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**Vol. 4 No. 2, Spring 2013; The Error in Finding that Undocumented Persons are Not “The People”: A Deeper Look at the Implications of United States v. Portillo-Munoz**

Dorota Gibala

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The Error in Finding that Undocumented  
Persons are Not “The People”: A Deeper  
Look at the Implications of *United States v.*  
*Portillo-Munoz*

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I. INTRODUCTION

[I]t does not follow, because aliens are not parties to the Constitution, as citizens are parties to it, that, whilst they actually conform to it, they have no right to its protection. Aliens are no more parties to the laws than they are parties to the Constitution; yet it will not be disputed that, as they owe, on one hand, a temporary obedience, they are entitled, in return, to their protection and advantage.

– James Madison<sup>1</sup>

The debate over what constitutional rights, if any, aliens retain while in the United States is one that seems to have been raging since the founding of the nation itself and is still very much in debate. The word “citizen,” however, is almost tellingly nowhere defined in the U.S. Constitution, and the Preamble articulates, “We the People of the United States” not, “We the

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1. JAMES MADISON, REPORT ON THE VIRGINIA RESOLUTIONS (1800), *reprinted in* 4 ELLIOT’S DEBATES 556 (2d ed. 1836).

Citizens of the United States.”<sup>2</sup> This, on the other hand, leads us to a question with seemingly no definite or agreed-upon answer: who exactly are “the people”? More specifically, do undocumented persons qualify as part of “the people”?

In the summer of 2011, the Fifth Circuit held in *United States v. Portillo-Munoz* that undocumented persons are not entitled to the protections of the Second Amendment to the Constitution.<sup>3</sup> Although part of the court’s reasoning was based on 18 U.S.C. § 922(g)(5),<sup>4</sup> its decision also turned on the belief that the meaning of the phrase “the people” in the Second Amendment<sup>5</sup> did not encompass undocumented persons.<sup>6</sup> The *Portillo-Munoz* court relied, in part, on the language of the Supreme Court in *District of Columbia v. Heller*,<sup>7</sup> which found that the phrase “the people” in the Second Amendment “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.”<sup>8</sup> The *Portillo-Munoz* court, however, diverged with the Supreme Court in that it held that the Second Amendment is an affirmative right granted to one by the government,<sup>9</sup> whereas the Supreme Court held that the Second Amendment, like the First and Fourth,<sup>10</sup> codifies a pre-existing, individual right.<sup>11</sup> How could

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2. See ALEXANDER M. BICKEL, *THE MORALITY OF CONSENT* 36 (1975):  
The Preamble speaks of ‘We the [P]eople of the United States,’ not, as it might have, of we the citizens of the United States at the time of the formation of this union. And the Bill of Rights throughout defines the rights of people, not of citizens. In the First Amendment, it is ‘the right of the people peaceably to assemble,’ in the Second, ‘the right of the people to keep and bear arms,’ whatever that might mean. And so on. No wonder, then, that citizenship was nowhere defined in the constitution.

*Id.*

3. *United States v. Portillo-Munoz*, 643 F.3d 437 (5th Cir. 2011).  
4. 18 U.S.C. § 922(g)(5) (stating that it is unlawful for any person illegally or unlawfully in the United States to possess any firearm or ammunition).  
5. U.S. CONST. amend. II (“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.” (emphasis added)).  
6. *Portillo-Munoz*, 643 F.3d at 442.  
7. *District of Columbia v. Heller*, 554 U.S. 570 (2008).  
8. *Id.* at 580 (quoting *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990)).  
9. *Portillo-Munoz*, 643 F.3d at 441.  
10. U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of *the people* peaceably to assemble, and to petition the Government for a redress of grievances.” (emphasis added)); U.S. CONST. amend. IV (“The right of *the people* to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”) (emphasis added)).

a pre-existing, individual right not dependent upon the Constitution for its guarantee be restricted to only citizens?

This Note argues that *Portillo-Munoz*'s reading of the Second Amendment's interpretation of "the people," as implying that "the people" exclusively encompasses only citizens, is erroneous with how the phrase "the people" is similarly situated in the Fourth Amendment. As set out in *Heller*, the two amendments have been tied together in purpose as asserting a basic right of persons against governmental intrusion.<sup>12</sup> In the same vein, contrary to what the *Portillo-Munoz* court asserts, undocumented persons have been held to retain certain Fourth Amendment rights, thus, by implication, to be included in "the people" therein.<sup>13</sup> Thus, the Second Amendment's reading of "the people" should logically extend to undocumented persons.

Before embarking on the argument that the meaning of "the people" in the Second Amendment is similar to the meaning of "the people" in the Fourth Amendment, this Note will provide an overview of the *Portillo-Munoz* case. An overview of the dissenting opinion of Circuit Judge Dennis in that case is then provided since this Note essentially sides with the dissent.

Other background information necessarily concerns the *Heller* case. This is not only important because of the *Portillo-Munoz* court's reliance on this case to disqualify undocumented persons from "the people" under the Second Amendment but also, as mentioned above, because of the Supreme Court's affirmation that the Second Amendment, like the Fourth Amendment, is an individual, pre-existing right.<sup>14</sup>

Also made clear is that Congress has plenary power over immigration law as per the Constitution.<sup>15</sup> As Circuit Judge Dennis argued in his dissenting opinion, "whether 18 U.S.C. § 922(g)(5) violates the Second Amendment is a separate question from whether *Portillo-Munoz* is part of 'the people' who have . . . Second[] and Fourth Amendment rights."<sup>16</sup> This Note does not argue the constitutionality of 18 U.S.C. § 922(g)(5) but, instead,

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11. *Heller*, 554 U.S. at 591.

12. *Id.*

13. See *Lopez-Rodriguez v. Mukasey*, 536 F.3d 1012 (9th Cir. 2008); see also *Martinez-Aguero v. Gonzalez*, 459 F.3d 618 (5th Cir. 2006); *Gonzalez-Rivera v. INS*, 22 F.3d 1441 (9th Cir. 1994); *Orhorhaghe v. INS*, 38 F.3d 488 (9th Cir. 1994); *United States v. Juarez-Torres*, 441 F. Supp. 2d 1108 (D.N.M. 2006).

14. *Heller*, 554 U.S. at 591.

15. Congress has power to regulate immigration laws as per the Commerce Clause, the Naturalization Clause, the Migration and Importation Clause, and the War Power, U.S. CONST. art. I, § 8, cl. 3; U.S. CONST. art. I, § 8, cl. 4; U.S. CONST. art. I, § 9, cl. 1; U.S. CONST. art. I, § 8, cl. 11.

16. *United States v. Portillo-Munoz*, 643 F.3d 437, 443 (5th Cir. 2011).

argues against the imprecision of finding that undocumented persons are not part of “the people” in the Second Amendment.

After providing this background information, the central argument is set forth. In making the case that undocumented persons retain constitutional rights, this Note first asserts that the Fourteenth Amendment’s language of “person” encompasses undocumented persons.<sup>17</sup> In laying out case law verifying this assertion, particular focus is put on the Supreme Court decision of *Plyler v. Doe*, which addresses the “personhood” of undocumented persons under the Equal Protection Clause.<sup>18</sup>

After establishing that undocumented persons already have recognized rights under the Constitution via the Fourteenth Amendment, the Fourth Amendment’s applicability to the undocumented person is argued. The *Portillo-Munoz* court asserted that there is no “precedent for the proposition that illegal aliens generally are covered by the Fourth Amendment.”<sup>19</sup> This pronouncement, however, is at odds with cases such as *United States of America v. Juarez-Torres*, which recently wrote that “the cloak of *Fourth Amendment* protection does not discriminate between United States citizens and illegal aliens.”<sup>20</sup>

That being said, there is a slight inconsistency with the assertion of some courts that undocumented persons retain Fourth Amendment rights and the “test” set out by the Supreme Court in *United States v. Verdugo-Urquidez*.<sup>21</sup> This test sets out that in order to qualify for personhood under the Fourth Amendment, and by implication to the Second Amendment, “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.”<sup>22</sup>

Lastly, after asserting that undocumented persons retain Fourteenth Amendment protections as persons and that, arguably, they retain Fourth Amendment protections, the foundational argument of this Note will be laid

17. U.S. CONST. amend. XIV, § 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive *any person* of life, liberty, or property, without due process of law; nor deny to *any person* within its jurisdiction the equal protection of the laws.

*Id.* (emphasis added).

18. *Plyler v. Doe*, 457 U.S. 202 (1982).

19. *Portillo-Munoz*, 643 F.3d at 440.

20. *United States v. Juarez-Torres*, 441 F. Supp. 2d 1108, 1121-22 (D.N.M. 2006) (emphasis added).

21. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990).

22. *Id.*

out. That is, undocumented persons, by reason of their being considered as part of “the people” under the Fourth Amendment, are considered part of “the people” under the Second Amendment. This will be done by hearkening back to the foundations and purpose of the amendments as written in the *Heller* case as well as others.

## II. BACKGROUND

### A. THE *PORTILLO-MUNOZ* MAJORITY

In an opinion written by Circuit Judge Garwood, the Fifth Circuit held that the defendant-appellant Armando Portillo-Munoz, an undocumented person, was not included in the Second Amendment’s phrase “the people,” and therefore, that he violated the law by carrying a gun.<sup>23</sup>

Factually, Armando Portillo-Munoz was found with a .22 caliber handgun and indicated the gun was for killing coyotes, as he was working as a ranch hand and it was utilized for defending his employer’s chickens.<sup>24</sup> Portillo-Munoz, however, was found to be, and admitted to being, illegally present in the country, first coming into the United States for six months and illegally reentering in 2009, this time for a year and six months before being found with the handgun.<sup>25</sup>

The court held that Portillo-Munoz’s conduct unquestionably violated 18 U.S.C. § 922(g)(5).<sup>26</sup> But, what of his constitutional right to bear arms? In finding that Portillo-Munoz had no constitutional right to bear arms, the court relied on the Supreme Court’s language in *Heller* and applied it to undocumented persons; it stated, “[undocumented persons] are not ‘law-abiding, responsible citizens’ or ‘members of the political community,’” nor “Americans,” since the *Heller* case used the term multiple times.<sup>27</sup>

Since the Supreme Court established the analysis of “the people” in the Fourth Amendment would extend to the Second Amendment,<sup>28</sup> the *Portillo-Munoz* court used *Verdugo-Urquidez*’s analysis to determine that the Second Amendment also “refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection

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23. *Portillo-Munoz*, 643 F.3d at 442.

24. *Id.* at 438-39.

25. *Id.*

26. *Id.* at 439.

27. *Id.* at 440 (relying on language from *Heller* stating “[w]e start therefore with a strong presumption that the Second Amendment right is exercised individually and belongs to all *Americans*,” the *Portillo-Munoz* court found that undocumented persons do not qualify as “Americans” as referred to in *Heller* (emphasis added) (quoting *District of Columbia v. Heller*, 554 U.S. 570, 644 (2008))).

28. *Portillo-Munoz*, 643 F.3d at 440.

with this country to be considered part of that community.”<sup>29</sup> Determining that the Supreme Court had not extended Fourth Amendment rights to undocumented persons, the court felt that those rights naturally did not extend in the Second Amendment context.<sup>30</sup>

Even if undocumented persons were found to retain Fourth Amendment rights, the court reasoned that the Fourth Amendment and Second Amendment were contrary in purpose<sup>31</sup>: “The Second Amendment grants an affirmative right to keep and bear arms, while the Fourth Amendment is at its core a protective right against abuses by the government.”<sup>32</sup> *Portillo-Munoz* then mentioned that “[a]ttempts to *precisely* analogize the scope of the two amendments is misguided” and wrote that there are “compelling reasons” for denying the right, including undocumented persons’ ease in circumventing detection and “already living outside the law” creates a more significant likelihood that they would “resort to illegal activities to maintain a livelihood.”<sup>33</sup> In acknowledging the constitutionality of the statute under which *Portillo-Munoz* was convicted,<sup>34</sup> the court pointed out that Congress has the authority to “regularly make[] rules that would be unacceptable if applied to citizens.”<sup>35</sup>

Ultimately, the court found that *Portillo-Munoz* did not retain a Second Amendment right because he was not included as part of “the people.”<sup>36</sup> In laying this foundation, the court established that section 922(g)(5) was thus constitutional.<sup>37</sup>

#### B. THE *PORTILLO-MUNOZ* DISSENT

Dissenting in the majority’s holding of *Portillo-Munoz*’s Second Amendment claim, Circuit Judge Dennis wrote that “whether 18 U.S.C. § 922(g)(5) violates the Second Amendment is a separate question from whether *Portillo-Munoz* is part of ‘the people’ who have First, Second, and Fourth Amendment rights.”<sup>38</sup> To hold that *Portillo-Munoz* is not a part of “the people” would have “far reaching consequences”;<sup>39</sup> in effect, it would mean that “millions of similarly situated residents of the United States are

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29. *Id.* (quoting *United States v. Verdugo-Urquidez*, 494 U.S. 259, 260 (1990)).

30. *Id.*

31. *Id.*

32. *Id.* at 441.

33. *Portillo-Munoz*, 643 F.3d at 441 (quoting *United States v. Toner*, 728 F.2d 115, 128-29 (2d Cir. 1984)).

34. *Id.*

35. *Id.* (quoting *Mathews v. Diaz*, 426 U.S. 67 (1976)).

36. *Id.* at 442.

37. *Id.*

38. *Portillo-Munoz*, 643 F.3d at 443 (Dennis, J., dissenting).

39. *Id.*

‘non-persons’ who have no rights to be free from unjustified searches of their homes and bodies and other abuses . . . .”<sup>40</sup>

Finding the majority’s endeavor to label the Second Amendment an “affirmative right” and the Fourth Amendment a “protective right” as unpersuasive, Judge Dennis referred to *Heller* in asserting that both rights assert a fundamental notion that one should be free from governmental infringement.<sup>41</sup> In essence, he asserted that both set out protective rights: one to be free from governmental invasion without foundation and the other against governmental contravention on the right to bear arms.<sup>42</sup>

Also, noting that those similarly situated to Portillo-Munoz have been held to retain Fifth and Fourteenth Amendment rights as “persons” under the Constitution,<sup>43</sup> Judge Dennis found it odd that simply because “the people” is the plural form of “persons” that the same subset of people were not intended to be covered under the Second and Fourth Amendments.<sup>44</sup> The difference in the protection of rights simply because of the difference in meaning between “people” and “person” thus seemed unusual to the judge.<sup>45</sup>

Judge Dennis also called into question the applicability of the precedents the court used in arriving at its conclusion.<sup>46</sup> In first referencing *Heller*, the judge pointed out that the Supreme Court decision never addressed the adaptation of the Second Amendment to noncitizens.<sup>47</sup> As the *Heller* Court had used the “substantial connections” language in *Verdugo-Urquidez* to determine who “the people” were in the Second Amendment, Judge Dennis also pointed out the court’s error in disqualifying Portillo-Munoz under this test.<sup>48</sup> Finding that “[n]othing in *Verdugo-Urquidez* requires that the alien must be lawfully present in the United States in order to establish substantial connections,”<sup>49</sup> Judge Dennis wrote that the *Verdugo-Urquidez* Court suggested that even the presence of someone in the country

40. *Id.*

41. *Id.* at 444.

42. *Id.*

43. *Portillo-Munoz*, 643 F.3d at 445 (Dennis, J., dissenting) (referring to *Plyler v. Doe*, 457 U.S. 202 (1982)).

44. *Id.*

45. *Id.* (judge noting it as “strange”).

46. *Id.*

47. *Id.*

48. *Portillo-Munoz*, 643 F.3d at 445-46 (under *Verdugo-Urquidez*, an alien secures “substantial connections” and is thus a part of the people when he or she first, is willingly present in the United States and second, accepts some “societal obligations”) (Dennis, J., dissenting).

49. *Id.* at 446.



for a “matter of days” would make them eligible for protection under the Fourth Amendment.<sup>50</sup>

In making the case that Portillo-Munoz would qualify as part of “the people” under the *Verdugo-Urquidez* “substantial connections” test, Judge Dennis established that Portillo-Munoz, as per the first prong of the test, came to the United States voluntarily.<sup>51</sup> It was also undisputed, Judge Dennis wrote, that Portillo-Munoz had taken on societal obligations.<sup>52</sup> After all, he had been working as a ranch hand for a steady six months when he was arrested (acquiring the firearm in the first place to protect his employer’s chickens), and prior to that, he had also worked at a dairy farm.<sup>53</sup> Similarly, Portillo-Munoz paid rent and economically supported his girlfriend and her child.<sup>54</sup> Further, Judge Dennis brought up the fact that to unlawfully enter the country is a misdemeanor<sup>55</sup> but that Portillo-Munoz had no criminal history and that “[m]any United States citizens have committed far more serious crimes, yet they still receive the constitutional protections given to ‘the people.’”<sup>56</sup>

In bringing up all of these points, Judge Dennis established that, essentially, Portillo-Munoz was a member of the community.<sup>57</sup> As a member of the community, Portillo-Munoz and people similarly situated should qualify as part of “the people” who are privileged to the assurances of not only the Fourth Amendment, but the Second Amendment as well.<sup>58</sup>

### C. THE *HELLER* DECISION AND “THE PEOPLE”

The Supreme Court decision of *District of Columbia v. Heller* firmly established the constitutionality of the individual right to bear arms.<sup>59</sup> Although the Court never answered the question of whether undocumented persons have the right to bear arms, as the dissent wrote in *Portillo-Munoz*,<sup>60</sup> it seems the Court tried to narrow the applicability of the Amendment as well.<sup>61</sup> Nevertheless, the Court also establishes that the right

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50. *Id.* (quoting *United States v. Verdugo-Urquidez*, 494 U.S. 259, 272 (1990)).

51. *Id.* at 447.

52. *Id.*

53. *Portillo-Munoz*, 643 F.3d at 447 (Dennis, J., dissenting).

54. *Id.*

55. *Id.* (to unlawfully enter the United States is a misdemeanor as per 8 U.S.C. § 1325(a)).

56. *Id.*

57. *Id.* at 448.

58. *Portillo-Munoz*, 643 F.3d at 448 (Dennis, J., dissenting).

59. *District of Columbia v. Heller*, 554 U.S. 570 (2008).

60. *Portillo-Munoz*, 643 F.3d at 445 (Dennis, J., dissenting).

61. *Heller*, 554 U.S. at 596.

to bear arms is a fundamental right granted to the individual, in the same vein as the Fourth Amendment.<sup>62</sup>

While the Court never addressed undocumented persons in its decision, it wrote that it started with a “strong presumption that the Second Amendment right is exercised individually and belongs to all Americans.”<sup>63</sup> The Court tried to define the meaning of “the people” in the operative clause of the Amendment by referencing the Fourth Amendment *Verdugo-Urquidez* case and its “political community” language, writing that “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.”<sup>64</sup> This “unspecified subset” could pose a problem; yet, again, the Court pulled this language from *Verdugo-Urquidez*, a case that in itself held the Fourth Amendment simply does not extend to aliens outside of the United States.<sup>65</sup> It left slightly ambiguous, however, the case of undocumented persons within the United States.<sup>66</sup>

Like the Fourth Amendment, however, the Court wrote that the Second Amendment classifies a pre-existing right.<sup>67</sup> The Court came to this determination by looking at the history surrounding the amendment and the fact that the amendment itself affirms only that the right guaranteed would not be “infringed.”<sup>68</sup> Because the amendment classifies a pre-existing right, the court ensured that it is “not a right granted by the Constitution. Neither is it in any manner dependent upon that instrument for its existence.”<sup>69</sup> This would suggest that the right to bear arms is not a right given to one by the government but an inherent right in that of any human being; one does not need a Constitution to guarantee it.<sup>70</sup>

The dissent, however, comprised of Justices Stevens, Souter, Ginsberg, and Breyer, picked up on the apparent incongruity between the majority’s insistence that the same group of people protected by the Fourth

62. *Id.* at 580.

63. *Id.* at 581.

64. *Id.* at 580.

65. *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990).

66. *See United States v. Portillo-Munoz*, 643 F.3d 437, 446 (5th Cir. 2011) (Dennis, J., dissenting).

67. *Heller*, 554 U.S. at 592.

68. *Id.* at 592:

This meaning is strongly confirmed by the historical background of the Second Amendment. We look to this because it has always been widely understood that the Second Amendment, like the First and Fourth Amendments, codified a *pre-existing* right. The very text of the Second Amendment implicitly recognizes the pre-existence of the right and declares only that it ‘shall not be infringed.’

*Id.*

69. *Id.* (quoting *United States v. Cruikshank*, 92 U.S. 542, 553 (1876)).

70. *Id.*

Amendment are also protected by the Second Amendment.<sup>71</sup> Justice Stevens wrote:

The centerpiece of the Court's textual argument is its insistence 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. According to the Court, in all three provisions . . . "the term unambiguously refers to all members of the political community, not an unspecified subset." But the Court *itself* reads the Second Amendment to protect a "subset" significantly narrower than the class of persons protected by the First and Fourth Amendments; when it finally drills down on the substantive meaning of the Second Amendment, the Court limits the protected class to "law-abiding, responsible citizens." But the class of persons protected by the First and Fourth Amendments is *not* so limited; for even felons (and presumably irresponsible citizens as well) may invoke the protections of those constitutional provisions. The Court offers no way to harmonize its conflicting pronouncements.<sup>72</sup>

Although the dissent specifically targeted the case of felons in its example,<sup>73</sup> the case of undocumented persons and their constitutional right to bear arms is not far off: the word "citizen[]" is, after all, used specifically by the Court and the dissent in its example.<sup>74</sup> For, if, as the majority argued, the meaning of the Second Amendment and the Fourth Amendment are in complicity, then "citizens" cannot, by logical extension, be the sole group covered by the Second Amendment. The dissent itself pointed out this agitation in constitutional meaning.<sup>75</sup> How does one synthesize the majority's interpretation, then, without including undocumented persons in the meaning of "the people" of the Second Amendment?

#### D. THE PLENARY POWER OF CONGRESS

As Judge Dennis suggested in his dissenting opinion in *Portillo-Munoz*, the question of whether undocumented persons qualify as part of "the people" under the Second and Fourth Amendments is quite different

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71. *Id.* at 644 (Stevens, J., dissenting).

72. *Heller*, 554 U.S. at 644.

73. *Id.*

74. *Id.*

75. *Id.*

from whether 18 U.S.C. § 922(g)(5) violates the Second Amendment.<sup>76</sup> This is in large part due to the fact that, as the majority in *Portillo-Munoz* correctly noted, “[i]n its exercise of broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens.”<sup>77</sup> The scope of this Note is limited in that it does not argue against Congress’s obvious plenary power over immigration law.<sup>78</sup>

As argued by the majority in *Portillo-Munoz*,<sup>79</sup> and even the Supreme Court in many instances,<sup>80</sup> Congress has plenary power when deciding matters that pertain to immigration: “it is the business of the political branches of the Federal Government, rather than that of either the States or the Federal Judiciary, to regulate the conditions of entry and residence of aliens.”<sup>81</sup> These courts have often recognized the fact that their powers are limited in such ways and give much deference to Congress when deciding matters of immigration.

Although it will not be contended that courts give Congress much deference in matters of immigration, it should also be noted, however, that Congress’s power does have its limits if a particular provision is in violation of the Constitution.<sup>82</sup> In the Supreme Court case of *Almeida-Sanchez v.*

76. *United States v. Portillo-Munoz*, 643 F.3d 437 (5th Cir. 2011).

77. *Id.* at 441 (quoting *Mathews v. Diaz*, 426 U.S. 67, 96 (1976)).

78. As mentioned previously, Congress has power to regulate immigration laws as per the Commerce Clause, the Naturalization Clause, the Migration and Importation Clause, and the War Power. *See* U.S. CONST. art. 1, § 8, cl. 3; *see also* U.S. CONST. art. 1, § 8, cl. 4; U.S. CONST. art. 1, § 9, cl. 1; U.S. CONST. art. 1, § 8, cl. 11.

79. *Portillo-Munoz*, 643 F.3d at 441.

80. *See Mathews v. Diaz*, 426 U.S. 67, 81 (1976); *see also Hampton v. Mow Sun Wong*, 426 U.S. 88, 117 (1976) (Rehnquist, J., dissenting) (“At the outset it is important to recognize that the power of the federal courts is severely limited in the areas of immigration and regulation of aliens.”); *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973) (White, J., dissenting):

But the power of the National Government to exclude aliens from the country is undoubted and sweeping. That the government of the United States, through the action of the legislative department, can exclude aliens from its territory is a proposition which we do not think open to controversy. Jurisdiction over its own territory to that extent is an incident of every independent nation. It is a part of its independence. If it could not exclude aliens, it would be to that extent subject to the control of another power.

*Id.* at 291 (citing *Chae Chan Ping v. United States*, 130 U.S. 581, 603-04 (1889)).

81. *Mathews v. Diaz*, 426 U.S. at 84.

82. *See Orhorhaghe v. INS*, 38 F.3d 488, 496 n.13 (9th Cir. 1994):

The INS argues that Smirnoff’s statement was justified under Section 287(a)(1) of the INA, 8 U.S.C. § 1357(a)(1), which gives INS agents statutory “power without warrant to interrogate any alien or person believed to be an alien as to his right to remain in the United States.” However, as the Supreme Court made clear in a case involving the very same

*United States*,<sup>83</sup> the Court itself wrote that “[i]t is clear, of course, that no Act of Congress can authorize a violation of the Constitution.”<sup>84</sup> Thus, although Congress does have power in these matters, Congress’s provisions are still subject to judicial review, even if the review is highly reverential of Congress’s power.

### III. ARGUMENT

#### A. THE FOURTEENTH AMENDMENT AND “PERSONHOOD”

In the Population Estimates Report authorized by the Department of Homeland Security,<sup>85</sup> as of January 2010, there are 10.8 million undocumented persons living in the United States.<sup>86</sup> Although there has been a one million person decline between 2007 and 2009 (decreased from 11.6 million), it was attributed to the fact that the United States was “in the midst of [an] economic recession.”<sup>87</sup> However, before the recession, the population increase of undocumented persons was approximated at an average annual increase of 500,000 per year.<sup>88</sup> Can these millions of people be denied “personhood” status and, thus, any protection under the Constitution? Certainly not under the Fourteenth Amendment.<sup>89</sup>

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provision of the INA, “no Act of Congress can authorize a violation of the Constitution.”

*Id.* (quoting *United States v. Brignoni-Ponce*, 422 U.S. 873, 877 (1975)).

83. *Almeida-Sanchez*, 413 U.S. 266.

84. *Id.* at 272.

85. MICHAEL HOEFER ET AL., U.S. DEP’T OF HOMELAND SECURITY, ESTIMATES OF THE UNAUTHORIZED IMMIGRANT POPULATION RESIDING IN THE UNITED STATES: JANUARY 2010 (Feb. 2011), available at [http://www.dhs.gov/xlibrary/assets/statistics/publications/ois\\_ill\\_pe\\_2010.pdf](http://www.dhs.gov/xlibrary/assets/statistics/publications/ois_ill_pe_2010.pdf).

86. *Id.* In its estimates, the Department of Homeland Security believes that 8.6 million (eighty percent) of the total of the Unauthorized Immigrant Population are from the North America region (this includes Canada, Mexico, the Caribbean, and Central America). *Id.* About 1.0 million of the total are from Asia, and 0.8 million are from South America. About sixty-three percent of unauthorized immigrants are between the ages of twenty-five and forty-four years old. *Id.* It is estimated that fifty-seven percent in this age group are male. *Id.*

87. *Id.*

88. *Id.*

89. U.S. CONST. amend. XIV, § 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive *any person* of life, liberty, or property, without due process of law; nor deny to *any person* within its jurisdiction the equal protection of the laws.

As early in American case law as the close of the nineteenth century, the Supreme Court affirmed the notion that not only United States citizens are protected under the Fourteenth Amendment's Equal Protection and Due Process Clauses. In the oft-cited case of *Wong Wing v. United States*,<sup>90</sup> the court considered it a notion of foundational fairness:

The term "person," used in the [Fourteenth Amendment], is broad enough to include any and every human being within the jurisdiction of the republic. A resident, alien born, is entitled to the same protection under the laws that a citizen is entitled to. He owes obedience to the laws of the country in which he is domiciled, and, as a consequence, he is entitled to the equal protection of those laws.<sup>91</sup>

It seems that this foundational notion espoused by James Madison did not die as soon as the ink on the page dried.<sup>92</sup>

Justice Matthews, speaking for the Court in *Yick Wo v. Hopkins*,<sup>93</sup> wrote in an inspired manner:

[T]he fundamental rights to life, liberty, and the pursuit of happiness . . . are secured by those maxims of constitutional law which are the monuments showing the victorious progress of the race in securing to men the blessings of civilization under the reign of just and equal laws, so that . . . the government of the commonwealth "may be a government of laws and not of men."<sup>94</sup>

That is, in any modern civilization that takes seriously the notion that everyone is to be protected equally under its laws, we must look past the subjective and also take seriously the objectivity of the laws. Although this was

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*Id.* (emphasis added). This Note includes the Fifth Amendment in its analysis of the Fourteenth Amendment by implication, the difference being that the Fifth Amendment applies to the federal government. Thus, when aliens are subjected to federal removal proceedings, the Fifth Amendment commands that those "removal proceedings be fundamentally fair." See *Al Khouri v. Ashcroft*, 362 F.3d 461, 464 (8th Cir. 2004) ("The Fifth Amendment's Due Process Clause mandates that removal hearings be fundamentally fair.")

90. *Wong Wing v. United States*, 163 U.S. 228, 234 (1896) (in addition to declaring that non-citizens were covered by the Due Process Clause, the Court also declared that non-citizens were entitled to Fifth and Sixth Amendment rights).

91. *Id.* at 242 (Field, J., concurring in part and dissenting in part).

92. MADISON, *supra* note 1, at 556.

93. *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

94. *Id.* at 370.

most certainly easier said than done,<sup>95</sup> this philosophy as a whole was certainly weighing on the minds of the Justices, and non-citizens were found to retain Fourteenth Amendment rights.

Almost one hundred years later, and most recently, in the Supreme Court case of *Plyler v. Doe*,<sup>96</sup> the Court for the first time made it exceptionally clear that the Fourteenth Amendment applied not simply to “non-citizens” but to undocumented persons as well.<sup>97</sup> In this case, a Texas statute threatened to withhold from school districts any funding for the education of children who were not legally admitted into the United States.<sup>98</sup> In holding that undocumented persons were safeguarded by the Equal Protection Clause of the Fourteenth Amendment and that this statute violated that clause, the Court leapt headfirst into declaring who exactly were “persons” under the Fourteenth Amendment:

Appellants argue at the outset that undocumented aliens, because of their immigration status, are not “persons within the jurisdiction” of the State of Texas, and that they therefore have no right to the equal protection of Texas law. We reject this argument. Whatever his status under the immigration laws, an alien is surely a “person” in any ordinary sense of that term. Aliens, even aliens whose presence in this country is unlawful, have long been recognized as “persons” guaranteed due process of law by the Fifth and Fourteenth Amendments.<sup>99</sup>

Thus, the Court made it impossible to claim that undocumented persons were not “persons” that could claim Fourteenth Amendment rights; in fact, the Court implied that to claim otherwise would be nearly nonsensical.<sup>100</sup>

The Court further echoed the language of James Madison and the Court in *Wong Wing v. United States*<sup>101</sup> in writing that although a person

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95. See *Scott v. Sandford*, 60 U.S. 393, 393 (1856). See generally Pratheepan Gulasekaram, “The People” of the Second Amendment: Citizenship and the Right to Bear Arms, 85 N.Y.U. L. REV. 1521 (2010):

[Dred Scott], for the first time, expressly equated “the people” in the Constitution with citizens of the United States . . . . While overruled by the Fourteenth Amendment and vilified as a low point in American jurisprudence, the case reveals a great deal about the relationships among race, citizenship, and firearms.

*Id.* at 1550.

96. *Plyler v. Doe*, 457 U.S. 202 (1982).

97. *Id.* at 210.

98. *Id.* at 206.

99. *Id.* at 210.

100. *Id.*

might have entered the United States unlawfully, that person is still within the territory of the United States and, thus, “is subject to the full range of obligations imposed by the State’s civil and criminal laws. And until he leaves the jurisdiction . . . he is entitled to the equal protection of the laws that a State may choose to establish.”<sup>102</sup> Accordingly, it is firmly established that whether a non-resident remains in the United States legally or illegally,<sup>103</sup> that person is beyond any doubt considered a “person,” and not some shadow of a person, who is entitled to Fourteenth Amendment benefits.<sup>104</sup>

B. THE FOURTH AMENDMENT AS APPLICABLE TO UNDOCUMENTED PERSONS

These [Fourth Amendment rights], I protest, are not mere second-class rights but belong in the catalog of indispensa-

101. See MADISON, *supra* note 1, at 556; see also *Wong Wing v. United States*, 163 U.S. 228, 242 (1896).

102. *Plyler*, 457 U.S. at 215. The Court further invokes the notion of the inhumanity and disparagement of the American philosophy in finding that these people, who are definitely present in the United States, are not truly a “person”:

Sheer incapability or lax enforcement of the laws barring entry into this country, coupled with the failure to establish an effective bar to the employment of undocumented aliens, has resulted in the creation of a substantial ‘shadow population’ of illegal migrants—numbering in the millions—within our borders. This situation raises the specter of a permanent caste of undocumented resident aliens, encouraged by some to remain here as a source of cheap labor, but nevertheless denied the benefits that our society makes available to citizens and lawful residents. The existence of such an underclass presents most difficult problems for a Nation that prides itself on adherence to principles of equality under law.

*Id.* at 218-19.

103. See CHARLES GORDON, STANLEY MAILMAN & STEPHEN YALE-LOEHR, IMMIGRATION LAW AND PROCEDURE § 6.02 (2011):

These constitutional and statutory mandates mean that noncitizens in the United States are protected against arbitrary deprivation of their property and that they are entitled generally to the same procedural safeguards as citizens in criminal prosecutions, civil litigation, and administrative proceedings. Such constitutional protections shield those who are here illegally as well as those who have lawful status.

*Id.*

104. See also *Bolanos v. Kiley*, 509 F.2d 1023, 1025 (1975) (“We can readily agree that the due process and *equal protection clauses of the Fourteenth Amendment* apply to aliens within the United States and even to aliens whose presence here is illegal.” (emphasis added) (citations omitted)); see also *Shaughnessy v. United States*, 345 U.S. 206, 212 (1953) (“It is true that aliens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law.”); *Martinez v. Fox Valley Bus Lines, Inc.*, 17 F. Supp. 576, 577 (N.D. Ill. 1936).



ble freedoms. Among deprivation of rights, none is so effective in cowing a population, crushing the spirit of the individual and putting terror in every heart. Uncontrolled search and seizure is one of the first and most effective weapons in the arsenal of every arbitrary government.

– Justice Jackson<sup>105</sup>

Although it is well established that undocumented persons qualify as “persons” under the Fourteenth Amendment and Fifth Amendment,<sup>106</sup> the Fourth Amendment rights that undocumented persons retain are murkier and less streamlined.<sup>107</sup> The Supreme Court, in the 1984 case of *Immigration and Naturalization Service v. Lopez-Mendoza*,<sup>108</sup> held that the exclusionary rule under the Fourth Amendment did not apply to civil deportation proceedings unless the violation of the Fourth Amendment is “egregious” or “might transgress notions of fundamental fairness and undermine the probative value of the evidence obtained.”<sup>109</sup> This “egregious” violation exception, however, provides the basis for many motions to suppress evidence in immigration cases.<sup>110</sup> Further, many lower courts have taken this holding to mean that the Supreme Court assumes there to be a Fourth Amendment right for undocumented persons.<sup>111</sup>

In the five to four decision of *Lopez-Mendoza*, the Supreme Court held that, in accordance with the Board of Immigration Appeals (BIA) rulings, “[t]he mere fact of an illegal arrest has no bearing on a subsequent deportation proceeding.”<sup>112</sup> Thus, even though the search initially conducted might have been impermissible on Fourth Amendment grounds, the exclusionary

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105. *Brinegar v. United States*, 338 U.S. 160, 180 (Jackson, J., dissenting).

106. *See Plyler*, 457 U.S. at 210.

107. U.S. CONST. amend. IV (“The right of *the people* to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.” (emphasis added)).

108. *INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984).

109. *Lopez-Mendoza*, 468 U.S. at 1050-51.

110. *Motions to Suppress in Removal Proceedings: A General Overview*, THE LEGAL ACTION CENTER, 5 (Oct. 12, 2011), <http://www.legalactioncenter.org/sites/default/files/practice-advisory-motions-to-suppress-in-removal-proceedings-a-general-overview.pdf> [hereinafter THE LEGAL ACTION CENTER].

111. *See Martinez-Aguero v. Gonzalez*, 459 F.3d 618, 624 (5th Cir. 2006) (“In pre-*Verdugo-Urquidez* cases, the Supreme Court had assumed, and we have explicitly held, that the Fourth Amendment applies to aliens.”).

112. *Lopez-Mendoza*, 468 U.S. at 1040 (internal quotation marks omitted).

rule is not applicable and deportation is still possible.<sup>113</sup> Further, the Court found that Immigration and Naturalization Services (INS) provided its own exhaustive rules that provided against Fourth Amendment violations by its officers<sup>114</sup>: “[n]ew immigration officers receive instruction and examination in Fourth Amendment law, and others receive periodic refresher courses in law.”<sup>115</sup> This suggested that resorting to the exclusionary rule was unnecessary because, apparently, immigration officers would conform to the rules.<sup>116</sup>

However, the Court, writing that it “[does] not condone any violations of the Fourth Amendment that may have occurred in the arrests of the respondents,”<sup>117</sup> carved out what seemed to be an exception to the finding that the exclusionary rule did not apply in civil deportation proceedings: “Finally, we do not deal here with egregious violations of Fourth Amendment or other liberties that might transgress notions of fundamental fairness and undermine the probative value of the evidence obtained.”<sup>118</sup>

Disagreeing with the majority’s finding that the application of the exclusionary rule in civil deportation proceedings was unlikely to “provide significant deterrence,”<sup>119</sup> the dissent pointed out:

The suggestion that alternative remedies, such as civil suits, provide adequate protection is unrealistic. Contrary to the situation in criminal cases, once the Government has improperly obtained evidence against an illegal alien, he is removed from the country and is therefore in no position to file civil actions in federal courts. Moreover, those who are legally in the country but are nonetheless subjected to illegal searches and seizures are likely to be poor and uneducated, and many will not speak English. It is doubtful that the threat of civil suits by these persons will strike fear into

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113. *Id.* at 1043; *see also* THE LEGAL ACTION CENTER, *supra* note 110, at 4 (“The ‘exclusionary rule’ is a judicially created remedy to prevent the introduction of evidence obtained as a result of a Fourth Amendment violation. Its purpose is not to provide relief to the victim but to deter government officers from purposely engaging in similar misconduct in the future.”).

114. *Lopez-Mendoza*, 468 U.S. at 1044.

115. *Id.* at 1045.

116. *Id.* at 1046 (“Important as it is to protect the Fourth Amendment rights of *all persons*, there is no convincing indication that application of the exclusionary rule in civil deportation proceedings will contribute materially to that end.” (emphasis added)).

117. *Lopez-Mendoza*, 468 U.S. at 1050.

118. *Id.* at 1050-51.

119. *Id.* at 1053 (White, J., dissenting).

the hearts of those who enforce the Nation's immigration laws.<sup>120</sup>

Thus, the dissent found that the exclusionary rule should apply in deportation proceedings when deliberate violations of the Fourth Amendment were found.<sup>121</sup> Indeed, what use is it to find a Fourth Amendment violation but not be able to exclude the evidence found pursuant to that violation?<sup>122</sup>

In the Ninth Circuit case of *Orhorhaghe v. Immigration and Naturalization Service*,<sup>123</sup> the court found that an egregious violation of the Fourth Amendment had been committed against the petitioner Orhorhaghe and, consequently, the evidence discovered in the petitioner's apartment as a result of this violation was to be suppressed<sup>124</sup>. "The only reason for the agents' actions was that Orhorhaghe had a foreign-sounding name that caused them to suspect that he was an illegal alien. Accordingly, the agents violated the Fourth Amendment, and all evidence obtained as a result of the encounter was the fruit of this violation."<sup>125</sup>

As mentioned briefly above, INS agents turned up at Orhorhaghe's apartment without a warrant based upon the fact that he had a Nigerian-sounding name.<sup>126</sup> After looking into their computer system and verifying that there was no record of Orhorhaghe's lawful entry into the United States, the agents presented themselves to Orhorhaghe, who asked if they

120. *Id.* at 1055.

121. *Id.* at 1060.

122. See James L. Buchwalter, Annotation, *Unconstitutional Search or Seizure As Warranting Suppression of Evidence in Removal Proceeding*, 40 A.L.R. FED. 2d 489 (2011). In writing about the *Lopez-Mendoza* case, Buchwalter noted that "[a]lthough the egregious violation principle was enunciated by only a plurality of the Court, the view of the four dissenting Justices implicitly endorses the principle as well, as they argued for suppression to be allowed across the board; thus, the principle was supported by eight members of the Court with only Chief Justice Burger not allowing for suppression under any circumstances." *Id.* at 502 (emphasis added). Thus, although already a close decision, almost a plurality of the Justices (four) argued that in the case of a conscious Fourth Amendment violation, suppression should be allowed without the added weight of exemplifying "egregiousness." *Id.* Four more requested that the principle of egregiousness be shown first before suppressing illegally obtained evidence in a deportation proceeding. *Id.*

123. *Orhorhaghe v. INS*, 38 F.3d 488 (9th Cir. 1994).

124. *Id.* at 505:

In *INS v. Lopez-Mendoza*, the Supreme Court held that the Fourth Amendment exclusionary rule does not apply in deportation proceedings. However, the Court expressly left open the possibility that the exclusionary rule might still apply in cases involving "egregious violations of Fourth Amendment or other liberties that might transgress notions of fundamental fairness and undermine the probative value of the evidence obtained."

*Id.* at 492-93 (citations omitted) (quoting *Lopez-Mendoza*, 468 U.S. at 1050-51).

125. *Orhorhaghe*, 38 F.3d at 499-500.

126. *Id.* at 491.

had a warrant, to which they replied that they did not need one.<sup>127</sup> After receiving his half-hearted consent, the agents searched Orhorhaghe's apartment to find that he was in the United States illegally on an expired visa and that he had tried to acquire a California birth certificate.<sup>128</sup>

Finding the agents' premise for searching Orhorhaghe's apartment to be insufficient and the invitation inside to have been given under duress,<sup>129</sup> the court wrote that "evidence must be excluded when it 'is obtained by deliberate violations of the fourth amendment, or by conduct a reasonable officer should know is in violation of the Constitution.'"<sup>130</sup> Finding that a reasonable officer should have known the search being conducted was unlawful as per the Fourth Amendment, the court suppressed all evidence found.<sup>131</sup> The court even suppressed Orhorhaghe's admission of illegality, finding that it also was a "fruit of the unlawful search and seizure."<sup>132</sup>

The Ninth Circuit also found an egregious constitutional violation of an undocumented person's Fourth Amendment rights in the case of *Gonzalez-Rivera v. Immigration and Naturalization Service*.<sup>133</sup> In this case, Gonzalez was a passenger in his father's vehicle as they were driving to work when two officers stopped the car and ascertained that Gonzalez did not have documentation allowing him to reside legally in the United States.<sup>134</sup> When testifying at Gonzalez's motion to suppress hearing, one of the officers admitted there was nothing suspicious about the car in which Gonzalez's father was driving or the way in which it was being driven.<sup>135</sup> However, one of the first factors that the officer mentioned in his decision to stop the vehicle was the fact that Gonzalez and his father "appeared to be Hispanic."<sup>136</sup>

Agreeing that Gonzalez was indeed held solely because of his Hispanic appearance, the court found that stopping someone in this way, based upon their race alone, would be enough in and of itself to constitute an

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127. *Id.*

128. *Id.* at 492.

129. *Id.* at 499-500.

130. *Orhorhaghe v. INS* 38 F.3d 488, 501 (9th Cir. 1994) (quoting *Adamson v. Comm'r of Internal Revenue*, 745 F.2d 541, 545 (9th Cir. 1984)). The court also notes that it "[has] long regarded racial oppression as one of the most serious threats to our notion of fundamental fairness and consider[s] reliance on the use of race or ethnicity as a shorthand for likely illegal conduct to be 'repugnant under any circumstances.'" *Id.* at 503 (quoting *Gonzalez-Rivera v. INS*, 22 F.3d 1441, 1449 (9th Cir. 1994)).

131. *Id.* at 501.

132. *Id.* at 505 n.27.

133. *Gonzalez-Rivera*, 22 F.3d 1441.

134. *Id.* at 1443.

135. *Id.*

136. *Id.*

egregious violation of the Fourth Amendment.<sup>137</sup> In explaining its reasoning, the court first mentioned the repugnancy of using race as a ruse for illegal conduct and quoted the Supreme Court in reiterating that “discrimination on the basis of race is illegal, immoral, unconstitutional, inherently wrong, and destructive to democratic society.”<sup>138</sup> The court also mentioned that INS officers receive widespread training in Fourth Amendment law, and, thus, know when they have intentionally violated the law or have acted with cognizant oversight of the Constitution.<sup>139</sup> Hence, a reasonable officer should have known that he or she was violating the Constitution.<sup>140</sup> In its conclusion, the court found that because Gonzalez’s Fourth Amendment rights were violated egregiously due to a race-based stop, the evidence found (that of Gonzalez’s lack of paperwork) must be suppressed.<sup>141</sup>

It is important to note that whether or not the exclusionary rule is applied, in all of the cases mentioned above, the undocumented person was deemed to have Fourth Amendment rights.<sup>142</sup> In fact, the *Gonzalez-Rivera* court emphatically wrote that “[f]ederal courts cannot countenance deliberate violations of basic constitutional rights. To do so would violate our judicial oath to uphold the Constitution of the United States.”<sup>143</sup> This, again, suggests that undocumented persons are allowed, as mentioned, these “basic constitutional rights.”<sup>144</sup> If that is the case, then in order to invoke their Fourth Amendment rights, rationally, undocumented persons must be included in the “the people” of the Fourth Amendment.

All of these assertions, however, seem to clash when brought into comparison with the 1990 Supreme Court case of *Verdugo-Urquidez*.<sup>145</sup> There seems to be a slight inconsistency with the Fourth Amendment’s practical applicability to undocumented persons in certain cases and the interpretation of who “the people” are in this amendment as interpreted by the Supreme Court.<sup>146</sup>

Believing that Verdugo-Urquidez was a leader in a large narcotics smuggling ring, the United States Drug Enforcement Administration (DEA)

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137. *Id.* at 1451.

138. *Gonzalez-Rivera*, 22 F.3d at 1450-51 (quoting *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 521 (1989)).

139. *Id.* at 1450.

140. *Id.*

141. *Id.* at 1452.

142. *See id.*; *see also* *Orhorhaghe v. INS*, 38 F.3d 488, 505 (9th Cir. 1994); *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1043 (1984).

143. *Gonzalez-Rivera*, 22 F.3d at 1448.

144. *Id.*

145. *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990).

146. *See Gonzalez-Rivera*, 22 F.3d 1441; *see also Orhorhaghe*, 38 F.3d 488; *United States v. Juarez-Torres*, 441 F. Supp. 2d 1108 (D.N.M. 2006).

obtained a warrant for his arrest.<sup>147</sup> A year later, Verdugo-Urquidez was found by officers in Mexico and handed over to United States marshals.<sup>148</sup> Subsequently, without authorization from the United States Justice Department or any United States Attorney's Office, the DEA searched two of Verdugo-Urquidez's properties and detained certain documents.<sup>149</sup>

Chief Justice Rehnquist, writing for the majority, found that no constitutional transgression had occurred because of the fact that the Fourth Amendment violation had occurred on foreign, and not American, soil.<sup>150</sup> Thus, the majority held that the Fourth Amendment is only applicable in protecting those within the jurisdiction of the United States.<sup>151</sup>

What did the Court have to say, however, about exactly who the Fourth Amendment protects, rather than the locus it covers? In commenting upon the *Lopez-Mendoza* case, the *Verdugo-Urquidez* Court wrote that a "majority of Justices assumed that illegal aliens in the United States have Fourth Amendment rights."<sup>152</sup> The key word is "assumed," as the Court went on to write that whether undocumented persons actually retain Fourth Amendment rights was not the point of the decision in *Lopez-Mendoza* and has never been formally decided by the Court.<sup>153</sup>

However, in the same vein, the *Verdugo-Urquidez* Court never decided upon whether undocumented persons present within the jurisdiction of the United States possess Fourth Amendment rights.<sup>154</sup> After all, the case itself focused on the question of whether non-citizens, on foreign soil, retained these basic constitutional benefits.<sup>155</sup> Interestingly enough, though, the Court assumed, for the sake of argument, that undocumented persons on American soil did possess Fourth Amendment rights<sup>156</sup>: "Even assuming such aliens would be entitled to Fourth Amendment protections, their situation is different from respondent's. The illegal aliens in *Lopez-Mendoza* were in the United States voluntarily and presumably had accepted some societal obligations . . . ."<sup>157</sup>

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147. *Verdugo-Urquidez*, 494 U.S. at 262.

148. *Id.*

149. *Id.*

150. *Id.* at 263-64.

151. *Id.*

152. *Verdugo-Urquidez*, 494 U.S. at 262.

153. *Id.* at 272-73 ("Our statements in *Lopez-Mendoza* are not dispositive of how the Court would rule on a Fourth Amendment claim by illegal aliens in the United States if such a claim were squarely before us. Even assuming such aliens would be entitled to Fourth Amendment protections, their situation is different from respondent's.")

154. *Id.*; see also *United States v. Portillo-Munoz*, 643 F.3d 437, 446 (5th Cir. 2011) (Dennis, J., dissenting).

155. *Verdugo-Urquidez*, 494 U.S. at 263-64.

156. *Id.* at 272-73.

157. *Id.*

As was referred to earlier in this Note, within this decision, the majority decided instead to utilize a test in deciding upon who “the people” are in the Fourth Amendment and, by implication, in all other amendments that reference “the people”<sup>158</sup>:

“[T]he people” seems to have been a term of art employed in select parts of the Constitution . . . . [I]t suggests that “the people” protected by the Fourth Amendment, and by the First and Second Amendments, and to whom rights and powers are reserved in the Ninth and Tenth Amendments, 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.<sup>159</sup>

So, although undocumented persons are not “part of a national community” for the purposes of this test, in order to assert their basic Fourth Amendment constitutional right, they have to prove that they have “otherwise developed sufficient connection with this country to be considered part of that community.”<sup>160</sup> In this case, because Verdugo-Urquidez had not yet developed these “substantial connections,” he was deemed to not have acquired Fourth Amendment rights.<sup>161</sup>

The Court mentioned two different ways in which “substantial connections” can be established<sup>162</sup>: first, that the alien has entered the United States voluntarily and second, that the alien has accepted some societal obligations.<sup>163</sup> Legality was never brought up as a necessary criterion.<sup>164</sup> Further, the Court was not explicit about how substantial “substantial” really was.<sup>165</sup> Yet, in the topic case of *Portillo-Munoz*, dissenting Circuit Judge Dennis wrote that the Court had suggested in this case “that if the alien’s presence . . . had been ‘prolonged’ for more than ‘a matter of days’ when the search occurred, he could perhaps have been eligible to ‘claim the pro-

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158. *Id.* at 265. See *District of Columbia v. Heller*, 554 U.S. 570 (2008), for an instance in which the usage of this Fourth Amendment test for “the people” was also utilized for the Second Amendment reference for the same group of people.

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

160. *Id.*

161. *Id.* at 274-75.

162. *Id.* at 273.

163. *Id.*

164. See *United States v. Portillo-Munoz*, 643 F.3d 437, 446 (5th Cir. 2011) (Dennis, J., dissenting) (“Nothing in *Verdugo-Urquidez* requires that the alien must be lawfully present in the United States in order to establish substantial connections.”).

165. *Verdugo-Urquidez*, 494 U.S. at 292.

tection of the Fourth Amendment.”<sup>166</sup> This advances the notion that perhaps “substantial” connections are not as “substantial” as we think they need to be.

Again, the *Verdugo-Urquidez* Court never decided the issue of the Fourth Amendment rights of undocumented persons on United States soil.<sup>167</sup> It did, nevertheless, mention the fact that a majority of the Court believed there to be Fourth Amendment rights for undocumented persons, even if this was never decided squarely before the Court.<sup>168</sup> It also laid out a test for determining who exactly are “the people” mentioned in this amendment.<sup>169</sup> Further, this test leaves lots of wiggle room open for undocumented persons to be considered as part of “the people.” In his dissenting opinion on the decision before the Court, Justice Kennedy wrote:

I cannot place any weight on the reference to “the people” in the Fourth Amendment as a source of restricting its protections. . . . [E]xplicit recognition of “the right of the people” to Fourth Amendment protection may be interpreted to underscore the importance of the right, rather than to restrict the category of persons who may assert it.<sup>170</sup>

### C. “THE PEOPLE” OF THE SECOND AND FOURTH AMENDMENTS

Determining who exactly “the people” are compromised of within the Second Amendment seems to be quite a difficult task. This task, however, becomes a bit more simplified when one realizes that “the people” of the Fourth Amendment are also the very same group of people protected within the Second Amendment.<sup>171</sup> As argued above, the Fourth Amendment is often used to defend the rights of undocumented persons.<sup>172</sup> Although the Supreme Court has not squarely decided this issue, a majority of the Court assumes already that undocumented persons retain a Fourth Amendment right.<sup>173</sup> If the same group of people is protected in the Second Amendment

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166. *Portillo-Munoz*, 643 F.3d at 446 (Dennis, J., dissenting).

167. *Verdugo-Urquidez*, 494 U.S. at 272.

168. *Id.*; see also *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1052 (1984) (“The Government of the United States bears an obligation to obey the *Fourth Amendment*; that obligation is not lifted simply because the law enforcement officers were agents of the Immigration and Naturalization Service, nor because the evidence obtained by those officers was to be used in civil deportation proceedings.”).

169. *Verdugo-Urquidez*, 494 U.S. at 272.

170. *Id.* at 276 (Kennedy, J., dissenting).

171. See *District of Columbia v. Heller*, 554 U.S. 570, 596 (2008).

172. See *Orhorhaghe v. INS*, 38 F.3d 488, 505 (9th Cir. 1994); see also *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1043 (1984).

173. *Verdugo-Urquidez*, 494 U.S. at 272.



as it is in the Fourth, it naturally follows that undocumented persons are a part of “the people” of the Second Amendment as well.<sup>174</sup>

The Second and Fourth Amendments are, first and foremost, not simply similar because they both encompass the same group of “people”<sup>175</sup>; this notion flows into another—the fact that both amendments also exemplify individual rights used to protect one from unauthorized power by the government.<sup>176</sup> In describing the protections of the Constitution, in particular the safeguards of the Fourth Amendment, the Supreme Court in *Almeida-Sanchez v. United States* wrote that “[t]he needs of law enforcement stand in constant tension with the Constitution’s protections of *the individual* against certain exercises of official power.”<sup>177</sup> To further this concept, in his Note, *Explaining Away the Obvious: The Infeasibility of Characterizing the Second Amendment as a Nonindividual Right*, George A. Mocsary wrote that “the Constitution consistently uses the term ‘right’ to refer to a protected personal interest and ‘power’ to refer to an enumerated governmental prerogative.”<sup>178</sup> Therefore, the key to the concept of the protections of the Bill of Rights is that of the notion that the weak, easily overpowered individual should have protections against a large, strong government.<sup>179</sup>

The belief that both amendments protect the individual right against abuses by the government and the idea that all of these individuals are, in fact, the same individuals go hand-in-hand. The United States Court of Appeals for the District of Columbia, in going over the history of the Second Amendment in the case of *Parker v. District of Columbia*,<sup>180</sup> elucidated:

In determining whether the Second Amendment’s guarantee is an individual one, or some sort of collective right, the most important word is the one the drafters chose to describe the holders of the right—“the people.” That term is found in the First, Second, Fourth, Ninth, and Tenth Amendments. It has never been doubted that these provisions were designed to protect the interests of *individuals* against government intrusion, interference, or usurpation.<sup>181</sup>

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174. *United States v. Portillo-Munoz*, 643 F.3d 437, 444 (5th Cir. 2011).

175. *Heller*, 554 U.S. at 596.

176. *Id.* at 592; see *Almeida-Sanchez v. United States*, 413 U.S. 266, 274 (1973).

177. *Almeida-Sanchez*, 413 U.S. at 273 (emphasis added).

178. George A. Mocsary, Note, *Explaining Away the Obvious: The Infeasibility of Characterizing the Second Amendment as a Nonindividual Right*, 76 *FORDHAM L. REV.* 2113, 2172 (2008).

179. *Id.*

180. *Parker v. District of Columbia*, 478 F.3d 370 (D.C. Cir. 2007).

181. *Id.* at 382.

The principle that these rights are individual and not granted to a specifically laid out subset of people, such as purely to the militia in the Second Amendment, espouses the idea that the right existed before the government formed.<sup>182</sup> After all, the Second Amendment simply guarantees that the right to bear arms “shall not be infringed.”<sup>183</sup> The *Heller* Court,<sup>184</sup> quoting *United States v. Cruikshank*,<sup>185</sup> held that this individual right is “not a right granted by the Constitution. Neither is it in any manner dependent upon that instrument for its existence.”<sup>186</sup> In essence, this is a right that is not granted by any government but that one holds inherently.<sup>187</sup>

As mentioned briefly above, the Second and Fourth Amendments both protect the same group of “the people.”<sup>188</sup> In the Fifth Circuit case of *United States v. Emerson*,<sup>189</sup> the court wrote emphatically:

There is no evidence in the text of the Second Amendment, or any other part of the Constitution, that the words “the people” have a different connotation within the Second Amendment than when employed elsewhere in the Constitution. In fact, the text of the Constitution, as a whole, strongly suggests that the words “the people” have precisely the same meaning within the Second Amendment as without.<sup>190</sup>

Therefore, the individual rights of “the people,” not determinative upon the Constitution for their existence, provide a safety net for the same group of people within each amendment.<sup>191</sup> The *Parker* court agreed,<sup>192</sup> explaining simply that “[t]he natural reading of ‘the right of the people’ in the Second Amendment would accord with usage elsewhere in the Bill of Rights.”<sup>193</sup>

Both the *Emerson* court and the *Parker* court derived their positions from the Supreme Court itself in the Fourth Amendment case of *Verdugo-Urquidez*, discussed previously.<sup>194</sup> In setting out its two-part test for deter-

182. See *Robertson v. Baldwin*, 165 U.S. 275, 280 (1897) (illuminating the roots of the Bill of Rights).

183. U.S. CONST. amend. II (“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.”).

184. *District of Columbia v. Heller*, 554 U.S. 570 (2008).

185. *United States v. Cruikshank*, 92 U.S. 542, 553 (1875).

186. *Heller*, 554 U.S. at 592 (quoting *Cruikshank*, 92 U.S. 542).

187. *Id.*

188. *Id.* at 596.

189. *United States v. Emerson*, 270 F.3d 203 (5th Cir. 2001).

190. *Id.* at 227-28.

191. *Id.*

192. *Parker v. District of Columbia*, 478 F.3d 370 (D.C. Cir. 2007).

193. *Id.* at 381.

194. *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990).

mining who exactly “the people” were,<sup>195</sup> *Verdugo-Urquidez* suggested that all uses of the phrase “the people” were consistent.<sup>196</sup> As George Mocsary noted, “[t]he Supreme Court has declared that the term ‘people’ should be construed identically everywhere in the Constitution.”<sup>197</sup>

Nevertheless, the *Portillo-Munoz* court reasoned, contrary to what the Supreme Court has held,<sup>198</sup> that the Second Amendment is not an individual right granted for protective purposes against abuses by the government but an affirmative right granted to one graciously by the powers vested in the government.<sup>199</sup> In erring on this point, the *Portillo-Munoz* court led its reasoning down a path in which it finally found that Armando Portillo-Munoz, a man who was caught with a gun simply because it was a part of his job to carry one, was not considered a part of “the people” of the Second Amendment.<sup>200</sup> The court, however, did acquiesce to the fact that the phrase “the people” is used similarly in the context of the Fourth Amendment as well as the Second.<sup>201</sup> With the knowledge that it was likely that similar groups of “the people” would thus be covered under both amendments, the court simply washed its hands of the matter by writing that the Supreme Court had never decided upon the issue of whether undocumented persons are covered under the Fourth Amendment.<sup>202</sup>

As explained above, however, the issue is not that simple; for, a majority of the Supreme Court already assumes that undocumented persons retain Fourth Amendment rights,<sup>203</sup> and there is much case law to support the notion that undocumented persons are covered under the Fourth Amendment, even if the exclusionary rule does not apply in some cases.<sup>204</sup> Courts could try to argue that the scope of “the people” within the Second and Fourth Amendments is different,<sup>205</sup> but this would not comport with the Supreme Court’s view that the Bill of Rights refers to “the people” in the same light throughout.<sup>206</sup> Pratheepan Gulasekaram, in his article “*The People*” of the

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195. *Id.* at 265-66.

196. *Id.* at 265.

197. Mocsary, *supra* note 178, at 2171.

198. *District of Columbia v. Heller*, 554 U.S. 570, 581 (2008).

199. *United States v. Portillo-Munoz*, 643 F.3d 437, 441 (5th Cir. 2011).

200. *Id.* at 442.

201. *Id.* at 440.

202. *Id.*

203. *Verdugo-Urquidez*, 494 U.S. at 272.

204. *See INS v. Lopez-Mendoza*, 468 U.S. 1032, 1043 (1984); *see also Gonzalez-Rivera v. INS*, 22 F.3d 1441 (9th Cir. 1994); *Orhorhaghe v. INS*, 38 F.3d 488 (9th Cir. 1994); *United States v. Juarez-Torres*, 441 F. Supp. 2d 1108 (D.N.M. 2006).

205. *See Verdugo-Urquidez*, 494 U.S. at 272.

206. Mocsary, *supra* note 178, at 2171.

*Second Amendment: Citizenship and the Right to Bear Arms*,<sup>207</sup> hit the nail on the head when he wrote:

Undoubtedly, one could argue that *Heller* gun rights are sui generis and that “the people” in the Second Amendment is narrower and more precisely defined than in other constitutional provisions. While this interpretation is plausible, it would undermine the *Heller* majority’s painstaking exegesis of “the people,” including the guidance sought from other constitutional allusions to the phrase. In addition, it ironically would contradict *Heller*’s fundamental holding regarding the individualized and self-protective characteristics of the right to bear arms. If “the people” referenced in the Second Amendment meant citizens, while the same phrase in the Fourth Amendment meant a broader class of persons with substantial connections, then the Second Amendment is exceptional in requiring obligation and loyalty to—and recognition by—the state in order to seek its protection. Conditioning the right on an intimate tie to the state suggests that the Amendment is not actually about self-defense, but about state-defense. . . . However, *Heller* rejected this reading in its characterization of the Second Amendment right as an individual right to self-defense, and therefore its tightening of “the people” relative to its other uses in the Constitution is plausible only at the expense of its keystones.<sup>208</sup>

Therefore, as Gulasekaram eloquently noted, if the people of the Second Amendment and the people of the Fourth Amendment are in fact the same people, “citizens” cannot be the sole group of benefactors under these amendments.<sup>209</sup> Gulasekaram pointed out, simply, “[i]n light of history, text, and logic, ‘the people’ of the Second Amendment must include more than citizens.”<sup>210</sup>

In light of these findings, the *Portillo-Munoz* court’s reasoning for disallowing Armando Portillo-Munoz the right to carry a firearm seems fatally flawed.<sup>211</sup> The court, knowing that it had the precedent of *Verdugo-*

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207. Pratheepan Gulasekaram, “The People” of the Second Amendment: Citizenship and the Right to Bear Arms, 85 N.Y.U. L. REV. 1521 (2010).

208. Gulasekaram, *supra* note 207, at 1538-39.

209. *Id.*

210. *Id.* at 1580.

211. United States v. Portillo-Munoz, 643 F.3d 437 (5th Cir. 2011).

*Urquidez* to deal with,<sup>212</sup> acknowledged the fact that the same group of people were covered in both the Fourth and Second Amendments but tried to sideline this issue by claiming that undocumented persons were not covered under the Fourth Amendment.<sup>213</sup> Then, the court, flying in the face of *Heller*,<sup>214</sup> established that the Second Amendment is an affirmative right and not a protective right granted to the individual.<sup>215</sup> With this misguided piece laid out, the court found that Portillo-Munoz was not a part of “the people” of the Second Amendment.<sup>216</sup> As the dissent noted, however, this decision has far-reaching consequences.<sup>217</sup> Because, simply put, if undocumented persons are not a part of “the people” of the Second Amendment, then they cannot be a part of “the people” of the rest of the amendments that cover “the people.”<sup>218</sup>

#### IV. CONCLUSION

The majority’s holding in *Portillo-Munoz*,<sup>219</sup> that Armando Portillo-Munoz is not a part of “the people” and thus has no Second Amendment rights, does not comport logically with the reasoning of the Supreme Court.<sup>220</sup> Not only does the court not follow precedent in that the Second Amendment is an individual right not granted to one by the Constitution<sup>221</sup> and not an affirmative right as the court assumes, but the court also then dismisses the idea that the same group of people are covered under both the Second and Fourth Amendment by noting that there is no precedent for finding that undocumented persons are covered under the Fourth Amendment.<sup>222</sup> Although the *Verdugo-Urquidez* Court noted that the Supreme Court has never decided the issue of whether undocumented persons retain Fourth Amendment rights, it noted correctly that a majority of Justices already assume that undocumented persons retain these rights.<sup>223</sup> Further,

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212. *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990).

213. *Portillo-Munoz*, 643 F.3d at 440.

214. *District of Columbia v. Heller*, 554 U.S. 570 (2008).

215. *Portillo-Munoz*, 643 F.3d at 440-41.

216. *Id.* at 442.

217. *Id.* at 443 (Dennis, J., dissenting).

218. Mocsary, *supra* note 178, at 2171. As noted above, this is because the Supreme Court has held that the same “people” are depicted analogously throughout the Bill of Rights.

219. *Portillo-Munoz*, 643 F.3d at 442.

220. *See* *District of Columbia v. Heller*, 554 U.S. 570 (2008).

221. *Id.* at 592.

222. *Portillo-Munoz*, 643 F.3d at 440.

223. *United States Verdugo-Urquidez*, 494 U.S. 259, 272 (1990).

there is ample case law to support the view that undocumented persons retain Fourth Amendment rights.<sup>224</sup>

Although it is arguable that undocumented persons retain Fourth Amendment rights, it is without a doubt that undocumented persons are already covered under the Constitution within the Fourteenth Amendment Due Process and Equal Protection Clauses.<sup>225</sup> As the Supreme Court held in *Plyler*, “[w]hatever his status under the immigration laws, an alien is surely a ‘person’ in any ordinary sense of that term.”<sup>226</sup> Therefore, undocumented persons are already covered under provisions within the Constitution.

As the dissenting opinion in *Portillo-Munoz*, written by Circuit Judge Dennis, correctly stated,<sup>227</sup> to hold that Portillo-Munoz is not a part of “the people” would, in effect, mean that “millions of similarly situated residents of the United States are ‘non-persons’ who have no rights to be free from unjustified searches of their homes and bodies and other abuses, nor to peaceably assemble or petition the government.”<sup>228</sup> To hold such would put these millions of people, and even American citizens, in dangerous territory.

The calling into question of who makes up “the people” or who is a “person” hopelessly reminds us of a past, as exemplified by the *Dred Scott* case,<sup>229</sup> in which African Americans were not treated as people but as property.<sup>230</sup> It is time for Americans to collectively realize that we are only as strong as our weakest link. The American Civil Liberties Union is undoubtedly correct when it writes: “[u]pholding the rights of immigrants is important to us all. When the government has the power to deny legal rights and due process to one vulnerable group, everyone’s rights are at risk.”<sup>231</sup> Does this nation truly pride itself on the idea that there is equality under the law for everyone<sup>232</sup> and that justice is blind, or do such beliefs only stretch so far as an “us versus them” mentality can stretch? As undocumented persons are expected to abide by American laws, they should also have rights and be protected under such laws,<sup>233</sup> not simply by reason of their being

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224. *Gonzalez-Rivera v. INS*, 22 F.3d 1441 (9th Cir. 1994); *see also Orhorhaghe v. INS*, 38 F.3d 488 (9th Cir. 1994); *United States v. Juarez-Torres*, 441 F. Supp. 2d 1108 (D.N.M. 2006).

225. *See Plyler v. Doe*, 457 U.S. 202, 210 (1982).

226. *Id.*

227. *Portillo-Munoz*, 643 F.3d at 443 (Dennis, J., dissenting).

228. *Id.*

229. *Scott v. Sandford*, 60 U.S. 393 (1856).

230. *Id.*

231. *Immigrants’ Rights*, ACLU.COM, <http://www.aclu.org/human-rights/immigrants-rights> (last visited Jan. 19, 2013).

232. *See Plyler*, 457 U.S. at 219.

233. *See MADISON*, *supra* note 1, at 556.

within this nation's jurisdiction but by virtue of their being, as Americans are too, human.

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