anonymous while purchasing a firearms,¹²² the government's purpose behind the Act seems to rely heavily on the fact that the Act targets individuals based on national origin.

Also, while tracking firearms is definitely a noble pursuit, the government has not shown much of an appetite when it comes to tracking interstate purchases of firearms by United States citizens. Even American citizens who have previously been under the careful watch of law enforcement agencies are not typically found to have committed any crimes by simply possessing a firearm.¹²³ Furthermore, there is little evidence to support the idea that if the government is aware of the identity of the owner of firearm, the government will automatically know the whereabouts of the firearm at issue. Additionally, even if the government is aware of the location of every firearm within the United

121. Audrey Carlsen and Sahil Chinoy, *How to Buy a Gun in 15 Countries*, THE TORONTO STAR, <https://www.thestar.com/news/world/2018/03/02/how-to-buy-a-gun-in-15-countries.html> (last visited Mar. 12, 2018).

122. Kiannah Sepeda-Miller, *Fact-check: Tammy Duckworth on Target in "Gun Show Loophole" Claim*, CHICAGO SUN TIMES, <https://chicago.suntimes.com/crime/tammy-duckworth-gun-show-loophole-background-check-claim-politifact-fact-check/> (last visited Aug. 31, 2018).

123. Meribah Knight, *Waffle House Shooting Underscores How Gun Laws Vary From State to State*, NPR, <https://www.npr.org/2018/04/23/605103200/waffle-house-shooting-underscores-how-gun-laws-vary-from-state-to-state> (last visited Apr. 24, 2018).

States, it is highly unlikely that law enforcement would be able to use that information to prevent the owner of a firearm from using the firearm in a negative manner.

Even if the government's assertion that keeping track of firearms within the United States is accepted as a compelling interest, there is little reason to believe that 922 (g)(5)'s impact is narrowly tailored to serve the government's interest. Surely there are alternatives to restricting the Second Amendment rights of undocumented immigrants in order to keep track of firearms within the United States.

As stated earlier, the United States government has not made parallel efforts to ensure that the location of firearms owned by American citizens are known by law enforcement.¹²⁴ For example, consider the Second Amendment rights of an American citizen that has committed a misdemeanor in comparison to an undocumented immigrant that has committed no other crime but remaining in the United States without documentation. The application of 922 (g)(5) to the American citizen would not result in the infringement of Second Amendment rights, while the Second Amendment rights of the undocumented immigrant would clearly be infringed. The application of 922 (g)(5) in this scenario clearly illustrates that (i) 922 (g)(5) discriminates based on national origin, (ii) 922 (g)(5) has a disparate impact on undocumented immigrants, and (iii) application of 922 (g)(5) is not narrowly tailored to the government's compelling interest in keeping track of firearms within the United States, rather, 922 (g)(5) is under-inclusive considering its application to American citizens.

The *Meza* court incorrectly applied 922 (g) precedent in holding that there is no reason to distinguish between other provisions of 922 (g) and 922 (g)(5).¹²⁵ There is a significant difference. There are no other provisions within 922 (g) that specifically highlight individuals that are not lawfully within the United States. The constitutional concerns that apply under 922 (g)(5) are drastically different from the other provisions of 922 (g).

While the Act is not facially discriminatory, an analysis under *Yick-Wo* to determine if the Act is discriminatory as-applied to certain national groups is required. Although the focus of this article does not include deportation of undocumented immigrants, it is relevant to discuss the connection between convictions under the Act and statistics regarding the deportation of undocumented immigrants. For the years 2014 through 2016, nationals from Mexico, Guatemala, Honduras, and El Salvador combine to represent a striking 94.3% of all deportations

124. *Id.*

125. *See Meza*, 2014 US Dist. LEXIS 50485 at 6.

from the United States.¹²⁶ Although the percentage of deportations based on criminal activity is actually quite low,¹²⁷ 922 (g)(5) is among the top ranked lead charges for immigration convictions in U.S. District Courts.¹²⁸ Between 2008 and 2017, an annual average of roughly three-hundred undocumented immigrants are prosecuted under the Act.¹²⁹

Considering increasing co-operation between local law enforcement and U.S. Immigration and Customs Enforcement (“ICE”), mere charges under 922 (g)(5) can result in deportation for undocumented immigrants.¹³⁰ The relationship between local law enforcement and ICE establishes a substantial connection from charges or convictions under 922 (g)(5) directly to the proportion of nationals from Mexico, Guatemala, Honduras, and El Salvador that are deported from the United States. Simply put, it is almost guaranteed that undocumented immigrants charged or convicted under 922 (g)(5) will be deported. Furthermore, bearing in mind the percentage of all deportees that are nationals of Mexico, Guatemala, Honduras, and El Salvador, there is a high likelihood that undocumented immigrants charged or convicted under the Act will be deported to one of the aforementioned countries.

Under *Yick-Wo*, if a facially neutral law is applied unfairly to a particular group based on national origin, heightened scrutiny is required. Furthermore, the *Abcarian* court directly addressed disproportional application of laws by highlighting the potential for law enforcement to oppress unpopular groups with the use of facially neutral laws.¹³¹ Similar to the Chinese business owners in *Yick-Wo*, considering the statistics presented above, nationals from Mexico, Guatemala, Honduras, and El Salvador have had facially neutral laws applied to them in a highly disproportionate manner.

Proponents of the Act will argue that nationals from Mexico, Guatemala, Honduras, and El Salvador are the most numerous undocumented immigrants in the United States. While true, that argument essentially highlights that the Act unfairly targets

126. Latest Data: Immigration and Customs Enforcement Removals, <http://trac.syr.edu/phptools/immigration/remove/> (Last visited Mar. 12, 2018).

127. Nature of Charge in New Filings Seeking Removal Orders Through July 2018, http://trac.syr.edu/phptools/immigration/charges/apprep_newfiling_charge.php (Last visited Aug. 31, 2018).

128. Immigration Convictions for February 2018, <http://trac.syr.edu/tracreports/bulletins/immigration/monthlyfeb18/gui/> (Last visited Mar. 12, 2018).

129. Federal Weapons Prosecutions Rise for Third Consecutive Year, <http://trac.syr.edu/tracreports/crim/492/> (Last visited Mar. 12, 2018).

130. Alex Horton, *A California Sheriff is Posting Inmate Release Dates to Help ICE Capture Undocumented Immigrants*, https://www.washingtonpost.com/news/post-nation/wp/2018/03/27/a-calif-sheriff-is-skirting-state-sanctuary-laws-to-help-ice-capture-undocumented-immigrants/?noredirect=on&utm_term=.2f7093df2134 (Last visited Mar. 12, 2018).

131. *Abcarian*, 617 F.3d at 940.

undocumented immigrants of certain national origins. Therefore, if the Act undoubtedly targets individuals of certain national origins, there is no question that strict scrutiny should be applied in determining the constitutionality of the Act.

C. Regulating Criminal Activity with the Commerce Clause

Chief Justice Rehnquist's opinion in *Lopez* is directly analogous to current applications of the Act. The Court foreshadowed other applications under 922 (g) as violating Congress' power under the Commerce Clause. The third prong of the test outlined by Chief Justice Rehnquist is imperative to the analysis of 922 (g)(5).¹³² The Act exposes undocumented immigrants to a potential criminal conviction simply for *possessing* a firearm. Using Chief Justice Rehnquist's direct language in *Lopez*, "[t]he possession of a gun in a local school zone is in no sense an economic activity that might . . . *substantially* affect any sort of interstate commerce."¹³³ If the possession of a firearm in a specified place does not substantially affect any sort of interstate commerce, how can the possession of a firearm by an undocumented immigrant affect interstate commerce? The government's "cost of crime" argument was rejected by the Court because the connection between the possession of a firearm within a school zone and interstate commerce required too many inferences.

An undocumented immigrant's possession of a firearm does not have any more rational relation to interstate commerce than the possession of a firearm within a school zone. Congress simply does not have the power to regulate criminal activity under the guise of Commerce Clause power. Under *Morrison*, aggregating each undocumented immigrant's possession of a firearm is not permitted. Therefore, it is difficult to imagine a scenario that 922 (g)(5) substantially affects interstate commerce.

IV. CONCLUSION

Undocumented immigrants are undoubtedly "people." It is disingenuous for courts to apply the First, Fourth, Fifth, and Fourteenth Amendments to all persons within the United States while holding that undocumented immigrants do not have the Second Amendment right to bear arms. The *Martinez-Aguero* test applied by the Seventh Circuit in *Meza-Rodriguez* should be applied by courts seeking to analyze whether

132. *Lopez*, 514 U.S. at 558-559.

133. *Id.* at 567.

or not undocumented immigrants possess Second Amendment rights. The *Martinez-Aguero* standard takes into account an individual's connection and commitment to the United States, while providing a fair standard to undocumented immigrants that have established substantial connections to the United States.

The Seventh Circuit was correct in determining that, depending on the circumstances, undocumented immigrants are to be considered people, but the *Meza-Rodriguez* court should have gone further to require the use of strict scrutiny in analyzing 922 (g)(5). It is without question that the Act prohibits undocumented immigrants from possessing firearms. It is also without question that undocumented immigrants are classified as "aliens" because they are foreign nationals. Discriminating against certain groups because of national origin is only permitted where the government can pass the test of strict scrutiny.¹³⁴

Alternatively, under a *Yick-Wo* analysis, considering the above statistics related to the deportation of nationals from Mexico, Guatemala, Honduras, and El Salvador, the Act should be analyzed under strict scrutiny due to the as-applied impact to undocumented immigrants from the aforementioned countries. It is well-settled that the Fourteenth Amendment applies not only to citizens of the United States, but to all individuals within the United States at any given time. While the impact to nationals from Mexico, Guatemala, Honduras, and El Salvador is heavily impacted by the proximity to the United States, the impact in how 922 (g)(5) is applied is unquestionably disparate.

Finally, Congress has violated the Commerce Clause power delegated by the Constitution. Taken together, *Lopez* and *Morrison* clearly limit Congress' Commerce Clause power to enact legislation that has a *substantial* effect on interstate commerce. Further, Congress cannot aggregate minor effects on interstate into a larger, substantial effect on interstate commerce.¹³⁵ The possession of firearms by undocumented immigrants does not have a substantial effect on interstate commerce. Without evidence of a substantial effect on interstate commerce, Congress' attempt to limit criminal activity is not permitted within the powers delegated by the Commerce Clause.

134. See *Yick Wo*, 118 U.S. at 356.

135. *Morrison*, 529 U.S. at 617.