
THE MEANING(S) OF “THE PEOPLE” IN THE CONSTITUTION

The Constitution famously begins with a flourish, “We the People.”¹ Less famously, the phrase “the people” appears in several other constitutional clauses, five of which are in the Bill of Rights.² The First Amendment ensures “the right of the people” to petition the government and to assemble peacefully;³ the Second Amendment protects “the right of the people to keep and bear Arms”;⁴ the Fourth Amendment protects “the right of the people” against unreasonable searches and seizures;⁵ and the Ninth and Tenth Amendments reserve to “the people” nonenumerated rights and powers, respectively.⁶ Do these references to “the people” point to particular individuals, or are they merely rhetorical? If they point to particular individuals, do they refer to American citizens, or to everyone in the country irrespective of citizenship? Finally, could “the people” mean different things in different amendments?

The courts largely overlooked these questions for 200 years (1789–1989).⁷ Since then, the Supreme Court has twice commented on this phrase’s meaning, but the two analyses are in tension. In *United States v. Verdugo-Urquidez*⁸ in 1990, the Court said that “the people” refers to those “*persons* who are part of a *national community*,”⁹ or who have “substantial connections” to the United States.¹⁰ The touchstone was not citizenship, but the extent of one’s connection to this country. This definition of “the people” applied consistently throughout the Bill of Rights, the Court said.¹¹ In *District of Columbia v. Heller*¹² in 2008, the Court approvingly quoted *Verdugo-Urquidez*’s definition, and similarly suggested that the term “the people” has a consistent meaning throughout the Constitution.¹³ But *Heller* also said that “the people” “refers to all *members* of the *political community*.”¹⁴

¹ U.S. CONST. pmbl.

² *Id.* art. I, § 2, cl. 1; *id.* amends. I, II, IV, IX, X, XVII.

³ *Id.* amend. I.

⁴ *Id.* amend. II.

⁵ *Id.* amend. IV.

⁶ *Id.* amends. IX, X.

⁷ *But see infra* notes 90–91 and accompanying text (discussing *Dred Scott v. Sandford*, 60 U.S. 393, 404 (1857) (“The words ‘people of the United States’ and ‘citizens’ are synonymous.”)).

⁸ 494 U.S. 259 (1990).

⁹ *Id.* at 265 (emphases added).

¹⁰ *Id.* at 271.

¹¹ *Id.* at 265.

¹² 128 S. Ct. 2783 (2008).

¹³ *Id.* at 2790–91.

¹⁴ *Id.* at 2790 (emphases added).

Heller thus contains a confusing three-part analysis: (1) it approved of *Verdugo-Urquidez*'s interpretation; (2) it substituted "members of the political community" for "persons who are part of a national community"; and (3) it suggested that "the people" means the same thing throughout the Constitution. *Heller*'s analysis has created a tension that has attracted little notice.¹⁵

This tension could be resolved in several ways, but one way should give us pause: *Heller* could be viewed as changing the meaning of "the people" throughout the Bill of Rights by limiting "the people" to "members of the political community," which might be interpreted to mean, *inter alia*, "eligible voters." This interpretation could have significant consequences for individuals who seemingly enjoyed several constitutional rights after *Verdugo-Urquidez*, but who might not enjoy them under this view of *Heller*. These individuals could include (1) noncitizens, whether foreign students, those on work visas, or undocumented immigrants;¹⁶ and (2) certain classes of citizens who typically cannot vote, such as minors and felons.¹⁷ Since *Heller*, a few lower court opinions already indicate that this interpretation is possible.¹⁸

This Note argues against that interpretation of *Heller*. Part I summarizes *Verdugo-Urquidez*, *Heller*, and lower courts' interpretations of these two cases. Parts II and III argue that *Heller*'s exegesis of "the people" should not be interpreted to affect the meaning of *other* constitutional clauses. Part II contends that, due to its many ambiguities, *Heller* has not resolved the meaning of "the people" in the Second Amendment. Part III argues that, even if it had, *Heller*'s analysis should not affect the meaning of other amendments, because "the people" can embrace different individuals in different clauses. This Part focuses on the First, Second, and Fourth Amendments because they are frequent sources of dispute. These amendments' texts, origins, precedents, and purposes suggest that the same phrase, "the people," can have different meanings in different clauses. Part IV concludes.

I. VERDUGO-URQUIDEZ, HELLER, AND THEIR AFTERMATHS

This Part describes *Verdugo-Urquidez* and *Heller*, as well as lower courts' subsequent interpretations of those cases. *Verdugo-Urquidez*'s

¹⁵ For a rare exception, see Pratheepan Gulasekaram, "The People" of the Second Amendment: Citizenship and the Right to Bear Arms, 85 N.Y.U. L. REV. 1521, 1536–37 (2010).

¹⁶ This Note uses the term "undocumented immigrants" instead of "illegal aliens," because determining illegality generally requires an adjudication. *See id.* at 1523 n.11; *see also* Mohawk Indus., Inc. v. Carpenter, 130 S. Ct. 599, 603 (2009) (using "undocumented immigrants").

¹⁷ *See* Bailey Figler, Note, A Vote for Democracy: Confronting the Racial Aspects of Felon Disenfranchisement, 61 N.Y.U. ANN. SURV. AM. L. 723, 724–25 (2006) (summarizing the state-by-state breakdown of felon disenfranchisement laws).

¹⁸ *See infra* notes 63–72 and accompanying text.

analysis of “the people” was influential, so *Heller*’s introduction of tension may have important implications.

A. United States v. Verdugo-Urquidez and Its Application

The United States suspected Rene Verdugo-Urquidez, a Mexican citizen and resident, of leading a Mexican drug organization that smuggled narcotics into the United States, and of being involved in the kidnapping and murder of an agent of the U.S. Drug Enforcement Administration (DEA).¹⁹ After his arrest in Mexico, Verdugo-Urquidez was brought to California, and DEA agents then worked with Mexican officials to search his homes in Mexico.²⁰ They did not have a search warrant, but they seized documents during the searches.²¹ The U.S. district court granted Verdugo-Urquidez’s motion to suppress, given the government’s failure to obtain a warrant.²² The Supreme Court reversed, holding that the Fourth Amendment does not apply to a search and seizure when the government acts (1) in a foreign country and (2) with respect to a citizen and resident of a foreign country.²³

The *Verdugo-Urquidez* Court made five types of arguments, based on text, intratextualism (that is, considering other relevant portions of the same legal text to interpret a phrase²⁴), origins, precedent, and purpose. The Court said the Fourth Amendment extends “only to ‘the people,’” a characteristic it shares with the First, Second, Ninth, and Tenth Amendments.²⁵ By contrast, the Fifth and Sixth Amendments use the broader terms “person” and “accused,” respectively.²⁶ The phrase “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.”²⁷ Since Verdugo-Urquidez was a Mexican citizen and resident with no connection to the United States, and he was challenging a search in Mexico, the Fourth Amendment did not extend to him.²⁸ In two centuries of precedent, the Court noted, the Fourth Amendment had never applied in such circumstances;²⁹ its purpose was not to restrain the government’s actions “against aliens outside of the United States.”³⁰

¹⁹ United States v. Verdugo-Urquidez, 494 U.S. 259, 262 (1990).

²⁰ *Id.*

²¹ *Id.* at 262–63.

²² *Id.* at 263.

²³ *See id.* at 274–75.

²⁴ *See generally* Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747 (1999).

²⁵ *Verdugo-Urquidez*, 494 U.S. at 265.

²⁶ *Id.* at 265–66.

²⁷ *Id.* at 265.

²⁸ *Id.* at 274–75.

²⁹ *Id.* at 267–73.

³⁰ *Id.* at 266.

Chief Justice Rehnquist's opinion nominally had the support of five Justices; but while Justice Kennedy provided the fifth vote, his concurrence explicitly disagreed with the majority's view of "the people." He wrote, "I cannot place any weight on the reference to 'the people' in the Fourth Amendment as a source of restricting its protections."³¹ In his view, the Framers' use of "the right of the people" reflects "the importance of the right," but does not "restrict the category of persons who may assert it."³² If the search had occurred in the United States, the Fourth Amendment would have applied, he said.³³ There were multiple dissents, and Justice Brennan's argued that everyone in the United States and subject to its laws — like Verdugo-Urquidez at the time of this search — should receive constitutional protections.³⁴

Verdugo-Urquidez received a mixed reaction. On the one hand, scholars criticized the opinion,³⁵ and at least one lower court declined to follow it, reasoning that "a majority of the Justices disagreed with" Chief Justice Rehnquist's opinion and that the Court's test was "unclear."³⁶ The Court articulated its test in different ways in its opinion: in some places it emphasized "voluntary" presence in the United States, in other places "substantial connections" to the country,³⁷ and in still other places the "accept[ance of] some societal obligations."³⁸

On the other hand, *Verdugo-Urquidez* affected the interpretation of the First and Fourth Amendments as well as courts' mode of analysis. With respect to the Fourth Amendment, prior to *Verdugo-Urquidez*, the Supreme Court had assumed that undocumented immigrants had Fourth Amendment rights,³⁹ and many lower courts — including the Second, Ninth, and D.C. Circuits — had applied the Fourth Amendment to undocumented immigrants.⁴⁰ Yet once *Verdugo-Urquidez* articulated the "substantial connections" test and used intratextualism, lower courts followed suit. In 1995, the Ninth Circuit noted that "[t]he

³¹ *Id.* at 276 (Kennedy, J., concurring).

³² *Id.*

³³ *Id.* at 278.

³⁴ See *id.* at 284 (Brennan, J., dissenting) ("[W]hen we impose . . . the obligation to comply with our criminal laws[] on foreign nationals, we in turn are obliged to respect certain correlative rights, among them the Fourth Amendment.").

³⁵ See, e.g., GERALD L. NEUMAN, STRANGERS TO THE CONSTITUTION 106 (1996) ("Rehnquist left the scope he intended for the Fourth Amendment very unclear.").

³⁶ *United States v. Guitterez*, 983 F. Supp. 905, 915 (N.D. Cal. 1998), *rev'd on other grounds*, 203 F.3d 833 (9th Cir. 1999); see also *Lamont v. Woods*, 948 F.2d 825, 835 (2d Cir. 1991) (noting that only a "plurality" agreed with Chief Justice Rehnquist's analysis of "the people").

³⁷ *Verdugo-Urquidez*, 494 U.S. at 271.

³⁸ *Id.* at 273.

³⁹ See *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1044–46 (1984).

⁴⁰ See *Verdugo-Urquidez*, 494 U.S. at 283 n.6 (Brennan, J., dissenting) ("Numerous lower courts . . . have held that illegal aliens in the United States are protected by the Fourth Amendment . . ." (citing *Benitez-Mendez v. INS*, 760 F.2d 907 (9th Cir. 1985); *United States v. Rodriguez*, 532 F.2d 834, 838 (2d Cir. 1976); *Au Yi Lau v. INS*, 445 F.2d 217, 225 (D.C. Cir. 1971)).

Fourth Amendment . . . protects a much narrower class of individuals than [does] the Fifth Amendment,” which extends to “all ‘persons.’”⁴¹ The court required significant connections to the country to be included among “the people.”⁴² Another federal court said, “A nonresident alien with no substantial connection to the United States is not one of ‘the people’ protected by the *Fourth Amendment* but certainly is a ‘person’ and is therefore . . . [protected] by the *Fifth Amendment*.”⁴³

Verdugo-Urquidez also affected the interpretation of the First Amendment. In a case about the First Amendment rights of legal noncitizens, the Ninth Circuit distinguished between the Petition and Assembly Clauses, which refer to “the people,” and the Free Speech Clause, which contains “no expressed limitation” because it simply asserts that Congress shall make no law.⁴⁴ Thus, the court concluded that the First Amendment’s speech protections “at a minimum apply to all persons legally within our borders.”⁴⁵ Relatedly, after *Verdugo-Urquidez*, the government argued in multiple cases “that neither the First nor Fourth Amendment applies to undocumented persons.”⁴⁶

B. District of Columbia v. Heller and Its Application

In 2008, the Supreme Court invalidated two District of Columbia laws that severely restricted handgun possession,⁴⁷ holding that these laws violated the Second Amendment.⁴⁸ The Court held that the Second Amendment protects an individual right — unconnected to service in the militia — to possess certain weapons for self-defense.⁴⁹ The Court clarified that “longstanding prohibitions,” such as those forbidding felons from owning guns, remained “presumptively lawful.”⁵⁰

To reach its holding, the *Heller* Court — like the *Verdugo-Urquidez* Court — made five types of arguments based on text, intratextualism, origins, precedent, and purpose. *Heller* parsed the Second Amendment’s text and analyzed a variety of sources, including many from the

⁴¹ *United States v. Barona*, 56 F.3d 1087, 1093 (9th Cir. 1995).

⁴² *See id.* at 1093–94.

⁴³ *United States v. Baboolal*, No. 05-CR-215, 2006 U.S. Dist. LEXIS 40645, at *12 (E.D. Wis. June 16, 2006).

⁴⁴ *Underwager v. Channel 9 Austl.*, 69 F.3d 361, 365 (9th Cir. 1995).

⁴⁵ *Id.*

⁴⁶ Michael J. Wishnie, *Immigrants and the Right to Petition*, 78 N.Y.U. L. REV. 667, 682 (2003) (citing *Am.-Arab Anti-Discrimination Comm. v. Reno*, 70 F.3d 1045, 1056 (9th Cir. 1995), *vacated*, 525 U.S. 471 (1999); *United States v. Guitterez*, 983 F. Supp. 905, 911 (N.D. Cal. 1998), *rev’d*, 203 F.3d 833 (9th Cir. 1999)).

⁴⁷ *See* *District of Columbia v. Heller*, 128 S. Ct. 2783, 2788 (2008) (summarizing relevant provisions of the D.C. Code).

⁴⁸ *See id.* at 2821–22.

⁴⁹ *See id.* at 2797, 2821.

⁵⁰ *Id.* at 2816–17 n.26.

Founding era.⁵¹ The Court first determined that “the right of the people” refers to individuals, not to the militia; proceeding intratextually, the Court commented on the meaning of “the people” in other parts of the Constitution, noting that the phrase appears seven times.⁵² And “in all six other provisions of the Constitution that mention ‘the people,’ the term unambiguously refers to all members of the political community, not an unspecified subset.”⁵³ The Court approvingly quoted *Verdugo-Urquidez*, and approached the rest of its analysis “with a strong presumption that the Second Amendment right is exercised individually and belongs to all Americans.”⁵⁴ Next, the Court decided that to “keep and bear arms” referred to the purpose of possessing arms for self-defense.⁵⁵ It then noted that longstanding prohibitions were still presumptively constitutional, and held that Second Amendment rights inure at least to “law-abiding, responsible citizens.”⁵⁶

In dissent, Justice Stevens said that the “centerpiece” of the Court’s argument was its claim “that the words ‘the people’ . . . in the Second Amendment must have the same meaning, and protect the same class of individuals, as . . . in the First and Fourth Amendments.”⁵⁷ But he criticized the Court for in fact limiting “the people” of the Second Amendment to a “significantly narrower” group — law-abiding citizens — than those entitled to First and Fourth Amendment rights.⁵⁸

Several cases have subsequently interpreted *Heller*. In *Fletcher v. Haas*,⁵⁹ the District of Massachusetts concluded that *Heller*’s reference to “law-abiding, responsible citizens” identified a minimum class of rightsholders; it did not preclude extending Second Amendment rights to other qualified individuals.⁶⁰ Thus, the court held that two lawful permanent residents were among “the people” of the Second Amendment.⁶¹ In the vast majority of post-*Heller* cases, though, courts have

⁵¹ See Lawrence B. Solum, *District of Columbia v. Heller and Originalism*, 103 NW. U. L. REV. 923, 924–26 (2009).

⁵² *Heller*, 128 S. Ct. at 2790–91.

⁵³ *Id.* The Court seems to have been referring to the Constitution as of 1791, because one subsequent amendment also used this phrase. See U.S. CONST. amend. XVII.

⁵⁴ *Heller*, 128 S. Ct. at 2791.

⁵⁵ *Id.* at 2791–97.

⁵⁶ *Id.* at 2821; see *id.* at 2816–17 & n.26.

⁵⁷ *Id.* at 2826 (Stevens, J., dissenting).

⁵⁸ *Id.* at 2827. Two years later, the Court held that the Second Amendment codified a fundamental right, which the Court incorporated against the states. See *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3036–37 (2010). Four Justices voted to incorporate through the Fourteenth Amendment’s Due Process Clause, which applies to “any person,” U.S. CONST. amend. XIV, § 1, while one Justice voted to incorporate through that amendment’s Privileges or Immunities Clause, which applies to “citizens,” *id.* Compare *McDonald*, 130 S. Ct. at 3050 (plurality opinion), with *id.* at 3059 (Thomas, J., concurring in part and in the judgment).

⁵⁹ 851 F. Supp. 2d 287 (D. Mass. 2012).

⁶⁰ *Id.* at 297–98.

⁶¹ *Id.* at 301–02.

upheld various restrictions, including laws that prohibit certain types of guns or gun possession in sensitive places like school zones, as well as laws barring gun ownership by certain individuals, such as felons, drug addicts, and undocumented immigrants.⁶²

In one such case, *United States v. Portillo-Munoz*,⁶³ the Fifth Circuit held that Second Amendment rights do not extend to undocumented immigrants because they are not among “the people” of that amendment.⁶⁴ The court noted that *Heller* both described Second Amendment rights as inuring to “law-abiding, responsible citizens” and “all Americans,” and said that the Constitution’s other uses of “the people” referred to “all members of the political community.”⁶⁵ The court reasoned that undocumented immigrants are neither law-abiding citizens, Americans, nor members of the political community.⁶⁶ The defendant argued that he satisfied *Verdugo-Urquidez*’s “substantial connections” test since he had lived and worked in the United States for eighteen months.⁶⁷ The court replied that, “[p]rior to . . . *Heller*, the Supreme Court interpreted the meaning of the phrase ‘the people’ in the context of the Fourth Amendment and indicated that the same analysis would extend to the text of the Second Amendment.”⁶⁸ But the court did *not* evaluate the defendant’s “substantial connections” argument; in fact, whereas *Verdugo-Urquidez*’s test seems to contemplate case-by-case application, the Fifth Circuit held that a whole class of individuals is not among “the people.” The court thus implied that, after *Heller*, the *Verdugo-Urquidez* test no longer applies — at least not to the Second Amendment. Moreover, the Fifth Circuit noted in dicta that neither the Supreme Court nor the Fifth Circuit had held that the *Fourth* Amendment applies to undocumented immigrants⁶⁹ — a remark that was unnecessary for its decision and that might suggest a narrowing of the Fourth Amendment’s scope,⁷⁰ perhaps related to the court’s view of *Heller* as emphasizing citizenship for inclusion among “the people.”

⁶² See Adam Winkler, *Heller’s Catch-22*, 56 UCLA L. REV. 1551, 1565–66 & nn.76–89 (2009) (collecting cases and noting that courts often rely on *Heller*’s “laundry list,” *id.* at 1566, of permissible restrictions on the right to keep and bear arms).

⁶³ 643 F.3d 437 (5th Cir. 2011).

⁶⁴ *Id.* at 440.

⁶⁵ *Id.* (quoting *District of Columbia v. Heller*, 128 S. Ct. 2783, 2790–91, 2821 (2008)) (internal quotation mark omitted).

⁶⁶ *Id.* at 442.

⁶⁷ Initial Brief of Appellant at 7–8, *Portillo-Munoz*, 643 F.3d 437 (No. 11-10086).

⁶⁸ *Portillo-Munoz*, 643 F.3d at 440.

⁶⁹ *Id.*

⁷⁰ Prior to *Portillo-Munoz*, the Fifth Circuit had said, “Once aliens become subject to liability under United States law, they also have the right to benefit from [Fourth Amendment] protection.” *United States v. Cortes*, 588 F.2d 106, 110 (5th Cir. 1979) (citing *United States v. Cadena*, 585 F.2d 1252, 1262 (5th Cir. 1978)).

The Fifth Circuit is one of many courts to hold that undocumented immigrants lack Second Amendment rights because they are “outside the American political community.”⁷¹ For instance, one court reached this conclusion after quoting *Heller*’s political community definition of “the people” and noting that “*Heller* grouped this reference to ‘the people’ [in the Second Amendment] with others found in the Bill of Rights, specifically the First, Fourth, and Ninth Amendments.”⁷² In short, certain lower courts have taken *Heller*’s analysis of “the people” seriously and implied that this analysis might extend to other clauses.

Cases like *Portillo-Munoz* raise a disconcerting possibility: that it is plausible to interpret *Heller* as (1) redefining the meaning of “the people” by limiting it to “members of the political community,” rather than “persons” with substantial connections to the country; and (2) extending this definition to other clauses that refer to “the people.” Of course, this is not the only way to view *Heller*. *Heller*’s seemingly different definition of “the people” might have been “inadvertent” or “a colloquial allusion to a general class of persons”;⁷³ or, given that *Heller* primarily concerned the nature of Second Amendment rights, not the precise identity of Second Amendment rightsholders, one might caution against ascribing much weight to its rightsholder-related nouns.⁷⁴

Indeed, as Parts II and III argue, there are significant difficulties with interpreting *Heller* as both narrowing the scope of “the people” and extending this definition to other constitutional clauses. But this view is at least plausible, and it matters: *Heller*’s reference to the political community, if taken at face value, might mean that various groups that have had First and Fourth Amendment rights could lose them. As is explained below, if “members of the political community” is taken to mean “eligible voters” — which is not an unreasonable definition, though certainly not the only one — it could exclude minors, felons, and noncitizens (whether lawful or not) from inclusion among “the people.” Moreover, the only scholar to address the issue in depth, Professor Pratheepan Gulasekaram, wrote that *Heller* seems “intended to

⁷¹ *United States v. Guerrero-Leco*, No. 3:08cr118, 2008 WL 4534226, at *1 (W.D.N.C. Oct. 6, 2008), *vacated on other grounds*, 446 Fed. App’x. 610, 611 (4th Cir. 2011); *see also* *United States v. Flores*, 663 F.3d 1022, 1023 (8th Cir. 2011) (“[T]he protections of the Second Amendment do not extend to aliens illegally present in this country.” (citing *Portillo-Munoz*, 643 F.3d 437)); *United States v. Yanez-Vasquez*, No. 09-40056-01-SAC, 2010 WL 411112, at *2 (D. Kan. Jan. 28, 2010) (“[T]he defendant has not shown that . . . illegal aliens are among ‘the people’ contemplated by the Second Amendment.”).

⁷² *United States v. Boffil-Rivera*, No. 08-20437, 2008 U.S. Dist. LEXIS 84633, at *16 (S.D. Fla. Aug. 12, 2008).

⁷³ Gulasekaram, *supra* note 15, at 1532.

⁷⁴ *Cf.* *United States v. Huitron-Guizar*, 678 F.3d 1164, 1168 (10th Cir. 2012) (acknowledging *Heller*’s references to citizenship but declining to conclude “that the right to bear arms is categorically inapplicable to non-citizens” since *Heller* addressed “the amendment’s *raison d’être* — does it protect an individual or collective right? — and aliens were not part of the calculus”).

constrict the constitutional definition of ‘the people’’: *Verdugo-Urquidez*’s definition was “malleable” and might “includ[e] all who believe in the ideals of” this country, but *Heller*’s definition implies that “the people” are “only those with political rights — e.g., voting, public office.”⁷⁵ This Note calls this view the “strong” reading of *Heller*.

II. *HELLER*’S AMBIGUITIES

The strong reading of *Heller* presumes first, that *Heller* resolved the meaning of “the people” in the Second Amendment, and second, that this definition extends to the First and Fourth Amendment contexts. Both premises are problematic. This Part confronts the first; Part III addresses the second.

Heller contains many ambiguities, but a few are especially relevant. First, *Heller* may not definitively resolve which individuals have Second Amendment rights. It is possible (perhaps probable) that *Heller* was the first word about the Second Amendment, not the last. The question before the Court was whether the Second Amendment codified an individual or collective right, not which particular individuals possessed that right.⁷⁶ Indeed, it may have been unnecessary to evaluate the meaning of “the people” at all.⁷⁷ *Heller* reflects this posture, as its holding is capacious enough to permit future growth: “*whatever else it leaves to future evaluation*, [the Second Amendment] surely elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home.”⁷⁸

Because *Heller* did not hold that *only* law-abiding, responsible citizens have Second Amendment rights, it is possible that irresponsible citizens — or responsible noncitizens — could have such rights, too.⁷⁹ The District of Massachusetts interpreted *Heller* in this fashion, concluding that two lawful permanent residents were among “the people” of the Second Amendment.⁸⁰ If the Supreme Court agreed, it would cast significant doubt on the strong reading, which places great weight on *Heller*’s noun choices. *Heller* used several, somewhat different nouns to describe potential rightsholders under the Second Amend-

⁷⁵ Gulasekaram, *supra* note 15, at 1536; *cf.* Winkler, *supra* note 62, at 1563 n.67 (“*Heller* . . . suggested that ‘the people’ referred to in the Second Amendment should be treated the same as ‘the people’ referred to in the First and Fourth Amendments.”).

⁷⁶ See *District of Columbia v. Heller*, 552 U.S. 1035 (2007) (granting certiorari on the question of whether the District of Columbia’s laws “violate the Second Amendment rights of individuals who are not affiliated with any state-regulated militia”).

⁷⁷ The Court could have said that Dick Heller, a law-abiding citizen, presumably satisfied any plausible definition of “the people.”

⁷⁸ *District of Columbia v. Heller*, 128 S. Ct. 2783, 2821 (2008) (emphasis added).

⁷⁹ See Recent Case, 125 HARV. L. REV. 835, 838 n.49 (2012).

⁸⁰ *Fletcher v. Haas*, 851 F. Supp. 2d 287, 301–02 (D. Mass. 2012).

ment (for example, "individuals," "citizen[s]," and "Americans"⁸¹) — terms that have different implications.

Second, a related ambiguity is *Heller's* analysis of "the people." After noting that the phrase "the people" appears in six provisions of the Constitution besides the Second Amendment, the *Heller* Court said that, in each of these clauses, the phrase "unambiguously refers to all members of the political community, not an unspecified subset."⁸² The Court did not define "the political community." It is not a self-defining phrase. Possible meanings include: (1) registered voters; (2) eligible voters (irrespective of whether they are registered); (3) all citizens; (4) those who are, or expect to become, eligible to vote; (5) those who are legally entitled to contribute to political campaigns; and (6) those who are participating in U.S. government or politics. Yet each of these possible definitions faces challenging questions. Many people, including minors, felons, and noncitizens like foreign students, would not fit within several of these definitions, because they cannot vote due to age, prior criminal record, or lack of citizenship. Several definitions could therefore deny them First and Fourth Amendment rights. The "campaign contribution" definition would solve certain problems but would include corporations,⁸³ and thereby seem to sweep too broadly by including entities that cannot operate a firearm. And the final definition might simply replace one ambiguous phrase with another.

Heller's ambiguities regarding these two central points — its holding and its analysis of "the people" — are consistent with the fact that the opinion seems deliberately minimalist in several respects. *Heller* expressly declined to address many aspects of the Second Amendment, noting that the opinion did not purport to "clarify the entire field."⁸⁴ For instance, the Court neither articulated the level of scrutiny for evaluating restrictions on Second Amendment rights, nor explained what sufficed as a "longstanding" prohibition. Thus, *Heller's* general approach is consistent with its ambiguities regarding the Second Amendment's rightsholders. Given these uncertainties, the strong view accords undue weight to *Heller's* particular nouns, which also lack consistency.

III. *HELLER'S* INAPPLICABILITY TO OTHER AMENDMENTS

Even if *Heller's* exegesis of "the people" did resolve the meaning of "the people" in the Second Amendment, that exegesis need not affect the First and Fourth Amendments. *Verdugo-Urquidez* and *Heller* both

⁸¹ 128 S. Ct. at 2801.

⁸² *Id.* at 2790–91.

⁸³ *See, e.g.,* *Citizens United v. FEC*, 130 S. Ct. 876, 886 (2010).

⁸⁴ *Heller*, 128 S. Ct. at 2821.

suggest that “the people” has a consistent meaning throughout the Constitution. Though both opinions defend this point for only a sentence or two,⁸⁵ the rationale might be that (1) it is a standard principle of interpretation that “identical words and phrases within the same statute should normally be given the same meaning,” though context matters;⁸⁶ (2) this statutory presumption applies to the Bill of Rights, due to the context — these amendments were drafted, passed, and ratified at the same time, by the same individuals, and in response to the same bundle of Antifederalist fears; and (3) the original, unamended Constitution included the terms “citizen,” “person,” and “the people,”⁸⁷ so the decision to use “the people” in the Bill of Rights might suggest a desire to draw on that specific term’s meaning.

Nonetheless, this Part suggests that we should reconsider *Verdugo-Urquidez* and *Heller*’s suggestion that “the people” has a consistent meaning throughout the Constitution. As those cases demonstrate, constitutional interpretation has many sources. It starts with the text, but if the text is unclear, recourse to sources such as intratextualism, origins, precedent, and purpose is appropriate.⁸⁸ This Part thus begins with the text of “the people” and, concluding that it is not clear, proceeds to consider the different texts, origins, precedents, and purposes of the First, Second, and Fourth Amendments. It argues that, given these amendments’ many differences, the same phrase can — and should — be interpreted differently in these amendments.⁸⁹

A. Text

1. “*The People*.” — The phrase “the people” is not defined in the Constitution, nor is its meaning clear on its face. It might refer to citizens, or to all citizens and some noncitizens (such as those persons with substantial connections), or to everyone in the United States. Each of these interpretations has received at least some support from courts or individual Justices. In the infamous *Dred Scott v. Sandford*⁹⁰ decision, Chief Justice Taney wrote that “[t]he words ‘people of the United States’ and ‘citizens’ are synonymous.”⁹¹ In *Verdugo-Urquidez*, Chief Justice Rehnquist said that “the people” encompassed citizens and those noncitizens with substantial connections to this country.⁹² In dissent, Justice Brennan argued that everyone in the United States and

⁸⁵ See *id.* at 2790–91; *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990).

⁸⁶ *Powerex Corp. v. Reliant Energy Servs., Inc.*, 551 U.S. 224, 232 (2007).

⁸⁷ See *infra* notes 108–21 and accompanying text.

⁸⁸ See generally, e.g., *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819) (making textual, intratextual, historical, precedential, practical, and structural arguments).

⁸⁹ For a possible alternative that is consistent with this approach, see *infra* note 197.

⁹⁰ 60 U.S. (19 How.) 393 (1857).

⁹¹ *Id.* at 404.

⁹² See 494 U.S. 259, 265 (1990).

subject to its laws should receive constitutional protections.⁹³ Thus, while several interpretations are possible, the Court has not clearly embraced one, so this analysis turns to other accepted interpretive principles to inform the meaning — or the *meanings* — of “the people.”

2. *The First, Second, and Fourth Amendments.* — Although the First, Second, and Fourth Amendments share an important phrase, their textual contexts differ. These differences do not require treating each amendment differently, but they are one element of the argument that these amendments have so many dissimilarities that interpreting them differently is not only possible, but preferable.

Each of these three amendments has textual features that are different from the others. The Second Amendment, for instance, implicates only one right attributable to “the people,” the right “to keep and bear Arms.”⁹⁴ The First Amendment identifies two rights of “the people,” the rights “peaceably to assemble” and “to petition the Government for a redress of grievances.”⁹⁵ But the reference to these two rights is mediated by the presence of three other rights in the amendment (freedom of religion, speech, and the press), which are phrased as negative commands to the government (“Congress shall make no law . . .”) rather than affirmative grants of rights to “the people.”⁹⁶ It is textually unclear whether these three other rights affect the scope of petition and assembly rights: petition and assembly rights could be viewed as coextensive with the three other rights, or as narrower, broader, or completely distinct. Finally, the Fourth Amendment ensures “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.”⁹⁷ It is the only amendment to use “persons” after using “the people,” raising the question whether it extends to a broader class of individuals than do these other clauses.⁹⁸

Given these three amendments’ textual differences, it is not obviously correct to conclude that their shared phrase, “the people,” has a single meaning. This Part thus turns to other relevant clauses in the rest of the Constitution.⁹⁹

⁹³ *Id.* at 284 (Brennan, J., dissenting) (“[W]hen we impose . . . the obligation to comply with our criminal laws[] on foreign nationals, we in turn are obliged to respect certain correlative rights, among them the Fourth Amendment.”).

⁹⁴ U.S. CONST. amend. II.

⁹⁵ *Id.* amend. I.

⁹⁶ *Id.*

⁹⁷ *Id.* amend. IV.

⁹⁸ See Akhil Reed Amar, *Second Thoughts*, LAW & CONTEMP. PROBS., Spring 2002, at 103, 105.

⁹⁹ This section skips the debates on the Bill of Rights since they were limited, especially on these issues, and the Senate’s debates were private at the time. See Jack N. Rakove, *The Second Amendment: The Highest Stage of Originalism*, 76 CHI.-KENT L. REV. 103, 153–54 (2000).

B. Intratextualism

The next interpretive technique is “intratextualism,” which entails using other relevant portions of the same legal text to inform the meaning of a word or phrase.¹⁰⁰ As Professor Akhil Amar has demonstrated,¹⁰¹ the Supreme Court used this interpretive method (among others) in several seminal cases, including *Marbury v. Madison*,¹⁰² *Martin v. Hunter’s Lessee*,¹⁰³ *McCulloch v. Maryland*,¹⁰⁴ and *Roe v. Wade*.¹⁰⁵ *Verdugo-Urquidez* and *Heller* also used this technique.¹⁰⁶

The Constitution uses a variety of terms to describe the holders of different rights. The First, Second, and Fourth Amendments refer to “the people.” The Bill of Rights contains no references to citizens,¹⁰⁷ but a few other clauses do. One must be a citizen to be eligible for the Presidency,¹⁰⁸ the Senate,¹⁰⁹ or the House of Representatives.¹¹⁰ The Fourteenth Amendment’s Privileges or Immunities Clause also refers to citizens.¹¹¹ Certain other clauses refer to “person,” like the Fifth Amendment¹¹² and the Fourteenth Amendment’s Due Process and Equal Protection Clauses.¹¹³ Similarly, the Sixth Amendment guarantees certain rights to “the accused.”¹¹⁴ Several clauses do not identify a beneficiary, but appear to be flat prohibitions, such as the Eighth Amendment, which begins, “Excessive bail shall not be required”¹¹⁵ This variety of phrasing does not necessarily tell us what “the people” means, but it suggests that the phrase could mean something different from “citizen” and from “person,” because the Framers could have chosen to, but did not, use either of those terms.¹¹⁶

As *Heller* and *Verdugo-Urquidez* suggested, the Constitution’s other uses of “the people” might also be helpful. The original, unamended Constitution contained two such references: the Preamble and Section

¹⁰⁰ Amar, *supra* note 24, at 748.

¹⁰¹ *Id.* at 749–78.

¹⁰² 5 U.S. (1 Cranch) 137 (1803).

¹⁰³ 14 U.S. (1 Wheat.) 304 (1816).

¹⁰⁴ 17 U.S. (4 Wheat.) 316 (1819).

¹⁰⁵ 410 U.S. 113 (1973).

¹⁰⁶ See *supra* notes 25–26, 52–53 and accompanying text.

¹⁰⁷ See T. Alexander Aleinikoff, *Citizens, Aliens, Membership and the Constitution*, 7 CONST. COMMENT. 9, 21 (1990) (“The Bill of Rights seems to consciously avoid using . . . ‘citizen.’”).

¹⁰⁸ See U.S. CONST. art. II, § 1, cl. 5.

¹⁰⁹ See *id.* art. I, § 3, cl. 3.

¹¹⁰ See *id.* art. I, § 2, cl. 2.

¹¹¹ See *id.* amend. XIV, § 1.

¹¹² *Id.* amend. V.

¹¹³ *Id.* amend. XIV, § 1.

¹¹⁴ *Id.* amend. VI.

¹¹⁵ *Id.* amend. VIII.

¹¹⁶ Cf. Gulasekaram, *supra* note 15, at 1533 (noting that the Constitution presumably uses the terms “citizens,” “persons,” and “people,” “for distinct, although not precisely defined, purposes”).

2 of Article I. The Preamble's first words, "We the People of the United States,"¹¹⁷ might refer to citizens¹¹⁸ and might suggest that other references to "the people" point to citizens. Yet the shorter phrase "the people," in the amendments, might mean something different since it lacks the possessive phrase "of the United States."¹¹⁹

Next, Section 2 of Article I states that the House of Representatives shall be chosen by "the People of the several States," and the voters are those individuals who satisfy the qualifications "for Electors of the most numerous Branch of the State Legislature."¹²⁰ This usage of "the people" is a delegation to the states: "The requirements . . . that voters must satisfy are to be determined by the state[s]."¹²¹ In practice, this clause admitted various meanings; at the Founding, women could vote in New Jersey but in no other state, only some free black citizens could vote, and slaves could not vote at all.¹²² Thus, for this clause, "the people" largely meant property-owning white adult males, at least initially. The Preamble and Article I's different usages of "the people" suggest that the phrase was used differently in different clauses; in fact, the same clause meant different things in different states.

This fact is not necessarily surprising. First, the *Heller* Court said that the same term can have different meanings in different parts of the Constitution: "[T]he word 'state' did not have a single meaning in the Constitution."¹²³ Second, reading "the people" on an amendment-by-amendment basis may be more faithful to Supreme Court practice. The Court has adopted a case-by-case approach in related areas, holding that noncitizens are entitled to certain constitutional guarantees within the United States;¹²⁴ that citizens are entitled to certain constitutional guarantees outside the United States;¹²⁵ and that the Constitution's guarantees apply differently in the United States territories (for instance, Guam or pre-1959 Hawaii), depending on whether a territory

¹¹⁷ U.S. CONST. pmb.

¹¹⁸ See AKHIL REED AMAR & ALAN HIRSCH, FOR THE PEOPLE, at xv (1998).

¹¹⁹ Cf. *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 334 (1816) (noting that Article III says the judicial power extends to "all cases" and "controversies," not *all* controversies, and that "[f]rom this difference of phraseology, perhaps, a difference of constitutional intention may, with propriety, be inferred. It is hardly to be presumed that the variation . . . could have been accidental.").

¹²⁰ U.S. CONST. art. I, § 2, cl. 1.

¹²¹ SETH LIPSKY, THE CITIZEN'S CONSTITUTION 5 (2009).

¹²² *Id.*

¹²³ 128 S. Ct. 2783, 2800 (2008); see also 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 208, at 193 (Boston, Hilliard, Gray & Co. 1833) ("[T]he word 'state' is used in various senses.").

¹²⁴ See Linda S. Bosniak, *Membership, Equality, and the Difference that Alienage Makes*, 69 N.Y.U. L. REV. 1047, 1060–61 (1994) (stating that all immigrants have Fourth, Fifth, Sixth, and Eighth Amendment rights in criminal proceedings).

¹²⁵ See *Reid v. Covert*, 354 U.S. 1 (1957) (holding that certain constitutional rights, such as Fifth and Sixth Amendment protections, could follow citizens extraterritorially for capital cases).

is “surely destined” to become a state.¹²⁶ Furthermore, notwithstanding repeated calls by Justice Black for “total incorporation” of the Bill of Rights,¹²⁷ the Court has consistently adhered to its practice of “selective incorporation,” whereby it proceeds one amendment at a time¹²⁸ — or even one part of one amendment at a time.¹²⁹ Analogies to related aspects of constitutional interpretation thus show a tendency to consider each amendment a separate sphere.

Several scholars support this premise as well. Professor Jack Rakove notes that textualists claim that “the word *people* has the same meaning” in the First, Second, Fourth, Ninth, and Tenth Amendments; but “[t]his assumption, though not unreasonable, is itself an arbitrary one.”¹³⁰ The phrase “the people” may “ha[ve] different valences in different provisions of the Bill of Rights.”¹³¹ Another scholar criticizes *Heller*’s analysis of “the people,” arguing that “the phrase is used differently in different parts of the Constitution.”¹³² Professors Adrian Vermeule and Ernest Young argue that the Constitution generally has a “patchwork character,”¹³³ lacks overarching coherence, and “protect[s] divergent values” in different clauses.¹³⁴ They note that intratextualism is based on the principle of statutory interpretation that “identical words used in different parts of the same act are intended to have the same meaning,”¹³⁵ but that this presumption “readily yields whenever variations in context or other sources of meaning suggest that the identical terms were . . . used with different intent.”¹³⁶ Thus, they emphasize the importance of context, history, precedent, purpose, and practice — the traditional interpretive tools that Amar

¹²⁶ *Boumediene v. Bush*, 128 S. Ct. 2229, 2254 (2008) (describing how, under the doctrine of territorial incorporation, “the Constitution applies in full in incorporated Territories surely destined for statehood but only in part in unincorporated Territories”); see also *The Insular Cases* (for example, *De Lima v. Bidwell*, 182 U.S. 1 (1901); *Dooley v. United States*, 182 U.S. 222 (1901); *Armstrong v. United States*, 182 U.S. 243 (1901); *Downes v. Bidwell*, 182 U.S. 244 (1901)).

¹²⁷ See, e.g., *Duncan v. Louisiana*, 391 U.S. 145, 163 (1968) (Black, J., concurring) (“[T]he Fourteenth Amendment made all of the provisions of the Bill of Rights applicable to the States.”).

¹²⁸ See, e.g., *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010) (Second Amendment).

¹²⁹ Various protections of the Sixth Amendment, for instance, were individually incorporated: the right to a speedy trial, *Klopfer v. North Carolina*, 386 U.S. 213 (1967); the right to a public trial, *In re Oliver*, 333 U.S. 257 (1948); the right to a jury trial, *Duncan*, 391 U.S. 145; the right to confront opposing witnesses, *Pointer v. Texas*, 380 U.S. 400 (1965); and the right to counsel, *Gideon v. Wainwright*, 372 U.S. 335 (1963).

¹³⁰ Rakove, *supra* note 99, at 113.

¹³¹ *Id.* at 119 n.38.

¹³² George A. Nation III, *The New Constitutional Right to Guns: Exploring the Illegitimate Birth and Acceptable Limitations of This New Right*, 40 RUTGERS L.J. 353, 370 (2009).

¹³³ Adrian Vermeule & Ernest A. Young, *Hercules, Herbert, and Amar: The Trouble with Intratextualism*, 113 HARV. L. REV. 730, 732 (2000).

¹³⁴ *Id.* at 749.

¹³⁵ *Id.* at 734 (quoting *Sullivan v. Strop*, 496 U.S. 478, 484 (1990)).

¹³⁶ *Id.* (quoting *Atl. Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 433 (1932)) (internal quotation mark omitted).

also endorses.¹³⁷ The place to turn, then, is the context of the amendments at issue in this Note, especially because *Heller* and *Verdugo-Urquidez* embraced this multifaceted approach.

C. Origins, Precedents, and Purposes

This section argues that the Second Amendment is highly dissimilar from the First and Fourth Amendments, even though all three were written at the same time and responded to the same cluster of Antifederalist concerns. This section will also point out where the rightsholders differ among the amendments. Since all three amendments codified preexisting rights, their origins and history are significant.

1. *The Second Amendment: Origins and Precedent.* — At the time of the Founding, the right to bear arms was limited to certain adult male citizens and those individuals who swore allegiance to the state.¹³⁸ The constitutional right to bear arms was initially “considered congruent to voting, holding public office, or serving on juries — rights associated with each other and denied even to many citizens.”¹³⁹ The Founding generation had a “racialized, gendered, and class-stratified understanding of persons permitted to own guns.”¹⁴⁰ This generation also disarmed certain white males, including felons¹⁴¹ and British loyalists.¹⁴² Consistent with this account, various Founding-era sources refer to arms-bearing as a *citizen’s* right. Examples include the first Militia Act;¹⁴³ James Madison’s description in the *Federalist Papers* of the “militia amounting to near half a million of citizens with arms in their hands”;¹⁴⁴ and several early state constitutions that guaranteed the right to bear arms to “the citizens” or “every citizen,” but none of which granted this right to “all persons,” “any individual,” or

¹³⁷ See *id.* at 748 (“[C]onstitutional interpreters do not follow a single approach to constitutional interpretation that applies across the various parts of the Constitution.”); Amar, *supra* note 24, at 748 (discussing established approaches to constitutional interpretation and calling intratextualism “another rich technique of constitutional interpretation”).

¹³⁸ Saul Cornell & Nathan DeDino, *A Well Regulated Right: The Early American Origins of Gun Control*, 73 *FORDHAM L. REV.* 487, 506–07 (2004) (compiling revolutionary-era statutes that provided for confiscating weapons from those individuals who refused to swear allegiance to the state or to the United States); see also Don B. Kates, Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 *MICH. L. REV.* 204, 217 n.54 (1983) (noting that, to the Founders, the common law right to keep and bear arms did not extend to certain people “because of perceived unfitness, untrustworthiness or alienage”).

¹³⁹ Gulasekaram, *supra* note 15, at 1547.

¹⁴⁰ *Id.* at 1546–47.

¹⁴¹ See Kates, *supra* note 138, at 266.

¹⁴² See Gulasekaram, *supra* note 15, at 1545.

¹⁴³ Act of May 8, 1792, ch. 33, 1 Stat. 271 (making eligible for the militia “each and every free able-bodied white male citizen of the respective states” between eighteen and forty-five years old, and requiring each to “provide himself” with a firearm, *id.* ch. 33, § 1, 1 Stat. at 271).

¹⁴⁴ *THE FEDERALIST NO.* 46, at 296 (James Madison) (Clinton Rossiter ed., 2003).

an analogous phrase.¹⁴⁵ Similarly, scholars emphasize the Second Amendment's thrust as ensuring "an armed citizenry,"¹⁴⁶ "the armed citizenry,"¹⁴⁷ or "a well-armed citizenry."¹⁴⁸

Subsequent history supports this view. Pre-Civil War state court cases support the connection between gun rights and citizenship: Michigan's Supreme Court said in 1829 that the federal Constitution grants "the citizen the right to keep and bear arms,"¹⁴⁹ and the Tennessee Supreme Court stated in 1840 that "[t]he citizens have the unqualified right to keep the weapon."¹⁵⁰ After the Civil War, the Freedmen's Bureau Act¹⁵¹ granted "all the citizens," irrespective of race, several rights including the "right to bear arms."¹⁵² Today, thirty-five states give citizens or "the people" the right to bear arms, whereas only nine grant "all persons" or a comparable group this right.¹⁵³ And the same modern statute that prohibits firearm possession by unlawful aliens also bars possession by those individuals who renounce their citizenship.¹⁵⁴

2. *The First Amendment: Origins and Precedent.* — The First Amendment was not so limited. Several scholars have written about the First Amendment's Petition Clause, which this Note will examine as a proxy for both petition and assembly rights.¹⁵⁵ In the Founding era, petitioning was nearly "an absolute right"¹⁵⁶ that everyone enjoyed: this right "was exercised by noncitizens, including immigrants, Native Americans, and slaves, as well as by other marginalized members of the polity, such as women, Jews, and free blacks."¹⁵⁷ The same First Congress that passed the Bill of Rights established rules for receipt of petitions, and they "contained no . . . limitations on the capaci-

¹⁴⁵ See Eugene Volokh, *State Constitutional Rights to Keep and Bear Arms*, 11 TEX. REV. L. & POL. 191, 193–204 (2006) (citing PA. CONST. art. I, § 21 (1790); KY. CONST. art. XII, cl. 23 (1792); MISS. CONST. art. I, § 23 (1817); CONN. CONST. art. I, § 15 (1818); ALA. CONST. art. I, § 27 (1819); ME. CONST. art. I, § 16 (1819)).

¹⁴⁶ Mathew S. Nosanchuk, *The Embarrassing Interpretation of the Second Amendment*, 29 N. KY. L. REV. 705, 717 (2002).

¹⁴⁷ Amar, *supra* note 98, at 111.

¹⁴⁸ Rakove, *supra* note 99, at 165.

¹⁴⁹ *United States v. Sheldon*, available in 5 TRANSACTIONS OF THE SUPREME COURT OF THE TERRITORY OF MICHIGAN 337, 346 (W. Blume ed., 1940).

¹⁵⁰ *Aymette v. State*, 21 Tenn. (2 Hum.) 154, 160 (1840).

¹⁵¹ Act of July 16, 1866, ch. 200, 14 Stat. 173.

¹⁵² *Id.* ch. 200, § 14, 14 Stat. at 176.

¹⁵³ See Volokh, *supra* note 145, at 193–204.

¹⁵⁴ See 18 U.S.C. § 922(g)(5) (2006) (prohibiting firearm possession by unlawful aliens); *id.* § 922(g)(7) (prohibiting firearm possession by anyone who "renounced his [U.S.] citizenship").

¹⁵⁵ A leading scholar characterizes the right of assembly as including "the meeting together of a group of people for action or for communication of ideas." M. GLENN ABERNATHY, *THE RIGHT OF ASSEMBLY AND ASSOCIATION* 4 (2d ed. 1981).

¹⁵⁶ Norman B. Smith, "Shall Make No Law Abridging . . .": *An Analysis of the Neglected, but Nearly Absolute, Right of Petition*, 54 U. CIN. L. REV. 1153, 1182 (1986).

¹⁵⁷ Wishnie, *supra* note 46, at 684; see also Gregory A. Mark, *The Vestigial Constitution: The History and Significance of the Right to Petition*, 66 FORDHAM L. REV. 2153, 2182 (1998).

ty of noncitizens to petition."¹⁵⁸ In fact, noncitizens successfully petitioned the first few Congresses — sometimes with the support of national leaders and constitutional Framers such as George Washington, James Madison, Alexander Hamilton, and Rufus King.¹⁵⁹ The First Congress enacted several private bills in response to petitions, and the first private bill in our history responded to a noncitizen's petition.¹⁶⁰ This history is consistent with the English and colonial rights of petition, which extended to all persons irrespective of citizenship.¹⁶¹

The relative importance of petitioning has waned over time, but it remains relevant and there has been subsequent interpretation of this right. In one line of cases, the Supreme Court determined that *corporations* possess the constitutional right to petition, and hence are immune from liability when they support laws that would have anticompetitive effects.¹⁶² It is long established that corporations are "legal persons" for certain purposes; but it would seem to be another matter to say that they are among "the people," since the Supreme Court has indicated that "persons" refers to a broader class of individuals than does "the people."¹⁶³ This inclusive interpretation of the Petition Clause suggests that "the people" was interpreted broadly for this clause, or perhaps it was not interpreted at all. In another case, *Thomas v. Collins*,¹⁶⁴ the Court said that the rights to free speech and press were deliberately "coupled in a single guaranty with the rights of the people peaceably to assemble and to petition for redress of grievances. All these, though not identical, are *inseparable*. They are cognate rights, and therefore are united."¹⁶⁵ To the extent that the First Amendment's many rights are connected, a brief review of speech rights may be informative.

The First Amendment's speech protections extend broadly, not only to adult citizens and corporations,¹⁶⁶ but also to children, felons, and noncitizens. With respect to children, the Supreme Court has said that

¹⁵⁸ Wishnie, *supra* note 46, at 698.

¹⁵⁹ *See id.* at 701–12.

¹⁶⁰ *Id.* at 700.

¹⁶¹ *See id.* at 685, 688. To be sure, the fact that noncitizens and second-class citizens *exercised* petition rights in the Founding era does not necessarily mean that these individuals had a *constitutional* right to do so; many rights are not constitutional in nature. But it at least suggests that the Framers may have contemplated an expansive, non-citizenship-based definition of "the people" for First Amendment purposes.

¹⁶² *See* *United Mine Workers of Am. v. Pennington*, 381 U.S. 657, 670 (1965); *E. R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 135 (1961).

¹⁶³ *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990) ("Th[e] Fourth Amendment's] text, by contrast with the Fifth and Sixth Amendments, extends its reach only to 'the people.'").

¹⁶⁴ 323 U.S. 516 (1945).

¹⁶⁵ *Id.* at 530 (emphasis added) (citations omitted).

¹⁶⁶ *See* *Citizens United v. FEC*, 130 S. Ct. 876, 913 (2010) ("No sufficient governmental interest justifies limits on the political speech of nonprofit or for-profit corporations.").

“neither the Fourteenth Amendment nor the Bill of Rights is for adults alone.”¹⁶⁷ Minors possess First Amendment rights,¹⁶⁸ though “[t]heir First Amendment speech rights are considerably foreshortened” compared to those rights of adults.¹⁶⁹ Once they have served their time, felons also have First Amendment protections,¹⁷⁰ and courts have presumed that they have association rights as well.¹⁷¹ The contours of noncitizens’ First Amendment rights are complex, but at a minimum, certain noncitizens have speech rights in certain contexts. Once noncitizens enter the country lawfully, their speech rights appear to be nearly coextensive with those rights of citizens.¹⁷² This longstanding right is consistent with the fact that noncitizens have many constitutional rights, including the protections of the Fifth, Sixth, and Eighth Amendments;¹⁷³ the Fourteenth Amendment’s Due Process¹⁷⁴ and Equal Protection Clauses;¹⁷⁵ and arguably the Fourth Amendment in criminal cases.¹⁷⁶ However, when Congress legislates on immigration-related matters of admission, exclusion, and deportation, the Supreme Court has displayed great deference; thus, Congress can exclude noncitizens for speech that the Constitution would protect for citizens, like membership in a political party.¹⁷⁷

3. *The Fourth Amendment: Origins and Precedent.* — The Fourth Amendment codified several premises that emerged during the colonial era.¹⁷⁸ One such premise is that “A man’s home is his castle,”¹⁷⁹ while another is that law enforcement officials cannot obtain “general war-

¹⁶⁷ *In re Gault*, 387 U.S. 1, 13 (1967).

¹⁶⁸ See, e.g., *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 514 (1969) (holding that, under the First Amendment, public schools could not forbid students from wearing arm-bands to demonstrate opposition to the Vietnam War).

¹⁶⁹ Note, *Children as Believers: Minors’ Free Exercise Rights and the Psychology of Religious Development*, 115 HARV. L. REV. 2205, 2206 & n.8 (2002) (“[T]he First Amendment rights of students in the public schools ‘are not automatically coextensive with the rights of adults in other settings.’” *Id.* at 2206 n.8 (quoting *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266 (1988)).

¹⁷⁰ See *Amar*, *supra* note 98, at 107. But see *United States v. Schave*, 186 F.3d 839, 844 (7th Cir. 1999) (holding it constitutional to condition the defendant’s release on his not associating with organizations espousing violence).

¹⁷¹ *United States v. Ritter*, 118 F.3d 502, 504–05 (6th Cir. 1997).

¹⁷² See *Bridges v. Wixon*, 326 U.S. 135, 148 (1945) (“Freedom of speech and of press is accorded aliens residing in this country.” (citing *Bridges v. California*, 314 U.S. 252 (1941))).

¹⁷³ See *Wong Wing v. United States*, 163 U.S. 228, 238 (1896) (Fifth and Sixth Amendments).

¹⁷⁴ See, e.g., *id.*; *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886).

¹⁷⁵ See, e.g., *Plyler v. Doe*, 457 U.S. 202, 230 (1982) (holding that Texas violated the Equal Protection Clause by denying undocumented children the free public school education that it provided children who were citizens or legal noncitizens).

¹⁷⁶ See *Bosniak*, *supra* note 124, at 1060–61.

¹⁷⁷ See *Kleindienst v. Mandel*, 408 U.S. 753, 762 (1972) (upholding the U.S. Attorney General’s right to refuse entry into the United States to a Belgian Marxist, pursuant to the Immigration and Nationality Act of 1952).

¹⁷⁸ See generally WILLIAM J. CUDDIHY, *THE FOURTH AMENDMENT* (2009).

¹⁷⁹ See *id.* at lix.

rants."¹⁸⁰ In terms of drafting history, James Madison — the amendment's original drafter — examined various proposals and rejected one that would have limited the amendment's reach to "citizens."¹⁸¹

Subsequent interpretation has generally supported this view. The landmark case *Bivens v. Six Unknown Named Agents*¹⁸² featured several opinions, all of which articulated an individualistic (that is, person-based, not citizen-based) view of the Fourth Amendment: the majority said that the Fourth Amendment "limit[s] the exercise of federal power";¹⁸³ the concurrence said that the Fourth Amendment protects "personal interests" like privacy, and prevents officials from "invad[ing] protected zones of an individual's life";¹⁸⁴ and the dissent said that the Fourth Amendment protects "a suspect" and an "aggrieved person."¹⁸⁵ In 1984, the Court assumed without deciding that "the Fourth Amendment applied to illegal aliens in the United States."¹⁸⁶ Several lower courts held that the Fourth Amendment protected "citizen and alien alike."¹⁸⁷ The Supreme Court clarified that, in the deportation context, the Fourth Amendment need not apply¹⁸⁸ — a holding consistent with deference to Congress on immigration-related questions. But until 1990, it was assumed that the Fourth Amendment applied territorially, at least outside the deportation context.

Verdugo-Urquidez chipped away at that assumption to some extent, but the opinion may lack the force of most precedents. First, Justice Kennedy provided the crucial fifth vote but disagreed over the importance of "the people."¹⁸⁹ Second, as the case involved the search of a Mexican citizen's home *in Mexico*, it may not have required any evaluation of "the people" at all.¹⁹⁰ Third, the opinion clarified that this Mexican citizen's situation might "differ[] from" that of undocu-

¹⁸⁰ See *id.* at 537–698.

¹⁸¹ See *id.* at 672 (noting that a leading Antifederalist, the "Federal Farmer," modeled his proposed amendment after the Massachusetts Constitution of 1780, which protected citizens, but that Madison's proposal used "the people," *id.* at 692).

¹⁸² 403 U.S. 388 (1971).

¹⁸³ *Id.* at 392.

¹⁸⁴ *Id.* at 408 (Harlan, J., concurring in the judgment).

¹⁸⁵ *Id.* at 430 (Blackmun, J., dissenting).

¹⁸⁶ *United States v. Verdugo-Urquidez*, 494 U.S. 259, 272 (1990) (describing *INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984)).

¹⁸⁷ *United States v. Cruz*, 581 F.2d 535, 537 (5th Cir. 1978) (en banc) (holding that the Fourth Amendment "affords citizen and alien alike protection against illegal stops, searches, and arrests"), *overruled on other grounds by* *United States v. Causey*, 834 F.2d 1179, 1184–85 (5th Cir. 1987) (en banc); see also *Benitez-Mendez v. INS*, 760 F.2d 907, 910 (9th Cir. 1985) (finding, *inter alia*, that an undocumented immigrant's "arrest violated the Fourth Amendment").

¹⁸⁸ See *Lopez-Mendoza*, 468 U.S. at 1042–43.

¹⁸⁹ See *supra* notes 31–32 and accompanying text.

¹⁹⁰ See *Verdugo-Urquidez*, 494 U.S. at 275–78 (Kennedy, J., concurring).

mented immigrants.¹⁹¹ And fourth, the case's gruesome facts may be relevant.

4. *The Nature and Purposes of the First, Second, and Fourth Amendments.* — Although these amendments serve many purposes, their purposes differ in potentially important ways. *Heller* states that the Second Amendment is, at its core, about self-defense — the right of one individual (citizen?) to defend himself against others. This right concerns individuals' relationships with one another, not with the state. The collective right interpretation that *Heller* rejected would have concerned the relationship between the people and the state.

By contrast, the First and Fourth Amendments concern the individual's relationship with the state. Petition and assembly rights are about the ability to express oneself, inform the government about the operation of its policies, and influence its future policies.¹⁹² The right to communicate with policymakers is especially critical for those who lack voting rights, as it may be their sole method of influencing policy.¹⁹³ Similarly, the Fourth Amendment concerns the relationship between individuals and the state; when, for instance, can law enforcement officials enter your home or search your body? While the Fourth Amendment restrains government conduct, the Second Amendment is an affirmative right for individuals. In addition to possessing different purposes, these amendments seek to affect different actors' conduct.

Finally, there are strikingly different consequences for the misuse of the rights protected by these amendments. Words can be damaging, but guns are *sui generis*, a point that recent tragedies have made painfully clear.¹⁹⁴ Unlike guns, words or searches cannot be misused by criminals or accidentally used by children. These types of practical issues are entirely legitimate to consider, as Chief Justice Marshall demonstrated in *McCulloch v. Maryland*.¹⁹⁵ Indeed, the *Heller* majority and dissents all considered safety-related consequences.¹⁹⁶

In light of these amendments' different texts, origins, precedents, purposes, and consequences, it is logical to consider different defini-

¹⁹¹ *Id.* at 273 (majority opinion).

¹⁹² See Smith, *supra* note 156, at 1178–79.

¹⁹³ Cf. Jessica S. Horrocks, Note, *Campaigns, Contributions, and Citizenship: The First Amendment Right of Resident Aliens to Finance Federal Elections*, 38 B.C. L. REV. 771, 804 (1997) (arguing that resident aliens should be allowed to make political donations).

¹⁹⁴ See, e.g., Dan Frosch & Kirk Johnson, *Gunman Kills 12 at Colorado Theater; Scores Are Wounded, Reviving Debate*, N.Y. TIMES, July 20, 2012, at A1.

¹⁹⁵ 17 U.S. (4 Wheat.) 316, 402 (1819) (upholding the constitutionality of the second national bank, after reasoning in part that the government endured “embarrassments” after the first national bank’s charter expired and was not renewed, which demonstrated the bank’s “necessity”).

¹⁹⁶ See, e.g., 128 S. Ct. 2783, 2822 (2008) (noting that handguns are used for “self-defense in the home”); *id.* at 2845 n.38 (Stevens, J., dissenting) (noting that the D.C. legislature sought to prevent “gun-related deaths” through the provisions at issue); *id.* at 2857 (Breyer, J., dissenting) (citing statistics on “gun-related death, injury, and crime”).

tions of "the people" in each amendment. This approach would be consistent with the Court's and scholars' emphasis on context, and with the Court's tendency to view amendments as separate spheres.¹⁹⁷

IV. CONCLUSION

This Note has argued that *Heller's* exegesis of "the people" is in tension with *Verdugo-Urquidez's* analysis, but that courts should not adopt the strong reading of *Heller*, which could significantly affect the scope of the First and Fourth Amendments. *Heller* has important Second Amendment-related ambiguities, from its holding to its unclear key terms. And its analysis of "the people" is at odds with the First and Fourth Amendments' texts, origins, precedents, and purposes. All members of society exercised the right to petition before and after the Founding era. The Fourth Amendment was presumed to apply to all persons in the country for 200 years, and *Verdugo-Urquidez's* analysis is more consistent with this logical interpretation than is *Heller's*.

This Note closes with two final arguments, one based on practice, the other on principle. In practice, *Heller* and *Verdugo-Urquidez's* suggestions that "the people" has the same meaning across the Bill of Rights may promote consistency, but likely at the cost of clarity.¹⁹⁸ A court facing a Second Amendment question, for instance, could unsettle First or Fourth Amendment doctrines that seemed settled — without a First or Fourth Amendment dispute. And subsequent changes in the nascent Second Amendment doctrine could cause more uncertainty.

Finally, in principle, the groups that *Heller's* analysis of "the people" potentially excludes — minors, felons, and noncitizens — are groups that lack political power. They cannot vote, they likely lack the finances to influence policy, and they may lack facility with English. Because these groups cannot represent themselves as effectively as others, we should be especially careful before potentially depriving them of central rights.¹⁹⁹ And these rights — which include expression, association, and privacy — are fundamental to democracy, liberty, and basic decency. These ideas have been part of the American creed since the Founding. Thus, while it may be possible to view *Heller* as a commentary on the meaning of "the people" in the First and Fourth Amendments, this interpretation is at odds with the Court's precedents, the Constitution's purposes, and this country's principles.

¹⁹⁷ An alternative that is consistent with this approach is to have a single, broad definition of "the people," but to permit amendment-specific restrictions, such that in practice, those individuals who ultimately exercise Second Amendment rights would likely differ from those individuals with First or Fourth Amendment rights.

¹⁹⁸ See Vermeule & Young, *supra* note 133, at 732 (arguing that, compared to clause-by-clause interpretation, "intratextualism may well . . . destabilize interpretive practice").

¹⁹⁹ See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).