WE THE PEOPLE: ANALYZING THE 7TH CIRCUIT'S DECISION IN *UNITED STATES V. MEZA-RODRIGUEZ*, 798 F.3D 664 (7TH CIR. 2015)

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I. INTRODUCTION

Give me your tired, your poor,
Your huddled masses yearning to breathe free,
The wretched refuse of your teeming shore.
Send these, the homeless, tempest-tossed, to me:
I lift my lamp beside the golden door.[1]

These words, etched in the Statue of Liberty, embody the spirit of America as it existed as a fledgling nation in the late 1800s. However, a drastically different sentiment towards immigrants exists today.[2] Hostility towards immigrants intensified in the 1980s and 90s, marked by the passing of the Immigration Reform and Control Act of 1986 and the Personal Responsibility and Work Opportunity Reconciliation Act in 1996.[3] These laws, among other things, penalized employers for hiring undocumented immigrants and disqualified undocumented immigrants from federal benefits programs.[4]

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1. Emma Lazarus, *The New Colossus*, *reprinted in* EMMA LAZARUS: SELECTED POEMS AND OTHER WRITINGS, 233 (Gregory Eiselein, 2002).
2. *See* George J. Sanchez, *Face the Nation: Race, Immigration, and the Rise of Nativism in Late Twentieth Century America*, 31.4 INT'L MIGRATION REV. 1009, 1013 (1997) ("Signs . . . point to a resurgence of a nativism unparalleled in this country since the 1920s. From attacks on immigrants in urban unrest to legislative action attacking immigration policies to academic and media discussions resonating the familiar intellectualized examination of racialized dissonance of the past . . . .").
3. Jason H. Lee, *Unlawful Status As A "Constitutional Irrelevancy"?: The Equal Protection Rights of Illegal Immigrants*, 39 GOLDEN GATE U. L. REV. 1, 3 (2008) (discussing various anti-immigration laws passed in the 1990s).
4. *Id.*

Immigration issues continue to drive a political divide between Americans and pose difficult questions for lawmakers.[5] The Seventh Circuit made a noteworthy statement regarding immigrants in *United States v. Meza-Rodriguez*, when an undocumented immigrant challenged a statute for violating his Second Amendment rights.[6] The court was tasked with resolving two difficult issues. The first was whether undocumented immigrants are protected under the Second Amendment.[7] Answering this question necessarily involved interpreting unresolved, complex, and controversial legal issues surrounding the constitutional rights of undocumented immigrants. The court analyzed the definition of "the people" as used in the Second Amendment and held that the Second Amendment protects undocumented immigrants who have developed sufficient connections within the United States.[8] Second, the court had to decide whether 18 U.S.C. § 922(g)(5), a statute prohibiting undocumented immigrants from possessing firearms or ammunition, is constitutional.[9] The court held that § 922(g)(5) is constitutional because it is related to the important government objective of keeping guns out of the hands of presumptively dangerous individuals.[10]

This Note will not argue whether the Seventh Circuit was right or wrong in extending Second Amendment rights to undocumented immigrants. Rather, it will show how the majority's analysis of the Second Amendment in *Meza-Rodriguez* was logically flawed and created a constitutional anomaly. Section II of this Note provides the background of § 922(g), Second Amendment law, and the constitutional rights of undocumented immigrants. Section III sets forth the facts of *Meza-Rodriguez* and explains the legal issues relevant to this analysis. Finally, Section IV argues that the Seventh Circuit created a constitutional anomaly by recognizing Second Amendment rights of undocumented immigrants based on the "sufficient connections" test while simultaneously upholding the constitutionality of a statute categorically banning undocumented immigrants from exercising their rights.

II. LEGAL BACKGROUND

In 2005, Congress passed 18 U.S.C. § 922(g) with an objective "to keep guns out of the hands of presumptively risky people" and to

5. *See* Jeffrey C. Isaac, *Editor's Introduction: Immigration Politics*, 9.3 PERSPECTIVE ON POL. 501, 501 (2011) (describing immigration as "one of the most ethically challenging and politically compelling" conflicts amongst Americans and "a major topic of controversy").
6. *See* United States v. Meza-Rodriguez, 798 F.3d 664 (7th Cir. 2015).
7. *Id*. at 669.
8. *Id*. at 672.
9. *Id.*
10. *Id*. at 673.

"suppress[] armed violence."[11] Section 922(g) restricts the Second Amendment rights of certain categories of people, including felons, fugitives, users of controlled substances, the mentally ill, members of the armed forces dishonorably discharged from service, persons convicted of domestic violence, persons subject to restraining orders, persons who have renounced their United States citizenship, and immigrants (both lawfully and illegally residing in the United States).[12] The provision of § 922(g) contested in *Meza-Rodriguez* provides:

> [i]t shall be unlawful for any person . . .
> (5) 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 . . .
> to . . . possess in or affecting commerce, any firearm or ammunition[.][13]

Section 922(g)(5) addresses perhaps two of the most controversial and emotionally charged issues in modern America—gun control and immigration. However, Second Amendment rights and the constitutional rights of immigrants are largely unsettled areas of the law. Thus, with little guidance from the Supreme Court, the Seventh Circuit was faced with the challenge of implementing its own interpretation of the issues presented in *Meza-Rodriguez*.

A. Second Amendment Jurisprudence

The Second Amendment to the Constitution provides: "[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."[14] Described as "perhaps one of the worst drafted of all [the Constitution's] provisions,"[15] scholars and courts have grappled to discern its purpose. Unlike any other Amendment, the Second Amendment contains an opening clause.[16] This preamble is the source of hazy jurisprudence that has enveloped the Second Amendment in "constitutional mystery" for most of its existence.[17] Is the right to bear arms restricted for purposes of maintaining a militia? Or did

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11. *Id.* (quoting United States v. Yancey, 621 F.3d 681, 683–84 (7th Cir. 2010) (citing S. REP. NO. 90-1501, at 22 (1968)).
12. 18 U.S.C. § 922(g) (2015).
13. *Id.* § 922(g)(5).
14. U.S. CONST. amend. II.
15. Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637, 644 (1989).
16. *Id*.
17. Andrew R. Gould, Comment, *The Hidden Second Amendment Framework Within* District of Columbia v. Heller, 62 VAND. L. REV. 1535, 1536 (2009).

the Framers intend to confer an individual right to bear arms? For nearly 200 years, this question went unanswered, and the Second Amendment was treated as a peripheral addition to the Bill of Rights.[18] It was largely ignored by scholars and neglected by the Supreme Court.[19] The Second Amendment was absent from law reviews, casebooks, and other scholarly venues[20] and made its only substantive Supreme Court appearance of the twentieth century in 1939.[21]

In *United States v. Miller*, the Court held that a sawed-off shotgun was not protected under the Second Amendment because it had no "reasonable relationship to the preservation or efficiency of a well regulated militia."[22] *Miller* did little to resolve the dispute over the Second Amendment's interpretation.[23] In fact, both pro- and anti-Second Amendment advocates cited to *Miller* to support their opinions.[24] For almost seventy years, the Court repeatedly declined to clarify *Miller's* elusive and limited interpretation of the Second Amendment.[25] In the absence of any definitive guidance by the Supreme Court, lower courts generally adopted a "collective right" interpretation—the theory that the Second Amendment confers "either (1) a right of states to have militia systems, or (2) a right of individuals, but only to engage in state-organized militia activities."[26] As a result, the Second Amendment became a seemingly nonexistent right.[27] In 2008, however, the Supreme Court discredited the "collective right" theory and revitalized the Second Amendment in a revolutionary decision.[28]

In *District of Columbia v. Heller*, the Court held that the Second Amendment confers an individual right to possess arms for self-defense, unconnected with service in a militia.[29] This decision was the beginning of a drastic and rapid transformation in Second Amendment jurisprudence.[30]

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18. *See* Dan M. Peterson & Stephen P. Halbrook, *A Revolution in Second Amendment Law*, 29 DEL. LAW. 12, 12 (2011) ("Decisions by the lower federal courts over the past fifty years had nearly killed off any enforceable right to keep and bear arms under the federal Constitution."); *see also* Levinson, *supra* note 15, at 644.
19. Levinson, *supra* note 15, at 639–40.
20. *Id.*
21. Peterson, *supra* note 18.
22. United States v. Miller, 307 U.S. 174, 178 (1939).
23. Peterson, *supra* note 18, at 13.
24. *Id.*
25. Roger I. Roots, *The Approaching Death of the Collective Right Theory of the Second Amendment*, 39 DUQ. L. REV. 71, 78 (2000).
26. David T. Hardy, *The Rise and Demise of the "Collective Right" Interpretation of the Second Amendment*, 59 CLEV. ST. L. REV. 315, 317 (2011).
27. *Id.*; *see also* Peterson, *supra* note 18, at 13.
28. Hardy *supra* note 26; *see also* Peterson, *supra* note 18, at 13.
29. District of Columbia v. Heller, 554 U.S. 570, 595 (2008).
30. *See* Peterson, *supra* note 18 ("It is no exaggeration to say that in the past four years Second Amendment jurisprudence has been radically transformed. In all of our constitutional history, no provision of the Bill of Rights has undergone such a rapid and profound revolution in its interpretation.").

Two years after *Heller*, the Supreme Court, in *McDonald v. City of Chicago* held that "the Due Process Clause of the Fourteenth Amendment incorporates the Second Amendment rights recognized in *Heller*."[31] Thus, the Second Amendment applies to the States as well as the federal government.

Heller and *McDonald* had a profound impact on the landscape of Second Amendment jurisprudence.[32] For the first time in history, people could challenge the constitutionality of state and federal regulations that restricted individuals' right to bear arms. However, neither *Heller* nor *McDonald* provided an analytical framework to evaluate these challenges.[33] Consequentially, courts have wrestled with the level of scrutiny to apply to Second Amendment challenges,[34] the definition of the "Arms" protected under the Second Amendment,[35] where the right to bear arms can be exercised,[36] and as in *Meza-Rodriguez*, the "people" who are afforded the right.[37]

B. Constitutional Rights of Undocumented Immigrants

In 2012, the Department of Homeland Security estimated that 11.4 million undocumented immigrants resided in the United States.[38] Despite their substantial presence, the rights of undocumented aliens remain a complex and unresolved area of law.

Thus far, the Supreme Court has recognized the Fifth,[39] Sixth,[40] and Fourteenth[41] Amendment rights of undocumented aliens. However, these

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31. McDonald v. City of Chicago, 561 U.S. 742, 791 (2010).
32. Stephen Kiehl, *In Search of a Standard: Gun Regulations After* Heller *and* McDonald, 70 MD. L. REV. 1131, 1151 (2011) ("*District of Columbia v. Heller* and *McDonald v. Chicago* were hailed as landmark decisions that reshaped the Second Amendment landscape.").
33. Gould, *supra* note 17, at 1550; *see also* Allen Rostron, *Justice Breyer's Triumph in the Third Battle over the Second Amendment*, 80 GEO. WASH. L. REV. 703, 737 (2012) ("The Supreme Court's decisions in *Heller* and *McDonald* invited constitutional challenges to these laws but did not provide a clear framework for lower courts to use in evaluating those challenges.").
34. Rostron, *supra* note 33, at 705.
35. Michael P. O'Shea, *Modeling the Second Amendment Right to Carry Arms (I): Judicial Tradition and the Scope of "Bearing Arms" for Self-Defense*, 61 AM. U. L. REV. 585, 585 (2012).
36. *Id.*
37. *See generally* Mathilda McGee-Tubb, *Sometimes You're In, Sometimes You're Out: Undocumented Immigrants and the Fifth Circuit's Definition of "The People" in* United States v. Portillo-Muñoz, 53 B.C.L. REV. 75 (2012) (addressing lower courts' various treatment of "the people" as used in the Second Amendment in regards to undocumented aliens).
38. Bryan Baker & Nancy Rytina, *Estimates of the Unauthorized Immigrant Population Residing in the United States: January 2012*, DEP'T OF HOMELAND SEC. PUBLICATIONS LIBR., http://www.dhs.gov/sites/default/files/publications/ois_ill_pe_2012_2.pdf (last visited Aug. 27, 2016).
39. Wong Wing v. United States, 163 U.S. 228, 238 (1896).
40. *Id.*
41. Yick Wo v. Hopkins, 118 U.S. 356, 368–69 (1886).

rights are considerably limited by federal and state legislation that target immigrants based on their undocumented status.[42] Furthermore, the Court is reluctant to interfere with federal immigration law because Congress has plenary power over immigration.[43] Consequentially, immigration jurisprudence tends to be ambiguous and difficult for lower courts to consistently interpret. Nonetheless, the following Supreme Court cases set forth important dicta for analyzing the constitutional rights of undocumented aliens.

In *Plyler v. Doe*, the Court determined that an undocumented immigrant "is surely a person in any ordinary sense of the term"[44] and therefore protected under the Equal Protection Clause of the Fourteenth Amendment, which prohibits the States from denying to "any *person* within its jurisdiction the equal protection of the laws."[45] Usually, when legislation targets a class of persons based on their race, national origin, or alienage, the class is considered a "suspect class," warranting strict judicial scrutiny under an equal protection analysis.[46] However, the Court in *Plyler* held that undocumented immigrants cannot be treated as a suspect class because their undocumented status "is the product of voluntary action" that "is itself a crime."[47] Therefore, equal protection challenges to laws that categorically target undocumented immigrants are analyzed under a rational-basis review[48] and will be upheld if there is any conceivable rational support for the classification.[49]

In *United States v. Verdugo-Urquidez*, the Court suggested, but did not definitively hold, that undocumented immigrants are afforded Fourth Amendment rights as well.[50] The Fourth Amendment "protects 'the people' against unreasonable searches and seizures."[51] In *Verdugo-Urquidez* the Court entertained constitutional theories that have shaped the way lower courts evaluate challenges to immigration legislation.[52] The Court opined that the term "the people" as used in the First, Second, and Fourth

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42. *See* Michael R. Boland Jr., *No Trespassing: The States, the Supremacy Clause, and the Use of Criminal Trespass Laws to Fight Illegal Immigration*, 111 PENN ST. L. REV. 481, 483 (2006) (analyzing state and federal laws aimed at undocumented immigrants).
43. Mathews v. Diaz, 426 U.S. 67, 81(1976); *see* Plyler v. Doe, 457 U.S. 202, 225 (1982) ("The obvious need for delicate policy judgments has counseled the Judicial Branch to avoid intrusion into this field.").
44. *Plyler*, 457 U.S. at 210.
45. U.S. CONST. amend. XIV (emphasis added).
46. Graham v. Richardson, 403 U.S. 365, 371–72 (1971).
47. *Plyler*, 457 U.S. at 219 n. 19.
48. *Id.* at 217–18.
49. *See* FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 315 (1993) ("[T]hose attacking the rationality of the legislative classification have the burden to negative every conceivable basis which might support it.").
50. *See* United States v. Verdugo-Urquidez, 494 U.S. 259 (1990).
51. *Id.*
52. *See infra* note 56 and accompanying text.

Amendments refers to a narrower class of individuals than "the persons" used in the Fifth and Sixth Amendments.[53] Specifically, the Court suggested "the people" "refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community."[54] However, the Court emphasized that their analysis was "by no means conclusive"[55] and failed to define the meaning of "sufficient connections." Despite these ambiguities, lower courts have employed several varieties of the "sufficient connections" test to resolve constitutional issues.[56]

In summary, the Court has conclusively determined that undocumented immigrants are protected under the Fifth, Sixth, and Fourteenth Amendments.[57] However, state and federal legislation can constitutionally limit those rights based on an individual's undocumented status.[58] Furthermore, undocumented immigrants are *possibly* protected under the First, Second, and Fourth Amendments but only if they are sufficiently connected with the United States.[59] However, the Court has not determined what connections are sufficient for constitutional rights to attach to noncitizens.

C. Constitutional Challenges to § 922(g)

Since *Heller*, the constitutionality of categorical bans promulgated in § 922(g) have been challenged in every circuit.[60] However, these challenges have been widely unsuccessful based upon the courts' interpretation of precautionary language in *Heller*, stating that certain categorical bans are presumptively valid.[61]

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53. *Id.* at 265.
54. *Id.*
55. *Id.*
56. *See* United States v. Esparza-Mendoza, 265 F. Supp. 2d 1254 (D. Utah 2003); United States v. Ullah, No. 04-CR-30A(F), 2005 WL 629487 (W.D.N.Y. Mar. 17, 2005); United States v. Gutierrez-Casada, 553 F. Supp. 2d 1259 (D. Kan. 2008); United States v. Tehrani, 826 F. Supp. 789 (D. Vt. 1993).
57. *See Wong Wing*, 163 U.S. at 238; *Yick Wo*, 118 U.S. at 368–369.
58. Plyler v. Doe, 457 U.S. 202, 210 (1982).
59. *Verdugo-Urquidez*, 494 U.S. at 265.
60. *See* United States v. Torres-Rosario, 658 F.3d 110 (1st Cir. 2011); United States v. Stuckey, 317 Fed. Appx. 48 (2d Cir. 2009); United States v. Barton, 633 F.3d 168 (3d Cir. 2011); People v. Delacy, 192 Cal. App. 4th 1481 (2011); United States v. Whisnant, 391 Fed. Appx. 426 (6th Cir. 2010); United States v. Yancey, 621 F.3d 681 (7th Cir. 2010); United States v. Seay, 620 F.3d 919 (8th Cir. 2010); Van Der Hule v. Holder, 759 F.3d 1043 (9th Cir. 2014); United States v. Molina, 484 Fed. Appx. 276 (10th Cir. 2012); United States v. White, 593 F.3d 1199 (11th Cir. 2010); United States v. Portillo-Munoz, 643 F.3d 437 (5th Cir. 2011).
61. *See* District of Columbia v. Heller, 554 U.S. 570, 627 (2008) ("[N]othing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill."); *see also id.* at n. 26 (explaining the aforementioned quote, stating "[w]e identify

The Fourth, Fifth, and Eighth Circuits precede the Seventh Circuit in addressing specifically whether the categorical disqualification of undocumented aliens under § 922(g) unconstitutionally infringes upon Second Amendment rights.[62] The Tenth Circuit also addressed the issue but ultimately avoided the constitutional question, reasoning that it could "still easily find § 922(g)(5) constitutional" even assuming the Second Amendment includes undocumented immigrants.[63] While the Seventh Circuit concurred with its predecessors in upholding the constitutionality of § 922(g)(5), the Seventh Circuit was the first court to hold that the Second Amendment extends to undocumented immigrants.

III. EXPOSITION

In *Meza-Rodriguez* the Seventh Circuit addressed whether undocumented immigrants are protected under the Second Amendment and, if so, whether a statute categorically banning unauthorized immigrants from possessing arms or ammunition is constitutional.[64] The majority held that undocumented immigrants who have developed substantial connections in the United States are afforded Second Amendment rights.[65] However, the court upheld the constitutionality of § 922(g).[66]

A. Facts and Procedural Posture

Mariano A. Meza-Rodriguez, a citizen of Mexico, came to the United States with his family when he was only four or five years old.[67] Meza-Rodriguez and his family settled in Milwaukee.[68] Meza-Rodriguez attended public school, developed close relationships, and held various jobs.[69] Despite remaining in the United States for over twenty years, Meza-Rodriguez never regularized his status.[70]

On August 24, 2013, Milwaukee police officers responded to a report that an armed man was at a local bar.[71] The man was gone by the time the

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these presumptively lawful regulatory measures only as examples; our list does not purport to be exhaustive.").

62. *See* United States v. Carpio-Leon, 701 F.3d 974, 979 (4th Cir. 2012); United States v. Flores, 663 F.3d 1022, 1023 (8th Cir.2011); United States v. Portillo-Munoz, 643 F.3d 437, 442 (5th Cir. 2011).
63. United States v. Huitron-Guizar, 678 F.3d 1164, 1169 (10th Cir. 2012).
64. United States v. Meza-Rodriguez, 798 F.3d 664, 666 (7th Cir. 2015).
65. *Id.* at 670.
66. *Id.* at 673.
67. *Id.* at 666.
68. *Id.*
69. *Id.* at 671.
70. *Id.* at 666.
71. *Id.*

police arrived but was identified by witnesses as Meza-Rodriguez from a surveillance video.[72] Later that night, the same officers responded to a fight at a neighboring bar.[73] After breaking up the fight, the police recognized Meza-Rodriguez as the man in the surveillance video.[74] Meza-Rodriguez fled, and the officers chased him on foot.[75] The police eventually apprehended Meza-Rodriguez and found a .22 caliber cartridge in his pocket when they were patting him down.[76]

Meza-Rodriguez was indicted for violating 18 U.S.C. 922(g)(5), resulting in an aggravated felony.[77] Meza-Rodriguez moved to dismiss the indictment, claiming § 922(g)(5) imposes an unconstitutional restraint on his Second Amendment right to bear arms.[78] The district court denied the motion on the ground that the Second Amendment does not protect undocumented immigrants.[79] The government offered Meza-Rodriguez a plea agreement, and he pled guilty.[80] He preserved the issue of the constitutionality of § 922(g)(5) for appeal.[81] Meza-Rodriguez was sentenced to time served and then removed to Mexico.[82] As a convicted felon, Meza-Rodriguez is permanently barred from admission to the United States under immigration laws.[83] Meza-Rodriguez appealed his conviction in hopes of eventually returning to the United States.[84] The Seventh Circuit Court of Appeals affirmed the judgment.[85]

B. The Majority Opinion

Before the court could determine whether § 922(g)(5) impermissibly infringed on Meza-Rodriguez's Second Amendment rights, it had to decide whether Meza-Rodriguez was even afforded Second Amendment rights.[86] The court turned to the language of the Second Amendment, which provides, "the right of the people to keep and bear Arms, shall not be infringed."[87] Since the Supreme Court has not addressed whether unauthorized aliens are "the people" the Second Amendment intends to

72. *Id.*
73. *Id.*
74. *Id.*
75. *Id.*
76. *Id.*
77. *Id.*
78. *Id.*
79. *Id.* at 667.
80. *Id.*
81. *Id.*
82. *Id.*
83. *Id.*
84. *Id.* at 668.
85. *Id.* at 673.
86. *Id.* at 669.
87. *Id.*

bestow rights upon, the court turned to other circuits that have reached this issue.[88] The Fourth, Eighth, and Fifth Circuits have concluded that "the people," when used in the Second Amendment, refer to United States citizens.[89] Thus, they have held Second Amendment rights do not extend to undocumented immigrants.[90] These courts based their determinations off of the Supreme Court's opinion in *Heller*.[91]

In *Heller*, the Supreme Court stated that the Second Amendment protects the right of "law-abiding citizens" to use arms in self-defense.[92] The Court also stated the term "the people" refers to "members of the political community" and "not an unspecified subset" like a militia.[93] The Seventh Circuit was reluctant to place much weight on these passages.[94] While the court recognized that some of *Heller's* language linked Second Amendment rights to citizens of the United States, the Supreme Court was not attempting to define the term "people."[95] The Seventh Circuit did place emphasis, however, on *Heller's* comparison of the Second Amendment to the First and Fourth Amendment.[96] *Heller* concluded that "the words 'the people' as used in the Second Amendment must have the same meaning, and protect the same class of individuals, as when they are used in the First and Fourth Amendments."[97] The Seventh Circuit agreed that the Second Amendment should be interpreted consistently with the First and Fourth Amendments.[98] The court turned to the Supreme Court opinion in *United States v. Verdugo-Urquidez*, which theorized that undocumented immigrants are afforded constitutional rights when they develop sufficient connections in the United States.[99] The court also relied on *Plyler v. Doe*, where the Court stated that an undocumented immigrant was "surely a 'person' in any ordinary sense of that term" who is guaranteed due process under the Fifth and Fourteenth Amendments.[100] The court applied these interpretations and determined that Meza-Rodriguez had developed substantial connections within his Milwaukee community, and thus, was afforded protection under the Second Amendment.[101]

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88. *Id.*
89. *Id.*
90. *Id.*
91. *Id.*
92. *Id.*
93. *Id.*
94. *Id.*
95. *Id.*
96. *Id.*
97. District of Columbia v. Heller, 554 U.S. 570, 644 (2008).
98. *Meza-Rodriguez*, 798 F.3d at 670.
99. *Id.*
100. *Id.* at 671.
101. *Id.* at 672.

The court then addressed whether § 922(g) unconstitutionally restricted Meza-Rodriguez's Second Amendment rights.[102] As with any constitutional challenge, the court first had to decide the applicable level of scrutiny it should apply to § 922(g).[103] The court noted that the Supreme Court has shied away from dictating a particular level of scrutiny to apply to categorical bans on firearms.[104] However, the Supreme Court has articulated that a rational-basis review would be too lenient.[105] The court ultimately decided to adopt "some form of strong showing, akin to intermediate scrutiny" in accordance with other Seventh Circuit decisions interpreting § 922(g).[106]

In order to pass intermediate scrutiny, § 922(g)(5) must be "substantially related to an important governmental objective."[107] The court stated that Congress's objective in passing § 922(g) was "to keep guns out of the hands of presumptively risky people."[108] It reasoned that the government has an important objective in "preventing people who already have disrespected the law . . . from possessing guns."[109] The court then opined that undocumented immigrants are "presumptively risky" because they are easily able to evade law enforcement due to a lack of formal "registration, employment, and identification."[110] The court rejected the government's contention that unauthorized aliens are more likely to commit gun-related crimes than members of the general population.[111] Ultimately, the court reasoned that "Congress's interest in prohibiting persons who are difficult to track and who have an interest in eluding law enforcement is strong enough to support the conclusion that 18 U.S.C. § 922(g)(5) does not impermissibly restrict [Defendant's] Second Amendment right to bear arms."[112]

C. Judge Flaum's Opinion

Judge Flaum concurred in the judgment but expressed doubts that the Second Amendment grants rights to undocumented immigrants.[113] Judge Flaum stated that he did not read *Heller* in a way that suggested as

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102. *Id.*
103. *Id.*
104. *Id.*
105. *Id.*
106. *Id.*
107. *Id.*
108. *Id.* at 673.
109. *Id.*
110. *Id.*
111. *Id.*
112. *Id.*
113. *Id.* at 673.

expansive of an interpretation of the Second Amendment.[114] Rather, he proposed the issues in *Meza-Rodriguez* could be resolved without such a determination.[115] Judge Flaum suggested a more prudent analysis of the issues in *Meza-Rodriguez* similar to the Tenth Circuit's opinion in *United States v. Huitron-Guizar*.[116] In *Huitrion-Guizar*, the Tenth Circuit declined to address whether undocumented immigrants are afforded rights under the Second Amendment because the issue of whether § 922(g)(5) is constitutional could be resolved without compelling such an analysis.[117] Judge Flaum pointed out that an analysis in accord with the Tenth Circuit would have eliminated conflict with the Fourth, Fifth, and Eight Circuits.[118]

IV. ANALYSIS

Heller reaffirmed that the Second Amendment is not an unlimited right[119] and explicitly upheld the constitutionality of "longstanding prohibitions on the possession of firearms" by certain groups of people.[120] The Court has also held that federal legislation can classify individuals based on their undocumented immigration status as long as the classification is rationally related to a legitimate government interest.[121] The objective of § 922(g) is "to keep guns out of the hands of presumptively risky people," "to suppress armed violence," and "to keep weapons away from those deemed dangerous or irresponsible."[122] Congress undoubtedly has a compelling interest in limiting the Second Amendment rights of inherently dangerous or irresponsible individuals. However, the prohibition of the possession of firearms and ammunition by undocumented immigrants does not further this objective, and the majority in *Meza-Rodriguez* created a constitutional anomaly by upholding § 922(g)(5). Part A of this section argues that undocumented immigrants cannot reasonably be categorized as "presumptively risky" individuals. Part B shows how the majority created a constitutional anomaly by extending Second Amendment rights to undocumented immigrants who are sufficiently connected with the United States while simultaneously upholding § 922(g)(5). Finally, Part C asserts that the majority treated the Second Amendment as a second-class right by upholding § 922(g)(5).

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114. *Id.* at 674.
115. *Id.*
116. *Id.* at 674 (citing United States v. Huitron-Guizar, 678 F.3d 1164, 1169–70 (10th Cir. 2012)).
117. *Huitron-Guizar*, 678 F.3d at 1169.
118. *Meza-Rodriguez*, 798 F.3d 664 at 674.
119. District of Columbia v. Heller, 554 U.S. 570, 626 (2008).
120. *Id.*
121. Plyler v. Doe, 457 U.S. 202, 210 (1982).
122. *Meza-Rodriguez*, 798 F.3d 664 at 673.

A. Undocumented Immigrants are not Presumptively Risky

Unlike felons, the mentally ill, fugitives, and all other persons described in § 922(g), undocumented immigrants do not fall into a classification based on a criminal act[123] or an adjudication that they are unfit to possess a weapon. This suggests there is something inherently dangerous about their undocumented status. However, a classification based on the assumption that undocumented aliens are inherently dangerous while American citizens are trustworthy lacks a reasonable basis and is founded on xenophobic stereotypes.[124]

In reality, there is no data to support that unauthorized aliens are more likely to commit violent crimes than citizens and research actually suggests the opposite.[125] Legislation targeting immigrants is often driven by fear, rather than reason—fear that immigrants will threaten American jobs and change American values.[126] This fear, in turn, leads to prejudice and discrimination,[127] manifested in irrational laws such as the Chinese Exclusion Act,[128] the Red Scare,[129] and more modernly, parts of the USA Patriot Act.[130] While the national security and public safety of the United States is among the government's highest priorities, the laws of our country should not be founded upon discriminatory stereotypes.[131] The contention

123. *Id.* ("[U]nlawful presence in the country is not, without more, a crime.").

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

125. A report published this year from the Immigration Policy Center ("IPC") found that while the undocumented population more than tripled between 1990 and 2013, the violent crime and property crime rates significantly fell. Waiter A. Ewing, Daniel E. Martinez & Ruben G. Rumbaut, *The Criminalization of Immigration in the United States*, AM. IMMIGR. COUNCIL (July 8, 2015), http://immigrationpolicy.org/special-reports/criminalization-immigration-united-states (last visited Aug. 28, 2016). Another IPC report from 2007 stated, "for every ethnic group without exception, incarceration rates among young men are lowest for immigrants. This holds true especially for the Mexicans, Salvadorans, and Guatemalans who make up the bulk of the undocumented population." Ruben G. Rumbaut & Walter A. Ewing, *The Myth of Immigrant Criminality and the Paradox of Assimilation*, AM. IMMIGR. COUNCIL (Feb. 21, 2007), https://www.americanimmigrationcouncil.org/research/myth-immigrant-criminality-and-paradox-assimilation (last visited Aug. 27, 2016).

126. Hon. Paul Brickner & Meghan Hanson, *The American Dreamers: Racial Prejudices and Discrimination as Seen Through the History of American Immigration Law*, 26 T. JEFFERSON L. REV. 203, 217 (2004).

127. *Id.*

128. The Chinese Exclusion Act of 1882 barred the entry of Chinese laborers into the United States. *See* Kitty Calavita, *The Paradoxes of Race, Class, Identity, and "Passing": Enforcing the Chinese Exclusion Acts, 1882-1910*, 25.1 L. & SOC. INQUIRY 1, 1 (2000).

129. In the midst of the Cold War, American fears of communism led to the "Red Scare." *See* Seth F. Kreimer, *Sunlight, Secrets, and Scarlet Letters: The Tension Between Privacy and Disclosure in Constitutional Law*, 140 U. PA. L. REV. 1, 15–24 (1991). The Red Scare was an anti-Communist crusade characterized by paranoia and discriminatory laws that compromised American civil liberties in an attempt to uncover and persecute Communists living in America. *Id.*

130. *See* Brickner, *supra* note 126, at 231–36.

131. *See id.* at 237.

that undocumented immigrants are inherently dangerous or presumptively risky is based on ethnically biased assumptions and by no means supports a "strong showing" that § 922(g)(5) is related to the important government objective of suppressing armed violence.

The majority, itself, rejected the notion that undocumented immigrants are more likely to commit gun-related crimes than citizens.[132] However, the majority asserted that undocumented immigrants pose a safety risk because they can easily evade law enforcement.[133] The majority did not, however, offer support for this assertion and did not explain how this relates to suppressing armed violence. It merely concluded that "[p]ersons with a strong incentive to use false identification papers will be more difficult to keep tabs on than the general population."[134] The determination that unauthorized aliens are presumptively risky because they are hard to trace rests on faulty assumptions.

An undocumented immigrant who otherwise respects the laws of our nation is no more dangerous than a member of the general population. Mere presence in the United States without documentation is not, in itself, a crime.[135] There is nothing inherently dangerous about being undocumented, and the majority admitted this as well.[136] Thus, the majority's assertion that undocumented immigrants are difficult to trace begs the question: "So what?" The prohibition of firearms and ammunition by undocumented immigrants, based solely on the fact they are difficult to trace, still necessarily relies on the assumption that undocumented immigrants are likely to commit gun-related crimes. Keeping guns away from people who are hard to trace does not suppress armed violence. However, keeping guns away from people who are hard to trace and likely to commit gun-related crime suppresses armed violence.

Thus, the majority was actually asserting that undocumented immigrants who do commit gun-related crimes are more dangerous than citizens who commit gun-related crimes because unauthorized aliens are harder to track. This contention ignores that citizens who commit crimes have an interest in evading law enforcement as well. While many unauthorized aliens surely assume false identities, many American citizens use false identities too. A citizen who wants to use a gun for an improper purpose is no less able to use false pretenses to evade the police than an unauthorized alien. The government has continually struggled with gun-

132. United States v. Meza-Rodriguez, 798 F.3d 664, 673 (7th Cir. 2015).
133. *Id.*
134. *Id.*
135. *Id.* at 673 (citing Arizona v. United States, 132 S. Ct. 2492, 2505 (2012).
136. *Id.*

control and its ability to track and monitor firearms is an issue irrespective of immigration.[137]

Furthermore, the majority's assertions rest on assumptions that undocumented aliens are dissociated from American society. This improperly reflects the reality of the situation for many undocumented aliens. Many undocumented immigrants are not isolated from American society, but rather are immersed in American culture and communities. They are part of the American work force and raise families alongside American citizens.[138] Furthermore, the federal government as well as state governments have created programs that allow unauthorized aliens to share in the societal benefits that go along with citizenship. For instance, undocumented immigrants who work in the United States can file tax returns using an "Individual Tax Identification Number" (ITIN).[139] Twelve states and the District of Columbia have even enacted laws that allow undocumented immigrants to qualify for state driver's licenses using ITINs instead of social security numbers.[140]

Furthermore, many undocumented aliens, such as Meza-Rodriguez, were brought to the United States at a young age.[141] While they are formally citizens of other countries, these places are just as foreign to them as they are to natural-born American citizens. Because public schooling provides undocumented children "with an experience of inclusion atypical of undocumented adult life in the United States,"[142] such persons often do not even discover their undocumented status until adulthood.[143]

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137. *See* Lynn Murtha & Suzanne L. Smith, *"An Ounce of Prevention...": Restriction Versus Proaction in American Gun Violence Policies*, 10 ST. JOHN'S J. LEGAL COMMENT. 205, 207–09 (1994).

138. Undocumented immigrants make up 5.1% of the American labor force and approximately 7% of students in kindergarten through 12th grade have an undocumented parent. *See* Jens Manuel Korgstad & Jeffrey S. Passel, *5 Facts about Illegal Immigration in the U.S.*, PEW RES. CTR. (Nov. 19, 2015), http://www.pewresearch.org/fact-tank/2015/07/24/5-facts-about-illegal-immigration-in-the-u-s/.

139. Acquiring an ITIN from the IRS requires documents verifying the applicant's identity, including a name and address. *See The Facts about the Individual Tax Identification Number (ITIN)*, AM. IMMIGR. COUNCIL (June 30, 2009), http://www.immigrationpolicy.org/just-facts/facts-about-individual-tax-identification-number-itin. It is unlawful for the government to use ITIN information except for a criminal investigation or for tax purposes. *Id.*

140. Gilberto Mendoza, *States Offering Driver's Licenses to Immigrants*, NAT'L CONF. ST. LEGISLATURES (Aug. 8, 2015), http://www.ncsl.org/research/immigration/states-offering-driver-s-licenses-to-immigrants.aspx.

141. In 2010 there was an estimated 1 million undocumented children (under the age of 18) living in the United States. *See* Jeffrey S. Passel & D'vera Cohn, *Unauthorized Immigrants Population: National and State Trends*, 2010, PEW RES. CTR. (Feb. 1, 2011), http://www.pewhispanic.org/2011/02/01/iii-births-and-children/.

142. Roberto G. Gonzales, *Learning to Be Illegal: Undocumented Youth and Shifting Legal Contexts in the Transition to Adulthood*, 76.4 AM. SOC. REV. 602, 608 (2011).

143. *Id.* at 609.

While the majority seemingly rejected that undocumented immigrants are more likely to commit gun-related crimes than American citizens, its approval of § 922(g)(5) is still based upon false assumptions and stereotypes. Unauthorized aliens cannot rationally be categorized as "presumptively risky" because of their undocumented status.

B. The Majority Created a Constitutional Anomaly by Upholding § 922(g)(5) While also Employing the "Sufficient Connection" Test

The majority's holding that § 922(g)(5) is constitutional is anomalous in light of its holding that undocumented immigrants are afforded constitutional rights when they have developed sufficient connections with the United States.

The Court in *Verdugo-Urquidez* implied that the "sufficient connection" test[144] is founded on the concept of mutuality that "is essential to ensure the fundamental fairness that underlies our Bill of Rights."[145] That is, every person within the jurisdiction of the United States owes an obligation to obey the laws of our country and, in return, these persons should be entitled to their protection and advantage.[146] The purpose of the "sufficient connection" test is to determine whether an undocumented alien has fulfilled her obligation to American society to such a degree that warrants an obligation, in return, from the United States government.[147] Contrarily, the majority upheld § 922(g)(5) which, by its own interpretation, rests on the assumption that all illegal immigrations are so dissociated from society that they do not deserve Second Amendment rights.

More specifically, the majority upheld § 922(g)(5) because unauthorized aliens are difficult to trace. Yet an unauthorized alien that has satisfied the "sufficient connection" test is well connected to her community. This is why she is afforded Second Amendment rights! Undocumented immigrants who are protected by the Second Amendment have accepted societal obligations and have substantial ties to their communities. For instance, the majority in *Meza-Rodriguez* held that Meza-Rodriguez satisfied the "sufficient connection" test because he lived

144. United States v. Verdugo-Urquidez, 494 U.S. 259, 286 (1990) ("The Court articulates a "sufficient connection" test but then refuses to discuss the underlying principles upon which any interpretation of that test must rest.").

145. *Id.* at 284.

146. *Id.*

147. *See* Michael J. Tricarico, *How Sufficient Is the "Sufficient Connection Test" in Granting Fourth Amendment Protections to Nonresident Aliens?:* United States v. Verdugo-Urquidez, 64 ST. JOHN'S L. REV. 629, 641 (1990) ("The Court, seemingly is awarding the alien a degree of constitutional protection commensurate with the benefit the alien bestows upon the United States.").

in the United States for over 20 years, attended public schools, held employment, and "developed close relationships with family members and other acquaintances."[148] A person with such extensive ties to his community would not be difficult to find. In fact, Meza-Rodriguez illustrates this point. Witnesses easily identified Meza-Rodriguez the night he was apprehended, and police officers arrested him just a few hours later.[149]

By adopting the "substantial connections" test and upholding the constitutionality of § 922(g)(5), the majority in *Meza-Rodriguez* created an anomaly. According to the majority, undocumented immigrants deserve Second Amendment rights when they are sufficiently connected to their communities, yet these people do not deserve Second Amendment rights because they are too dissociated from their communities. These holdings cannot be reconciled.

C. The Majority Treated the Second Amendment as a Second-Class Right

The Court has held that the Second Amendment is a fundamental right that should not be treated differently than other provisions of the Bill of Rights.[150] Yet the majority stripped undocumented immigrants of their constitutional right to bear arms for unarticulated reasons—treating the Second Amendment as a second-class right.

In *Plyler v. Doe*, the Court held that "undocumented status is not irrelevant to any proper legislative goal"[151] and therefore, a statute may limit certain rights of undocumented immigrants. However, § 922(g)(5) does not just limit the Second Amendment rights of undocumented immigrants. Section 922(g)(5) completely eradicates an undocumented immigrant's Second Amendment rights. While *Plyler* held that undocumented immigrants can be constitutionally afforded a *lesser* degree of equal protection under the Fifth Amendment, it is well established that undocumented immigrants must be afforded *some* degree of equal protection.[152] The Second-Amendment should be treated accordingly.

While the Court is generally hesitant to definitively determine the scope of certain Amendments in immigration issues, the Court has never upheld a statute that denies undocumented immigrants all protection under a constitutional right they are deemed to hold. The majority treated the Second-Amendment as a second-class right by upholding § 922(g)(5).

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148. United States v. Meza-Rodriguez, 798 F.3d 664, 671 (7th Cir. 2015).
149. *Id.* at 666.
150. McDonald v. City of Chicago, 561 U.S. 742, 780 (2010).
151. *Plyler*, 457 U.S. at 210.
152. *Id.* (citing Shaughnessy v. Mezei, 345 U.S. 206, 212 (1953); Wong Wing v. United States, 163 U.S. 228, 238 (1896); Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886)).

V. CONCLUSION

The majority in *Meza-Rodriguez* created a constitutional anomaly by employing the "sufficient connection" test and simultaneously upholding § 922(g)(5). The majority contended that § 922(g)(5) suppresses armed violence because it keeps guns out of the hands of undocumented immigrants who are hard to trace, and thus, "presumptively risky." However, the majority offered no support for this argument, and the contention that undocumented immigrants are inherently dangerous is based on xenophobic notions. Furthermore, undocumented immigrants who are sufficiently connected to the United States are not hard to trace, and thus, are not "presumptively risky." Ultimately, the majority in *Meza-Rodriguez* treated the Second Amendment as a second-class right and its opinion was logically flawed.