

The Second Amendment's "People" Problem

*Pratheepan Gulasekaram**

The Second Amendment has a "people" problem. In 2008, District of Columbia v. Heller expanded the scope of the Second Amendment, grounding it in an individualized right of self-protection. At the same time, Heller's rhetoric limited "the people" of the Second Amendment to "law-abiding citizens." In 2022, New York State Rifle & Pistol Ass'n v. Bruen doubled down on the Amendment's self-defense rationales but, once again, framed the right as one possessed by "citizens." In between and after the two Supreme Court cases, several lower federal courts, including eight federal courts of appeals, wrestled with the question whether the right to keep and bear arms is a citizen-only right. Although those courts proffered varying perspectives on the meaning of "the people," they uniformly rejected challenges to the federal criminal ban on possession by unlawfully present persons and nonimmigrants.

In addition to the federal criminal ban, the immigration code allows for deportation of all noncitizens, including permanent residents, for firearms-related violations. In combination, the Supreme Court's rhetoric, lower federal courts' decisions, and federal criminal and immigration statutes excise noncitizens from "the people" of the Second Amendment.

This Article is the first to examine the relationship between "the people," immigration status, and the right to keep and bear arms in the wake of both Heller and Bruen. My analysis argues that courts undertheorize the systemic effects of constricting "the people" to citizens or, more recently, countenance historical inquiries that yield incoherent results. Intratextual comparison of

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“the people” of the Second Amendment with “the people” of the First and Fourth Amendments fares no better. That appraisal also commands broader inclusiveness for the Second Amendment’s rightsholders than current jurisprudence permits. This Article concludes that a more coherent theory of Second Amendment rightsholders would necessarily include most noncitizens, at least when the right is grounded in self-defense from interpersonal violence. This conclusion casts doubt on current federal law that categorically criminalizes possession by certain groups of noncitizens, as well as deportation rules that banish all noncitizens for firearms violations. More capacious interpretations of the Second Amendment’s “the people,” in turn, help ensure noncitizens’ inclusion under other core constitutional protections.

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INTRODUCTION†

The Second Amendment has a “people” problem. It is not obvious that it should. After all, following a decades-long political and legal campaign by gun advocates, in 2008, a sympathetic Supreme Court decreed that the Second Amendment enshrined a preconstitutional right of self-defense possessed by each of us in our individual capacities.¹ Presumably most persons—regardless of immigration status—might need the home and personal protection venerated by the Supreme Court in *District of Columbia v. Heller*² and recently reaffirmed in *New York State Rifle & Pistol Ass’n v. Bruen*.³

At the same time that it struck down the District of Columbia’s handgun law, however, *Heller* quizzically contracted the group who might possess a weapon. Without explanation, the majority announced that “the people” of the Second Amendment was synonymous with “law-abiding citizens.”⁴ Since then, several lower federal courts⁵ have been confronted with questions not presented in *Heller* yet prompted by its ultra vires citizenship talk: Are noncitizens rightsholders under the Second Amendment? Is the right to keep and bear arms a citizen-only right?

Lower federal courts wrestling with these questions since *Heller* have come to conflicting and inconsistent views on the scope of “the people” who may bear arms. Yet, all have ultimately and uniformly rejected noncitizens’ Second Amendment challenges to the federal

† As an introductory note, personal experience has taught that writing about firearms enflames passions, is often selectively quoted, and is often manipulated for ends at odds with the author’s view. For this reason, I wish to state unequivocally that my constitutional investigation of federal laws that regulate immigrant gun possession is not intended to advance a deregulatory agenda. I write these words shortly after a gunman massacred nineteen children and two teachers at an elementary school in Uvalde, Texas. It is almost certain that by the time this article goes to print, dozens more will meet a similar fate. For further discussion of this and the regularity of other firearm-aided mass murders in our recent history, see German Lopez, *America’s Gun Problem*, N.Y. TIMES (May 26, 2022), <https://www.nytimes.com/2022/05/26/briefing/guns-america-shooting-deaths.html> [<https://perma.cc/T7Y5-H6W7>]. I firmly believe in both the constitutional soundness and the policy wisdom of reasonable, comprehensive—and nondiscriminatory—gun regulation. See, e.g., Danny Y. Li, Note, *Antisubordinating the Second Amendment*, 132 YALE L.J. 1821, 1869–1906 (2023); Joseph Blocher & Reva B. Siegel, *When Guns Threaten the Public Sphere: A New Account of Public Safety Regulation Under Heller*, 116 NW. U. L. REV. 139, 163–80 (2021) [hereinafter Blocher & Siegel, *When Guns Threaten the Public Sphere*].

1. *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008) (striking down D.C.’s handgun law).

2. *Id.*

3. 142 S. Ct. 2111, 2156 (2022) (striking down New York’s discretionary permitting scheme for concealed carry of firearms in public).

4. *Heller*, 554 U.S. at 624–26.

5. See *infra* note 20 and Section I.B.

“alien-in-possession” criminal ban.⁶ Strikingly, these courts have done so while the Supreme Court has further expanded the substantive scope of the right through *McDonald v. City of Chicago*⁷ and *Bruen*.⁸ Debates over this new era of more accessible and more prevalent gun rights have obscured the courts’ corresponding diminution of “the people.”

The disconnect between federal courts’ expansion of gun rights and their contraction of noncitizens’ rights is typified by *United States v. Perez*.⁹ In many ways, Javier Perez seemed to be the quintessential wielder of arms imagined by *Heller* and *Bruen*. According to the trial record, he was attending a barbeque with family and friends when a menacing group of individuals, possibly with gang affiliations, approached the residence.¹⁰ Seeing them, Perez borrowed a friend’s firearm and displayed it to scare off the would-be attackers, returning the gun to its owner when the danger had passed.¹¹ Perez had no criminal convictions.¹² He had lived in the United States since he was thirteen years old, was gainfully employed, and was a father to two citizen children.¹³ Further, Perez is a member of a racial minority group,¹⁴ implicating the concerns voiced by Justices Thomas and Alito regarding the disparate impact of gun regulation on vulnerable populations.¹⁵ In short, his firearm possession implicated *Heller* and *Bruen*’s animating ethos: he temporarily wielded a handgun in defense of self, loved ones, and home.

6. See 18 U.S.C. § 922(g)(5) (criminalizing possession by unlawfully present persons and nearly every nonimmigrant). A “nonimmigrant” under federal immigration law is a lawful, but temporary, noncitizen in the United States here for specific purposes and time periods in the various “alphabet” visa categories. See 8 U.S.C. § 1101(a)(15); 8 C.F.R. §§ 214.1-.15. See also *infra* Section I.B for a discussion of lower federal court cases rejecting challenges to 18 U.S.C. § 922(g)(5).

7. 561 U.S. 742, 791 (2010) (without majority rationale, incorporating the Second Amendment against the states).

8. 142 S. Ct. at 2131–34.

9. 6 F.4th 448 (2d Cir. 2021).

10. *Id.* at 450.

11. *Id.*

12. *Id.* at 454. The opinion notes affiliations with a gang when he was young, but does not list any arrests, charges, or convictions related to the alleged affiliation.

13. *Id.* at 450.

14. *Id.*

15. See *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111, 2156 (2022) (Thomas, J.) (“New York’s proper-cause requirement violates the Fourteenth Amendment in that it prevents law-abiding citizens with ordinary self-defense needs from exercising their right to keep and bear arms.”); *id.* at 2158 (Alito, J., concurring) (“[The police cannot] provide bodyguard protection for [New York] State’s nearly 20 million residents or the 8.8 million people who live in New York City. . . . Some are members of groups whose members feel especially vulnerable.”). In *McDonald*, both Alito’s and Thomas’s opinions recount the nation’s long history of racial violence and disarmament, especially in the period during and after Reconstruction. *McDonald v. City of Chicago*, 561 U.S. 742, 771–80 (2010) (Alito, J., announcing the judgment of the Court); *id.* at 807–10 (Thomas, J., concurring in the judgement).

Despite these facts, what mattered to the court was Perez's lack of lawful immigration status.¹⁶ Federal law prohibits possession by noncitizens who are "illegally or unlawfully in the United States," as well as nearly all nonimmigrants.¹⁷ The majority assumed, without deciding, that Perez was part of "the people" who could raise the Second Amendment but ultimately held that the law's categorical exclusion of unlawfully present persons passed heightened scrutiny.¹⁸ The concurring opinion took the direct route, holding that noncitizens are not part of "the people," thus denying Perez's right to raise the Second Amendment.¹⁹ Eight appellate courts post-*Heller*, in line with the U.S. Court of Appeals for the Second Circuit's *Perez* decision, similarly have rejected Second Amendment challenges to the federal criminal ban on gun possession by certain noncitizens.²⁰ These courts have done so either by choosing one of the rationales proffered by the *Perez* majority and concurrence or, most recently, by relying on historical inquiry to conclude that noncitizens are not part of "the people."²¹ Separate from the criminal liability at issue in these cases, an even broader population—all noncitizens, including lawful permanent residents—faces immigration consequences, including deportation and detention, for firearms-related conduct and violations.²²

In combination, these federal criminal and immigration statutes, the several appellate court decisions, and the Supreme Court's

16. 6 F.4th at 454–56.

17. See 18 U.S.C. § 922(g)(5)(A)-(B). I have used the statutory definition here, but throughout this Article I will refer to the population regulated by § 922(g)(5) as those who are "unlawfully present." I recognize the indeterminacy and concerns with deploying that term as a proxy for unauthorized or undocumented status. As litigation over the legality of the DACA program and the status of DACA recipients has shown, there remains significant ambiguity and disagreement over what constitutes unlawful presence and who falls into that category.

18. 6 F.4th at 453–56.

19. *Id.* at 456–63 (Menashi, J., concurring in the judgment).

20. *Id.* at 456; *United States v. Sitladeen*, 64 F.4th 978, 985–86 (8th Cir. 2023); *United States v. Jimenez-Shilon*, 34 F.4th 1042, 1049–50 (11th Cir. 2022); *United States v. Torres*, 911 F.3d 1253, 1263–65 (9th Cir. 2019); *United States v. Meza-Rodriguez*, 798 F.3d 664, 668–73 (7th Cir. 2015); *United States v. Huitron-Guizar*, 678 F.3d 1164, 1167–70 (10th Cir. 2012); *United States v. Flores*, 663 F.3d 1022, 1023 (8th Cir. 2011); *United States v. Carpio-Leon*, 701 F.3d 974, 976–82 (4th Cir. 2012); *United States v. Portillo-Munoz*, 643 F.3d 437, 439–42 (5th Cir. 2011).

21. See *supra* note 20; *infra* Section II.B.

22. The Immigration and Nationality Act ("INA") permits the federal government to deport any noncitizen, including lawful permanent residents, with two firearms-related provisions: (1) 8 U.S.C. § 1227(a)(2)(C) converts a federal, state, or even foreign firearms violation into a deportable offense; and (2) a conviction for a firearms violation may constitute an "aggravated felony" under 8 U.S.C. § 1101(a)(43)(E). Section 1101(a)(43)(E), when used as the basis for removal, deprives noncitizens of a variety of defenses to, and relief from, deportation. Finally, firearms violations are among the category of offenses that trigger mandatory immigration incarceration. 8 U.S.C. § 1226(c)(1)(C). In fact, all of the noncitizen-defendants in the appellate cases could be summarily detained and deported based on their firearms convictions. See *supra* note 20.

rhetoric in *Heller* and *Bruen* significantly curtail, if not outright exclude, noncitizens from “the people” and, thus, the right to keep and bear arms. Together, they help relegate immigrants and guns to an obscured and hidden corner of American political and constitutional thought: a dark recess where political expediency, an unsympathetic population, and legal uncertainty converge to erode constitutional coverage.

This Article represents the first sustained scholarly inquiry into the relationship between “the people,” immigration status, and the Second Amendment in a post-*Heller* and post-*Bruen* world, with an eye toward a broader exegesis of rightsholders under the Constitution.²³ To be sure, scholarly literature on the Second Amendment is legion,²⁴ but a smaller group of scholars focuses on the exclusion of disfavored groups.²⁵ Other commentators have addressed questions regarding the scope of “the people” and citizenship generally;²⁶ still another growing

23. Currently, academic literature on the relationship between gun rights and immigrants’ rights mostly is limited to my prior work. See generally Pratheepan Gulasekaram, *Guns and Membership in the American Polity*, 21 WM. & MARY BILL RTS. J. 619 (2012) [hereinafter Gulasekaram, *Guns and Membership*]; Pratheepan Gulasekaram, “*The People*” of the Second Amendment: *Citizenship and the Right to Bear Arms*, 85 N.Y.U. L. REV. 1521 (2010) [hereinafter Gulasekaram, *Citizenship*]; Pratheepan Gulasekaram, *Aliens with Guns: Equal Protection, Federal Power, and the Second Amendment*, 92 IOWA L. REV. 891 (2007) [hereinafter Gulasekaram, *Aliens with Guns*]. I hasten to add that several student notes also have focused on specific circuit court cases discussed in this Article.

24. See generally Joseph Blocher, *Categoricalism and Balancing in First and Second Amendment Analysis*, 84 N.Y.U. L. REV. 375, 413–23 (2009); Darrell A.H. Miller, *Second Amendment Equilibria*, 116 NW. U. L. REV. 239 (2021); Patrick J. Charles, *Racist History and the Second Amendment: A Critical Commentary*, 43 CARDOZO L. REV. 1343 (2022) [hereinafter Patrick J. Charles, *Racist History*]; Jacob D. Charles, *Second Amendment Animus*, 116 NW. U. L. REV. 1 (2021) [hereinafter Jacob D. Charles, *Animus*]; Saul Cornell & Nathan DeDino, *A Well Regulated Right: The Early American Origins of Gun Control*, 73 FORDHAM L. REV. 487 (2004); Eugene Volokh, *The Commonplace Second Amendment*, 73 N.Y.U. L. REV. 793 (1998).

25. See generally Jacob D. Charles, *Defeasible Second Amendment Rights: Conceptualizing Gun Laws That Dispossess Prohibited Persons*, 83 LAW & CONTEMP. PROBS. 53 (2020) [hereinafter Jacob D. Charles, *Defeasible Second Amendment*]; Joseph Blocher & Caitlin Carberry, *Historical Gun Laws Targeting “Dangerous” Groups and Outsiders*, in NEW HISTORIES OF GUN RIGHTS AND REGULATION: ESSAYS ON THE PLACE OF GUNS IN AMERICAN LAW AND SOCIETY (Joseph Blocher, Jacob D. Charles & Darrell A.H. Miller eds., Oxford Univ. Press forthcoming Oct. 2023); Angela R. Riley, *Indians and Guns*, 100 GEO. L.J. 1675 (2012); Robert J. Cottrol & Raymond T. Diamond, “*Never Intended to Be Applied to the White Population*”: *Firearms Regulation and Racial Disparity—the Redeemed South’s Legacy to a National Jurisprudence?*, 70 CHI.-KENT L. REV. 1307 (1995).

26. See generally Note, *The Meaning(s) of “The People” in the Constitution*, 126 HARV. L. REV. 1078 (2013) [hereinafter Note, *Meaning(s)*]; D. Carolina Núñez, *Inside the Border, Outside the Law: Undocumented Immigrants and the Fourth Amendment*, 85 S. CAL. L. REV. 85 (2011); M. Isabel Medina, *Exploring the Use of the Word “Citizen” in Writings on the Fourth Amendment*, 83 IND. L.J. 1557 (2008); David C. Williams, *The Militia Movement and Second Amendment Revolution: Conjuring with the People*, 81 CORNELL L. REV. 879 (1996). I recognize that a related body of literature addresses “We the People” or “the people” as the center of debates over the locus of sovereignty and the legitimacy of constitutional change. See generally BRUCE A. ACKERMAN, *WE THE PEOPLE* (1991, 1998, 2014); AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND*

body of literature focuses on the extent of First Amendment guarantees and Bill of Rights criminal process protections for noncitizens.²⁷ Additionally, emerging scholarship is starting to address the difficulties with *Bruen's* recent prescription for a "text and history" approach to Second Amendment analysis.²⁸ This Article intervenes at the intersections of these multiple academic strands.

At its most specific, my analysis argues that current jurisprudential attempts to define specific rightsholders signified by "the people" are myopic and misguided, at least with regard to noncitizens. In response, this Article maintains that a more coherent theory of Second Amendment rightsholders would necessarily include most, if not all, noncitizens—at least when the right is grounded in self-protection from interpersonal violence. As a consequence, the Article casts doubt on current federal laws that criminalize possession by particular noncitizens, as well as deportation rules that banish all noncitizens for firearms violations.

The larger purpose of this exploration, however, lies outside of gun rights. Indeed, the ethic of firearm ownership and the drive to purchase a gun for self-defense are lower among noncitizens than citizens.²⁹ In fact, even among citizens, gun ownership is disproportionately associated with, and practiced by, a select group: white, male citizens.³⁰ The low rate of noncitizen ownership may owe to

RECONSTRUCTION (1998); LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004); Roman J. Hoyos, *Who Are "the People"?*, 11 ELON L. REV. 23 (2019); Randy E. Barnett, *We the People: Each and Every One*, 123 YALE L.J. 2576 (2014); Doni Gewirtzman, *Glory Days: Popular Constitutionalism, Nostalgia, and the True Nature of Constitutional Culture*, 93 GEO. L.J. 897 (2005). This important use of "the people" is not my central concern; this project starts from the premise (adopted by federal courts) that "the people" may also identify specific rightsholders.

27. See Jennifer M. Chacón, *Unsecured Borders: Immigration Restrictions, Crime Control and National Security*, 39 CONN. L. REV. 1827, 1867–73 (2007). See generally Michael Kagan, *When Immigrants Speak: The Precarious Status of Non-Citizen Speech Under the First Amendment*, 57 B.C. L. REV. 1237 (2016) [hereinafter Kagan, *When Immigrants Speak*].

28. See, e.g., Patrick J. Charles, *The Fugazi Second Amendment: Bruen's Text, History, and Tradition Problem and How to Fix It*, 71 CLEV. ST. L. REV. 623 (2023) [hereinafter Patrick J. Charles, *Fugazi Second Amendment*].

29. Cf. Natasha R. Saunders, Hannah Lee, Alison Macpherson, Jun Guan & Astrid Guttman, *Risk of Firearm Injuries Among Children and Youth of Immigrant Families*, 189 CANADIAN MED. ASS'N J. E1, E452–58 (2017) (finding that "[c]ompared with nonimmigrants, immigrant children and youth had a lower risk of unintentional firearm injury" in Ontario); Michael T. Light & Ty Miller, *Does Undocumented Immigration Increase Violent Crime?*, 56 CRIMINOLOGY 370 (2017) (finding in a study of all 50 states and Washington, D.C. from the years 1990 to 2014 that "undocumented immigration does not increase violence").

30. Kim Parker, Juliana Menasce Horowitz, Ruth Igielnik, J. Baxter Oliphant & Anna Brown, *The Demographics of Gun Ownership*, PEW RSCH. CTR. (June 22, 2017), <https://www.pewresearch.org/social-trends/2017/06/22/the-demographics-of-gun-ownership/> [https://perma.cc/KR5V-CQT4]; Dara Lind, *Who Owns Guns in America? White Men, Mostly*, VOX (Dec. 4, 2015, 1:10 PM), <https://www.vox.com/2015/12/4/9849524/gun-race-statistics> [https://perma

a number of factors (including the federal criminal ban), but it is reasonable to attribute some part to the cultural ethos and practice in countries of birth, where firearm availability and gun violence are dramatically lower than the United States.³¹ Perhaps in part because of this ethic, these regulations do not constitute a particularly significant source of expulsion from the country.³² Despite a cultural ethos agnostic to gun ownership among noncitizens and the relatively small (but nonzero) number of criminal and removal prosecutions, I engage this topic because the gun rights of noncitizens provide a prism into equality and the range of rightsholders under the Constitution.³³

Discrimination against noncitizens has at times garnered skeptical judicial inquiry. Unfortunately, judicial attention to equality and nondiscrimination guarantees has waned as of late.³⁴ Even as noncitizens, including unlawfully present persons, have become a

.cc/Y2XN-3MJL]; see also ALEXANDRA FILINDRA, RACE, RIGHTS, AND RIFLES: THE ORIGINS OF THE NRA AND CONTEMPORARY GUN CULTURE 2–8 (Univ. Chi. Press forthcoming 2023) (manuscript at 2–8) (on file with author).

31. See *Gun Ownership by Country 2023*, WORLD POPULATION REV., <https://worldpopulationreview.com/country-rankings/gun-ownership-by-country> (last visited Aug. 3, 2023) [<https://perma.cc/E23K-7RJV>] (noting that the United States has the highest rate of civilian gun ownership in the world); *How Many US Mass Shootings Have There Been in 2023?*, BBC: NEWS, <https://www.bbc.com/news/world-us-canada-41488081>.amp (last updated May 26, 2023) [<https://perma.cc/Z7MJ-4LD3>] (“The US ratio of 120.5 firearms per 100 residents, up from 88 per 100 in 2011, far surpasses that of other countries around the world.”); Sarah Smith, *Texas Shooting: America’s Gun Control Debate That Never Goes Away*, BBC: NEWS (May 25, 2022), <https://www.bbc.com/news/world-us-canada-61585716> [<https://perma.cc/DB5C-5NJJ>] (“American gun owners . . . see their firearms as protection[.]”).

32. According to data from U.S. Customs and Border Protection, since 2016, an average of only 173 noncitizens a year have been convicted of illegal weapons possession, transport, or trafficking. *Criminal Noncitizen Statistics Fiscal Year 2023*, U.S. CUSTOMS & BORDER PROT., <https://www.cbp.gov/newsroom/stats/cbp-enforcement-statistics/criminal-noncitizen-statistics> (last updated June 15, 2023) [<https://perma.cc/EAM2-2223>] (compilation of illegal weapons possession, transport, and trafficking cases). Moreover, the Department of Homeland Security rarely relies on firearms offenses as the basis for removal. Available data shows that from 2017 through 2022 only 1,835 people were deported specifically for their firearms offense. *Criminal Grounds for Deportation*, TRAC (July 29, 2022), <https://trac.syr.edu/immigration/reports/685/> [<https://perma.cc/SXP6-WY9B>]. Importantly, for both of those statistics, simple possession is lumped together with other weapons offenses, making it difficult to determine the number of removals for firearm possession alone. For context, during that same period, there were a total of more than 1.35 million removals by DHS. See *CBP Enforcement Statistics Fiscal Year 2023*, U.S. CUSTOMS & BORDER PROT., <https://www.cbp.gov/newsroom/stats/cbp-enforcement-statistics> (last updated June 15, 2023) [<https://perma.cc/9NER-CSF8>]; U.S. IMMIGR. & CUSTOMS ENFT, ANNUAL REPORT FISCAL YEAR 2022, at 18–19 (2022), www.ice.gov/doclib/eoy/iceAnnualReportFY2022.pdf [<https://perma.cc/5E8C-8DXY>]; U.S. DEP’T OF HOMELAND SEC., 2021 YEARBOOK OF IMMIGRATION STATISTICS 105 tbl.39 (2022), www.dhs.gov/immigration-statistics/yearbook/2021 [<https://perma.cc/PESK-ZYC4>].

33. See generally Blocher & Siegel, *When Guns Threaten the Public Sphere*, *supra* note †.

34. Cf. Joseph Blocher & Reva B. Siegel, *Race and Guns, Courts and Democracy*, 135 HARV. L. REV. F. 449, 449–50 (2022) (arguing that the problem of racial justice concerns in gun regulation “are partly attributable to the Court’s decades-long abdication of equal protection oversight of the criminal justice system”).

larger and more ingrained part of our national populace, they largely exist outside of some core constitutional protections. Beyond the Second Amendment, the Supreme Court has doubted the ability of certain noncitizens to seek shelter from government actions that implicate constitutional provisions even when the rightsholders are not limited to “the people.” For example, *Trump v. Hawaii*³⁵ and *Department of Homeland Security v. Thuraissigiam*³⁶ contract the ability of noncitizens to seek redress through the First Amendment and access due process and habeas protections.³⁷ These cases suggest that many noncitizens may not even be constitutionally recognized “persons,” let alone part of “the people.”

In short, this Article’s animating concern is that the Second Amendment’s “people” problem threatens to become the Constitution’s “people” problem. As the Supreme Court nestles the right to bear arms into the core of America’s most treasured civil liberties, the power to possess a firearm connotes more than the ability to own a particular form of property or even engage in a particular form of expression. Transcending both, the right to own a firearm evolves into a central signifier of belonging within the constitutional order.

Properly theorized, however, “the people” of the Second Amendment might generate egalitarian momentum. Broadening the Second Amendment’s rightsholders might serve as the wedge that pries open the door to more expansive reconsideration of constitutional coverage in other provisions. Moreover, elucidating and expanding “the people” in the crucible of the Second Amendment permits courts and commentators to scrutinize weighty concerns over belonging, Americanness, and national security. It simultaneously brings to the fore two age-old tensions that have defined America: First, a constant dialectic between being a nation of immigrants but one that is ever paranoid of the specter of existential threat from foreigners; second, a nation proud of its armed resistance to tyranny but one held hostage by the existential threat of firearms.

Part I of this Article begins with *Heller*’s catalytic effect on previously dormant Second Amendment challenges to group-based exclusions. Here, the Article critiques the various judicial attempts to deconstruct and reconstruct “the people” in the wake of a newly minted, self-defense-oriented Second Amendment. I argue that federal courts

35. 138 S. Ct. 2392 (2018).

36. 140 S. Ct. 1959 (2020).

37. See *id.* at 1969–83 (rejecting both due process and habeas claims of asylum seeker challenging sufficiency of process after having been found in the United States); *Trump*, 138 S. Ct. at 2415–23 (rejecting religious discrimination claim against President Trump’s Proclamation banning immigration from several majority Muslim countries).

have thus far undertheorized their approaches to “the people,” failing to acknowledge the indeterminacy of the phrase, the incompatibility of their interpretation with other amendments that similarly classify rightsholders, or the systemic effects of their interpretations. *Bruen*’s history-focused methodology only deepens the interpretative deficit. This Part concludes that neither the circuit court approaches of the past decade nor the Court’s turn in *Bruen* are theoretically sound methods for examining immigrant gun regulations.

Despite this conclusion, Part II indulges *Bruen*’s methodological prescription. It shows that even if historical inquiry could answer questions of the “who” of gun possession, past legal regulation cannot sustain gun laws premised on immigration status, at least when courts employ *Bruen*’s particular methodology. Here, the Article tracks the background of noncitizens’ exclusions from gun rights—initially premised on conflating citizenship with race and later on conflating noncitizens with “subversive” foreign ideologies—leading to statutory restrictions on immigrant gun possession during times of fervent anti-foreign sentiment. It shows that federal regulation of noncitizen possession galvanized in the mid-twentieth century as the product of a lobbying and legislative campaign that framed noncitizens as existential threats in the lead up to World War II through the Cold War. That campaign successfully substituted immigrant regulation for gun regulation. Given the motivations for such regulation and their relatively recent vintage, Part II concludes that they cannot provide a basis for upholding federal prohibitions on noncitizen possession under *Bruen*’s methodology.

In light of the failure of current judicial approaches, Part III asks whether any other theory might justify immigrant gun laws. As the Supreme Court has done, this Part engages in intratextual analysis, comparing the Second Amendment to the First and Fourth Amendments to yield a viable theory to undergird exclusion of noncitizens from the right to bear arms. Like the Second Amendment, these Bill of Rights protections inure to “the people,”³⁸ and current jurisprudence permits certain limitations based on immigration status.³⁹ Nevertheless, comparing judicial interpretations of “the people” as used in these amendments relative to each amendment’s purpose militates in favor of expanding “the people” who may bear arms, especially when the right is grounded in self-defense from private violence. A brief conclusion hinting at the broader implications of this analysis follows.

38. U.S. CONST. amends. I, IV.

39. See *infra* Section III.B (surveying First and Fourth Amendment deficits for noncitizens).

A final caveat before beginning: my inquiry into “the people” as a set of rightsholders is distinct from the larger project of several constitutional law scholars who use “the people” or “We the People” as the locus of discourse over sovereignty and the legitimacy of constitutional change.⁴⁰ Those works debate the authority for constitutional interpretation and contestation through the judicial branch, the institutions of federalism, and the mechanisms of popular constitutionalism. In that debate, “the people” and “We the People” function as an abstract collective, legitimizing sovereign power and validating sources of constitutional authority and interpretation. The primary focus of those inquiries centers on “We the People” or “the People of the several States,” which might be distinguished from invocations of “the people” as specific rightsholders under the Bill of Rights. Sidestepping fundamental questions about the nature and location of sovereignty in our constitutional order, I probe the conditions under which “the people” might exclude or include immigrants. Accordingly, my project here is more grounded in the mechanics of judicial decisionmaking and interpretation. I seek to explicate “the people” under the assumption that the phrase contemplates categories of persons and can help elucidate the boundaries of group-based exclusions from the Bill of Rights.

I. CONSTRICTING “THE PEOPLE”

Until *Heller*, federal courts operated under the principle that Congress had the power to reasonably regulate the possession and use of firearms.⁴¹ The principle was rarely tested before the Supreme Court, however, as the Second Amendment was not incorporated until 2010,⁴² and gun regulation was primarily (if not exclusively) a state and local matter until the mid-twentieth century.⁴³ The federal government began restricting firearms in 1934 with the National Firearms Act, which criminalized the possession of machine guns and sawed-off shotguns by any person, including citizens.⁴⁴ The Supreme Court

40. See, e.g., ACKERMAN, *supra* note 26; AMAR, *supra* note 26; KRAMER, *supra* note 26; Hoyos, *supra* note 26; Gewirtzman, *supra* note 26.

41. See *United States v. Miller*, 307 U.S. 174, 178–83 (1939) (holding the Second Amendment did not “guarantee[] the right to keep and bear” a specific style of shotgun); see, e.g., *Barrett v. United States*, 423 U.S. 212, 215–25 (1976) (upholding federal felon-in-possession provision under the Commerce Clause without discussion of the Second Amendment). *But see* *United States v. Emerson*, 270 F.3d 203, 260 (5th Cir. 2001) (opining that the Second Amendment protected an individual right to bear arms in self-defense, several years before *Heller*).

42. *McDonald v. City of Chicago*, 561 U.S. 742, 749–50 (2010).

43. See *infra* Sections II.A & B.

44. *Miller*, 307 U.S. at 175–78.

upheld that provision of the 1934 Act in *United States v. Miller*, declining to endorse an “individual” right to bear arms and instead focusing on the tie between the right to bear arms and its militia-focused clause.⁴⁵ A unanimous Court held that the Second Amendment did not protect possession of a short-barreled shotgun because use of such a weapon had no “reasonable relationship to the preservation or efficiency of a well regulated militia.”⁴⁶

With *Miller* supplying the prevailing interpretation of the Second Amendment, the exclusion of noncitizens would have been relatively uncontroversial.⁴⁷ Indeed, federal law from 1934 onward restricted the possession of certain types of weapons by all persons, as well as several classes of people from owning firearms.⁴⁸ As detailed more fully in Section II.B below, Congress enacted deportation laws based on gun violations in 1940. In 1968, Congress first attached federal criminal liability to firearm or ammunition possession by certain noncitizens.⁴⁹ Two decades later in 1986, Congress reenacted the alien-in-possession provision, 18 U.S.C. § 922(g)(5), as part of the Firearms Owners’ Protection Act (“FOPA”).⁵⁰ Notably, the adjacent subsections of § 922(g) criminalize possession by felons,⁵¹ those who have renounced U.S. citizenship,⁵² and those dishonorably discharged from the armed forces.⁵³

Presently, both the firearms-specific deportation provision and the alien-in-possession criminal ban remain in force.⁵⁴ In addition to the

45. *Id.*

46. *Id.*

47. A federal district court in 1910 mentioned the Second Amendment as part of its opinion, finding that the noncitizen’s prior firearms possession was not a crime involving moral turpitude. See *Ex parte Saraceno*, 182 Fed. 955, 957 (S.D.N.Y. 1910). The court’s brief invocation of the Amendment, however, did not define the substantive scope of the right to bear arms, “the people,” or how the Amendment factored into the court’s conclusion. *Id.*

48. National Firearms Act of 1934, Pub. L. No. 73-474, 48 Stat. 1236 (codified as amended at 26 U.S.C. § 5801).

49. Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 197; Gun Control Act of 1968, Pub. L. No. 90-618, 92 Stat. 1213. Title VII of the Omnibus Crime Control and Safe Streets Act imposed criminal liability for any “alien [who is] illegally or unlawfully in the United States,” to “receive[], possess[], or transport[]” any firearm. § 1201, 82 Stat. at 238.

50. Firearms Owners’ Protection Act, Pub. L. No. 99-308, 100 Stat. 449 (1986). In addition, FOPA passed the same year and by the same Congress as the Immigration Reform and Control Act (“IRCA”). Pub. L. No. 99-603, 100 Stat. 3359 (1986).

51. 18 U.S.C. § 922(g)(1).

52. *Id.* § 922 (g)(7).

53. *Id.* § 922 (g)(6).

54. In 1990, fifty years after its initial enactment, Congress modified and enacted the current version of the deportation provision. Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978. Unlike its predecessor, present-day 8 U.S.C. § 1227(a)(2)(C) is not limited to particular firearms like machine guns and sawed-off shotguns. Now, federal law provides a deportation basis for

specific removal ground for a firearms offense, another deportation provision renders noncitizens deportable for committing an “aggravated felony.”⁵⁵ Added to the Immigration and Nationality Act (“INA”) as part of the Anti-Drug Abuse Act of 1988,⁵⁶ the original aggravated felony definition included three crimes: murder, drug trafficking, and illegal *trafficking* in firearms and destructive devices. In 1994, Congress amended the definition of aggravated felony to include violations of the federal firearms laws, including *possession* violations like the federal alien-in-possession prohibition.⁵⁷ Another amendment deemed a “crime of violence” an aggravated felony, providing another basis for liability based on firearm use.⁵⁸

Both the firearms-offense-related deportability ground and the designation of particular federal firearms violations as aggravated felonies (including felon-in-possession and alien-in-possession provisions) apply to the entirety of the noncitizen population.⁵⁹ Both can be used to remove long-term permanent residents with significant family and social ties to the United States. In terms of total population, the broad application of the removal grounds means that, at any given time, at least twenty-five million individuals could face banishment from the United States for a firearms conviction.⁶⁰ At any given time,

convictions involving the purchase, sale, use, possession, or carrying of *any* firearm or destructive device. 8 U.S.C. § 1227(a)(2)(C).

55. 8 U.S.C. §§ 1101(a)(43), 1101(f)(8), 1227(a)(2)(A)(iii).

56. Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, sec. 7342, § 101(a), 102 Stat. 4181, 4469–70 (Title VII, Subtitle J, adding provisions related to deportation for “aggravated felonies”).

57. Immigration and Nationality Technical Corrections Act of 1994, 103 Pub. L. No. 416, sec. 222, § 101(a)(43), 108 Stat. 4305, 4320–21 (including as aggravated felonies violations of 18 U.S.C. § 922(g)).

58. 8 U.S.C. § 1101(a)(43)(F). As aggravated felonies, firearms-related convictions create multiple legal liabilities for noncitizens beyond serving as a basis for removal. If the noncitizen is found to have committed an aggravated felony, other parts of the INA permit the government to remove the noncitizen without a hearing in front of an immigration court, require the government to detain the noncitizen, and render the noncitizen ineligible for asylum, cancellation of removal, and voluntary departure. Firearms convictions also trigger mandatory detention, allowing federal officials to imprison noncitizens for lengthy periods pending their removal hearing or their removal. 8 U.S.C. § 1226(c).

59. 8 U.S.C. § 1227(a) (applying deportation rules to “any alien . . . in and admitted to the United States”).

60. Deportation provisions apply to any noncitizen, including lawful permanent residents (“LPRs”), nonimmigrants, and unlawfully present noncitizens. In 2022, there were approximately 12.9 million LPRs living in the United States. Bryan Baker & Sarah Miller, *Estimates of the Lawful Permanent Resident Population in the United States and the Subpopulation Eligible to Naturalize: 2022*, U.S. DEP’T OF HOMELAND SEC. 1–2 (Sept. 2022), https://www.dhs.gov/sites/default/files/2022-10/2022_0920_ply_lawful_permentent_resident_population_estimate_2022_0.pdf [https://perma.cc/7B2X-B85P]. In 2019, there were approximately 3.2 million nonimmigrant workers, students, and other visitors temporarily residing in the country. Bryan Baker, *Population Estimates of Nonimmigrants Residing in the United States: Fiscal Years 2017–2019*, U.S. DEP’T OF HOMELAND SEC. 1 (May 2021), www.dhs.gov/sites/default/files/publications/immigration-statistics/Pop_Estimate/NI/ni_population_estimates_fiscal_years_2017_-_2019v2.pdf

the federal alien-in-possession criminal law bans somewhere between ten and fifteen million people from exercising the right to bear arms,⁶¹ even for self-defense. For comparison, the adjacent felon-in-possession statutory provision that has garnered significant judicial attention since *Heller* likely deprives approximately nineteen million people of the ability to possess a firearm.⁶²

Until 2008, *Miller's* militia- or state-focused view of the Second Amendment provided legal cover for all manner of reasonable firearms regulations, including restrictions based on immigration status. *Heller*, however, proffered a new interpretation of the Second Amendment, one grounded in self-defense. In 2008, a five-Justice majority in *Heller* struck down a firearms law that banned nearly all handgun possession within the District of Columbia. In unequivocal language, *Heller* disassociates the right to bear arms from collective or state-centered readings that *Miller* prescribed, instead stating: “[T]he inherent right of self-defense has been central to the Second Amendment right. The handgun ban amounts to a prohibition of an entire class of ‘arms’ that is overwhelmingly chosen by American society for that lawful purpose.”⁶³ In short, the majority declared that the Second Amendment protected an individual right of armed self-defense, opining that the right to bear arms was unconstrained by the “militia” or “security of a free state” language in the Amendment’s prefatory clause.⁶⁴ In doing so, the Court galvanized the possibility of rethinking the tie between citizenship and the right to bear arms and invited examination of “the people” of the Second Amendment.

[<https://perma.cc/56MS-QTKM>]. In 2018, approximately 11.4 million people without lawful immigration status were living in the country. Bryan Baker, *Estimates of the Unauthorized Immigrant Population Residing in the United States: January 2015–January 2018*, U.S. DEP’T OF HOMELAND SEC. 1 (Jan. 2021), https://www.dhs.gov/sites/default/files/publications/immigration-statistics/Pop_Estimate/UnauthImmigrant/unauthorized_immigrant_population_estimates_2015_-_2018.pdf [<https://perma.cc/3GY5-PCWV>].

61. Demographers estimate the unlawfully present population to number in this range, depending on methodology used. See *supra* note 60; see also Abby Budiman, *Key Findings About U.S. Immigrants*, PEW RSCH. CTR. (Aug. 20, 2020), <https://www.pewresearch.org/short-reads/2020/08/20/key-findings-about-u-s-immigrants/> [<https://perma.cc/GPA8-HUPB>]; Mohammad M. Fazel-Zarandi, Jonathan S. Feinstein & Edward H. Kaplan, *The Number of Undocumented Immigrants in the United States: Estimates Based on Demographic Modeling with Data from 1990 to 2016*, PLOS ONE 1–10 (Sept. 21, 2018), <https://journals.plos.org/plosone/article/file?id=10.1371/journal.pone.0201193&type=printable> [<https://perma.cc/KNJ5-43PJ>].

62. Zach Sherwood, Note, *Time to Reload: The Harms of the Federal Felon-in-Possession Ban in a Post-Heller World*, 70 DUKE L.J. 1429, 1433 n.28 (2021); see Sarah K. S. Shannon, Christopher Uggen, Jason Schnittker, Melissa Thompson, Sara Wakefield & Michael Massoglia, *The Growth, Scope, and Spatial Distribution of People with Felony Records in the United States, 1948–2010*, 54 DEMOGRAPHY 1795, 1806 (2017).

63. *District of Columbia v. Heller*, 554 U.S. 570, 628 (2008).

64. *Id.* at 597–600.

Heller unlocked the opportunity for robust challenges to all manners of gun regulation, including the “who” of gun possession.⁶⁵ Simultaneously, however, its loose citizenship talk and exegesis of “the people” might be read to foreclose the ability of noncitizens to enjoy the right. Section I.A explains the Court’s attempt to define specific groups of rightsholders signified by “the people” leading up to, and including, *Heller*. Section I.B then documents how federal appellate courts have denied noncitizens without lawful status—and possibly the entire population of noncitizens—the opportunity to raise constitutional challenges to firearms regulations, primarily by excluding them from “the people.” Section I.C concludes by considering the impact of *Bruen*, the Court’s most recent expansion of Second Amendment rights, and arguing that *Bruen*’s history-focused methodology is unsuitable for determining questions regarding the “who” of gun possession.

A. The Supreme Court and “the People”

Other than the Supreme Court’s conflation of race, citizenship, and constitutional rights in *Dred Scott v. Sanford*,⁶⁶ the Court has rarely proffered insight on the extent of “the people” protected by various constitutional provisions.⁶⁷ One such notable instance, however, was *Heller*. Although neither the focus of the case nor a concern to that particular plaintiff,⁶⁸ Justice Scalia ruminated on the

65. See, e.g., Blocher & Carberry, *supra* note 25 (manuscript at 3) (“In contemporary litigation, the two most prominent categories of ‘who’ bans are those involving felons and the mentally ill.”); see also Sherwood, *supra* note 62, at 1433–35.

66. 60 U.S. 393 (1856). See *infra* Section II.A for a discussion of *Dred Scott*’s linking of race to citizenship and, therefore, to gun rights.

67. When the Court has, it generally speaks in sweeping and nebulous terms, more often focusing on the content of “citizens” and “citizenship.” See, e.g., *Minor v. Happersett*, 88 U.S. 162 (1874). The Court upheld a Missouri law that denied a U.S. citizen woman the right to suffrage, opining that citizenship did not imply suffrage and stating:

Before its adoption the Constitution . . . did not in terms prescribe who should be citizens of the United States . . . yet there were necessarily such citizens without such provision. There cannot be a nation without a people. The very idea of a political community, such as a nation is, implies an association of persons for the promotion of their general welfare. . . . For convenience it has been found necessary to give a name to this membership. . . . For this purpose the words ‘subject,’ ‘inhabitant,’ and ‘citizen’ have been used, and the choice between them is sometimes made to depend upon the form of the government. Citizen is now more commonly employed, however, and as it has been considered better suited to the description of one living under a republican government, it was adopted by nearly all of the States upon their separation from Great Britain When used in this sense it is understood as conveying the idea of membership of a nation, and nothing more.

Id. at 165–66.

68. *Heller*, 554 U.S. at 575 (“Dick Heller is a D.C. special police officer authorized to carry a handgun while on duty at the Thurgood Marshall Judiciary Building.”).

scope of “the people” to whom the right to keep and bear arms inured. Drawing from comparisons to the use of the phrase in the First and Fourth Amendments, he first posited that the phrase carried the same meaning throughout the Bill of Rights.⁶⁹ He then concluded that “the people” was not limited to those eligible to serve in a militia but instead meant “all members of the political community.”⁷⁰ At different points in the opinion, Justice Scalia refers to Second Amendment rightsholders as “all Americans,” “citizens,” “Americans,” and “law-abiding citizens.”⁷¹

Although *Heller*’s reading of the Second Amendment’s “operative clause” purported to be originalist,⁷² its thoughts on “the people” were neither particularly textualist nor originalist. Instead, the majority adopted its definition from *United States v. Verdugo-Urquidez*, a 1990 Supreme Court decision dealing with the contours of “the people” of the Fourth Amendment.⁷³ *Verdugo* concerned a noncitizen-defendant who had been apprehended in Mexico and brought into the United States by U.S. law enforcement for prosecution.⁷⁴ Without a warrant, U.S. Drug Enforcement Administration (“DEA”) officers acting in conjunction with Mexican law enforcement searched his residence in Mexico.⁷⁵ The defendant challenged the search of his home in Mexico and the introduction of evidence produced by that search.

A majority of Justices rejected the Fourth Amendment challenge but proffered conflicting rationales for the conclusion. A plurality of Justices in the lead opinion (including *Heller*’s author, Justice Scalia) argued that the defendant could not raise a Fourth Amendment claim because he was not part of “the people.”⁷⁶ Without substantiation, the lead opinion posited that the phrase was a “term of art” and that it must be read similarly throughout the Bill of Rights.⁷⁷ It then defined “the people” of the Fourth Amendment as those who were “part of a *national*

69. *Id.* at 579–81.

70. *Id.* at 580.

71. *Id.* at 579–81, 623–25.

72. *Id.* at 625–35.

73. *Id.* at 580–81 (citing *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990)). The Fourth Amendment protects the right of “the people” to be “secure in their persons” from unreasonable searches and seizures. U.S. CONST. amend. IV.

74. 494 U.S. at 262. The defendant was accused of involvement in the plot to torture and murder a U.S. DEA Special Agent, Enrique Camarena Salazar, who helped investigate and capture members of the Mexican cartel. *Id.* at 265.

75. *Id.* at 263.

76. *Id.* at 265–75.

77. *Id.* at 265. Throughout this Article, I refer to Chief Justice Rehnquist’s opinion for the Court as the “lead opinion.” As I explain in *infra* notes 79–80 and accompanying text, only four Justices agreed with the opinion’s interpretation of “the people.” The remaining Justices expressly either disagreed with the need to interpret the phrase or rejected the lead opinion’s view on that definition.

community or who have otherwise developed sufficient connection with this country to be considered part of that community.”⁷⁸ Other Justices, including those who agreed with the result, expressly rejected the lead opinion’s attempt to limit the class of rightsholders through “the people.”⁷⁹ Instead, their opinions suggested that “the people” connoted the importance of the right or that the case could have been decided based on extraterritoriality or the reasonableness of the search,⁸⁰ thus avoiding the need to define the contours of “the people.”

Taken on its own terms, the standard endorsed by four Justices in *Verdugo* implies two important aspects of noncitizens’ Fourth Amendment rights. First, the standard clarifies that no single factor determines the degree of connectedness to the country. At minimum, it means that immigration status alone is not determinative of “the people,” a view consistent with other cases that have also rejected the idea that immigration status, by itself, determines constitutional coverage.⁸¹ Second, and relatedly, the nature of the lead opinion’s test is specific to circumstance. Each individual’s level of connectedness matters—a standard at odds with blanket exclusions based on immigration status alone.

Eighteen years later, the *Heller* majority purported to rely on the plurality-backed standard from *Verdugo* but misquoted and altered its definition of “the people.” Like the lead opinion in *Verdugo*, the *Heller* majority first equated “the people” of the Second Amendment with those of the Fourth Amendment. In purporting to adopt *Verdugo*’s definition, however, the *Heller* majority contracted it in two critical ways: First, *Heller* wrote that “the people” meant “all members of the *political* community” instead of the “*national* community.” Second, it omitted *Verdugo*’s alternative that those with “sufficient connections to

78. *Id.* (emphasis added).

79. *Id.* at 276 (Kennedy, J., concurring) (“I cannot place any weight on the reference to ‘the people’ in the Fourth Amendment as a source of restricting its protections.”). Unlike Justice Stevens, who concurred only in judgment, Justice Kennedy’s opinion was styled as a concurrence. Thus, his vote provided a five-Justice majority for the lead opinion. In substance, however, his express rejection of the lead opinion’s interpretation of “the people” left only a plurality of four Justices endorsing the lead opinion’s rationale. In other words, although styled as a “concurrence,” Justice Kennedy’s opinion reads primarily as a concurrence only in the judgment.

80. *Id.* at 275–78 (Kennedy, J., concurring); *id.* at 279 (Stevens, J., concurring in the judgment).

81. See *Boumediene v. Bush*, 553 U.S. 723, 771 (2008) (detained noncitizens at Guantanamo Bay retained ability to raise a habeas challenge in federal court); *Zadvydas v. Davis*, 533 U.S. 678, 693–94 (2001) (removable noncitizen could raise a due process challenge to his indefinite detention); *Landon v. Plasencia*, 459 U.S. 21, 32–33 (1982) (permanent resident accused of aiding the unlawful entry of other noncitizens could challenge the sufficiency of the government’s removal process).

the country” were part of “the people” protected by the Bill of Rights.⁸² These subtle modifications whittled “the people” down to “citizens,” just as *Dred Scott* had done a century and a half prior.⁸³

The interpretations of “the people” proffered by *Heller* and *Verdugo* indicate that several Justices believe not only that the phrase delineates specific rightsholders but also that interpretative methods can help narrow the phrase in ways that exclude noncitizens. Before proceeding, an initial observation and disclosure is in order. My own view is that the phrase likely was never intended to identify specific rightsholders, and, even if so intended, courts and commentators lack both a theory and an interpretative methodology that would exclude noncitizens from its ambit.

The most expansive class of rightsholders identified by the Constitution are “persons” protected by the Fifth Amendment and the Fourteenth Amendment. In other places, the Constitution specifically protects the rights of “citizens.”⁸⁴ Circuit courts have posited that “the people” cannot be as broad as “persons,”⁸⁵ a position that both the *Heller* majority and the *Verdugo* lead opinion appear to implicitly adopt by suggesting an individualized, circumstance-specific test that might exclude some persons from the category of “the people.” Yet, this textual search for meaning does not yield a satisfactory answer as to the outer boundaries of “the people” or who among “persons” constitute “the people” and on what basis. This indeterminacy may explain why, until recently, the Court avoided attempts to define “the people” at all. Other than an overtly white supremacist interpretation in *Dred Scott*,⁸⁶ the *Verdugo* lead opinion was the first to directly engage the question and offer an indeterminate standard to determine “the people.” Instead, in cases where the identity of rightsholders constituted part of the interpretative question, the Court relied on location or other particularities to determine whether the Constitution applied.⁸⁷

82. *District of Columbia v. Heller*, 554 U.S. 570, 580 (2008); see also Gulasekaram, *Citizenship*, *supra* note 23, at 1530–31.

83. See *infra* Section II.A for a discussion of *Dred Scott*.

84. U.S. CONST. art. I, §§ 2-3; *id.* art. II, § 1; *id.* art. III, § 2; *id.* art. IV, § 2; *id.* amends. XI, XIV, XV, XIX, XXIV, XXVI. The Constitution, in other provisions, protects “persons,” *id.* amends. V, XIV, or the “accused,” *id.* amend. VI. Two other variations of “persons” reference enslaved persons or those who are not enslaved. *Id.* art. I, § 2, cl. 3 (contrasting the number of “free persons” with three-fifths of “all other persons”); *id.* art. I, § 9 (denying Congress the power to regulate the migration and importation of “such persons”).

85. See *United States v. Jimenez-Shilon*, 34 F.4th 1042, 1045 (11th Cir. 2022); *United States v. Huitron-Guizar*, 678 F.3d 1164, 1166 (10th Cir. 2012).

86. See *infra* Section II.A.

87. *Rasul v. Bush*, 542 U.S. 466, 483–84 (2004) (holding that the United States exercises territorial jurisdiction over Guantanamo Bay, and thus federal courts could hear habeas petitions

Suggesting that “the people” does not identify particular rightsholders begs the question of what the phrase signifies in the Second Amendment, and the Constitution generally. Justice Kennedy’s concurrence in *Verdugo* maintained that the phrase may have been included in the Constitution not to delineate rightsholders but to emphasize the importance or centrality of the right or concept:

For somewhat similar reasons, I cannot place any weight on the reference to “the people” in the Fourth Amendment as a source of restricting its protections. With respect, I submit these words do not detract from its force or its reach. Given the history of our Nation’s concern over warrantless and unreasonable searches, explicit 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.⁸⁸

On this view, “the people” does not do the work the *Verdugo* lead opinion, the *Heller* majority, or several appellate court cases coax it to do vis-à-vis immigration status and citizenship. In practice, it would mean that important constitutional rights inure to all persons—not because “the people” identifies a particular set of rightsholders but because core constitutional protections restrain governmental authority regardless of the characteristics of the persons subject to that authority.⁸⁹

Despite this normative view, the remainder of this Article engages federal courts on their own terms and proceeds on the assumption that “the people” as used in the Second Amendment (and elsewhere in the Bill of Rights) delineates particular rightsholders. If so, I ask whether any theory—whether proffered by the Supreme Court and lower federal courts or independently supplied—might justify the excision of noncitizens, or specific groups of noncitizens, from the Second Amendment.

B. Immigrants and “the People” Post-Heller

As I have predicted in prior work, *Heller*’s loose citizenship talk is likely to create doctrinal confusion over who may exercise the right to bear arms.⁹⁰ In the strongest reading of *Heller*’s language, no one but citizens—and within citizens, only those who may be characterized as “law-abiding”—could raise a Second Amendment challenge to firearms restrictions, including criminal liability for possession. That theory

from detainees); *Reid v. Covert*, 354 U.S. 1, 5 (1956) (holding civilian Respondents “could not constitutionally be tried by military authorities” for conduct that had occurred overseas).

88. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 276 (1990) (Kennedy, J., concurring).

89. *Id.* at 283–90 (Brennan, J., dissenting) (arguing for a theory of “mutuality” and applying the Fourth Amendment when the federal government asserts its coercive authority).

90. Gulasekaram, *Guns and Membership*, *supra* note 23, at 622–23.

would allow Congress to not only criminalize possession by illegally present noncitizens and nonimmigrants (as it currently does) but also extend its regulatory power to lawful permanent residents. Noncitizens would lose any constitutional basis to challenge diminutions in gun rights, even with as-applied challenges from those without criminal histories and with significant social ties to the country.

Heller's holding and logic were immediately catalytic. Just prior to *Heller*, the Fifth Circuit dismissed a noncitizen's constitutional challenge to § 922(g)(5) out of hand, citing a case rejecting a challenge to the neighboring felon-in-possession provision for the proposition that "the constitutionality of § 922(g) is not open to question."⁹¹ After *Heller*, however, challenges to the felon-in-possession bans found new life,⁹² with an en banc court holding that certain felons are part of "the people" protected by the Second Amendment and rejecting § 922(g)(1) as applied to a defendant with a false statement conviction.⁹³ Even those who have committed domestic abuse have had their day; in the wake of *Bruen*, the Fifth Circuit struck down § 922(g)(8)'s prohibition on firearm possession by those subject to civil domestic restraining orders.⁹⁴

Noncitizens, however, have been left on the sidelines of this constitutional revolution in firearms rights. In the fourteen years since *Heller*, eight different courts of appeals rejected Second Amendment challenges to the federal alien-in-possession ban raised by unlawfully present persons.⁹⁵ Although all reached the same result, the several appellate courts proffered differing—and sometimes conflicting—visions of the rightsholders identified by "the people." Courts have (1) applied case-specific criteria to hold that certain unlawfully present persons can be part of "the people" even as they upheld the federal ban,⁹⁶ (2) categorically rejected noncitizens' claims because only citizens

91. *United States v. Lugo-Vargas*, 203 F. App'x 619, 620 (5th Cir. 2006) (per curiam) (unpublished) (quoting *United States v. Daugherty*, 264 F.3d 513, 518 (5th Cir. 2001)); cf. *United States v. Orellana*, 405 F.3d 360, 361–63, 370–71 (5th Cir. 2005) (applying the rule of lenity to dismiss a § 922(g)(5) prosecution against a noncitizen with Temporary Protected Status, concluding that it was not clear if Congress intended to include Temporary Protected Status within the criminal ban).

92. For cases challenging felon-in-possession bans, see *Binderup v. Att'y Gen. U.S.*, 836 F.3d 336, 339 (3rd Cir. 2016); *United States v. Carey*, 602 F.3d 738, 740–41 (6th Cir. 2010); *Kanter v. Barr*, 919 F.3d 437, 438–39 (7th Cir. 2019); and *Folajtar v. Att'y Gen. U.S.*, 980 F.3d 897, 899 (3rd Cir. 2020). See also *Sherwood*, *supra* note 62, at 1496–72 for further discussion.

93. *Range v. Att'y Gen. U.S.*, 69 F.4th 96, 98 (3d Cir. 2023) (en banc).

94. *United States v. Rahimi*, 61 F.4th 443, 448 (5th Cir. 2023); see also *United States v. Perez-Gallan*, No. PE:22-CR-00427-DC, 2022 WL 16858516, at *15 (W.D. Tex. Nov. 10, 2022) (also finding § 922(g)(8) unconstitutional following *Bruen*).

95. See *supra* note 20 and *infra* remainder of Section I.B.

96. See *United States v. Meza-Rodriguez*, 798 F.3d 664, 669–72 (7th Cir. 2015). A subset of three circuit courts have remained agnostic to the question whether unlawfully present noncitizens are "the people." See *United States v. Perez*, 6 F.4th 448, 451–53 (2d Cir. 2021); *United*

can be “the people,”⁹⁷ (3) categorically denied claims by unlawfully present noncitizens because that population is not law-abiding and therefore not “the people,”⁹⁸ and (4) relied on historical antecedents to reject noncitizens’ claims to “the people.”⁹⁹

Save for the last of these possibilities, the other circuit court approaches may be moribund after the Court’s recent turn in *Bruen*, which—at least in rhetoric¹⁰⁰—elevated text and history to be the primary, if not sole, determinants of constitutionality. Despite *Bruen*’s ostensibly new interpretive methodology,¹⁰¹ it is nevertheless worth considering the intervening post-*Heller* appellate court frameworks for noncitizens’ firearms rights. *Bruen*’s approach to the scope of regulations permissible under the Second Amendment may shed little light on questions about the meaning of “the people.”¹⁰² In fact, two of *Bruen*’s concurring opinions expressly disavowed the notion that the case decided the “who” of gun possession.¹⁰³ In addition, at least one post-*Bruen* appellate case upholding § 922(g)(5) cited extensively to pre-*Bruen* case law to substantiate its conclusion that unlawfully present noncitizens were not “the people.”¹⁰⁴ Moreover, as the limitations of a text and history framework reveal themselves in the coming years, future courts may not be constrained by *Bruen*’s methodology.¹⁰⁵

States v. Torres, 911 F.3d 1253, 1262–63 (9th Cir. 2019); United States v. Huitron-Guizar, 678 F.3d 1164, 1166 (10th Cir. 2012).

97. See United States v. Portillo-Munoz, 643 F.3d 437, 439–42 (5th Cir. 2011); United States v. Flores, 663 F.3d 1022, 1023 (8th Cir. 2011).

98. See United States v. Carpio-Leon, 701 F.3d 974, 976–82 (4th Cir. 2012).

99. See United States v. Sitladeen, 64 F.4th 978, 983–87 (8th Cir. 2023); United States v. Jimenez-Shilon, 34 F.4th 1042, 1046–50 (11th Cir. 2022).

100. See Adam M. Samaha, *Is Bruen Constitutional? On the Methodology That Saved Most Gun Licensing*, 98 N.Y.U. L. REV. (forthcoming 2023) (noting that despite focusing on text and history, critical aspects of *Bruen*’s analysis cannot be explained by those inquiries alone).

101. Joseph Blocher & Eric Ruben, *Originalism-By-Analogy and Second Amendment Jurisprudence*, 133 YALE L.J. (forthcoming) (manuscript at 12) (on file with authors) (describing *Bruen*’s methodology as “novel”).

102. See, e.g., *Sitladeen*, 64 F.4th at 984 (upholding § 922(g)(5) and stating “*Bruen* does not address the meaning of ‘the people,’ much less the constitutionality of criminal firearm statutes like § 922(g)(5)(A)”).

103. N.Y. State Rifle & Pistol Ass’n v. Bruen, 142 S. Ct. 2111, 2157 (2022) (Alito, J., concurring) (“Our holding decides nothing about who may lawfully possess a firearm or the requirements that must be met to buy a gun.”); *id.* at 2162 (Kavanaugh, J., concurring) (“Properly interpreted, the Second Amendment allows a ‘variety’ of gun regulations.” (citing *District of Columbia v. Heller*, 554 U.S. 570, 636 (2008))).

104. *Sitladeen*, 64 F.4th at 985–87 (citing United States v. Portillo-Munoz, 643 F.3d 437 (5th Cir. 2011)); see also Andrew Willinger, *Litigation Highlight: Eighth Circuit Rejects Challenge to Illegal-Alien Prohibition at Bruen Step One*, DUKE CTR. FOR FIREARMS L. (April 12, 2023), <https://firearmslaw.duke.edu/2023/04/litigation-highlight-eighth-circuit-rejects-challenge-to-illegal-alien-prohibition-at-bruen-step-one/> [https://perma.cc/TK52-C94T] (discussing the *Sitladeen* opinion).

105. See Blocher & Ruben, *supra* note 101 (manuscript at 37–38).

Indeed, *Bruen's* approach, as understood in subsequent cases, incorporates reasoning by analogy and investigation of the purposes of the regulation.¹⁰⁶ For example, while serving on the D.C. Circuit, then-Judge Kavanaugh, often credited with focusing judicial attention on “text, history, and tradition” for Second Amendment analysis, acknowledged the need to continue reasoning by analogy.¹⁰⁷ Accordingly, I briefly survey the various pre-*Bruen* appellate approaches below before returning to the specific implications of *Bruen's* approach in Section I.C.

1. The “Unauthorized People”

In assessing the constitutionality of § 922(g)(5)'s ban on possession by unlawfully present persons, the Seventh Circuit first identified the limited utility of *Heller's* discussion of “the people.”¹⁰⁸ Noting that the question whether noncitizens were part of “the people” was not presented in *Heller*, the court concluded that it was imprudent to place excessive weight on *Heller's* use of “citizens.”¹⁰⁹ Second, the panel sought guidance from *Verdugo*, adopting the lead opinion's “sufficient connections” test. Emphasizing the noncitizen-defendant's significant ties to the United States,¹¹⁰ the Seventh Circuit held that he was a member of “the people” eligible to invoke the right to bear arms.

106. *United States v. Rahimi*, 61 F.4th 443, 454 (5th Cir. 2023) (stating that modern day regulations need not be a “dead ringer for historical precursors” and need only be “analogous enough,” but that even if historical laws worked “how” modern day equivalents work, they also need to match “how” and “why” historical laws were enacted); see also Blocher & Ruben, *supra* note 101 (manuscript at 37–71); Darrell A.H. Miller & Joseph Blocher, *Manufacturing Outliers*, SUP. CT. REV. (forthcoming) (manuscript at 3) (on file with authors) (“*Bruen* demonstrates the Court's tendency to curate a historical record and then to treat it as an objective basis for decision.”).

107. See *Heller v. District of Columbia*, 670 F.3d 1244, 1269–75 (D.C. Cir. 2011) (Kavanaugh, J., dissenting) (arguing that text, history, and tradition should replace the tiers of scrutiny approach, but also acknowledging that “principles” must be applied to modern situations); see also Miller & Blocher, *supra* note 106 (manuscript at 11) (“Perhaps most perplexing, *Bruen* relied heavily on analogy but never specified criteria for determining when a present-day regulation is relevantly, as opposed to trivially, analogous to one in the past.”).

108. *United States v. Meza-Rodriguez*, 798 F.3d 664, 669 (7th Cir. 2015); Eric Ruben, *Law of the Gun: Unrepresentative Cases and Distorted Doctrine*, 107 IOWA L. REV. 173, 179 n.33 (“Then-Judge Kavanaugh suggested that when historical sources do not speak directly to a modern question, one must reason by analogy, identifying ‘principles’ that are relevantly similar in the two time periods.”).

109. *Meza-Rodriguez*, 798 F.3d at 669.

110. *Id.* at 670–71 (citing *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990)). Mariano Meza-Rodriguez, had been brought into the United States from Mexico when he was five and subsequently lived in Milwaukee for twenty years. *Id.* at 666. He was arrested following a fight in a local bar in which witnesses said he had a firearm, and video footage showed him holding an object that resembled a firearm. *Id.* When he was apprehended by police, however, he was only found in possession of a .22 caliber cartridge. *Id.* Because § 922(g)(5) covers the possession of firearms or ammunition, he was convicted and later deported. *Id.* at 667.

The Seventh Circuit's view has the potential to be quite significant.¹¹¹ By implication, the overwhelming majority of noncitizens, including all permanent residents, necessarily would be part of "the people."¹¹² In addition, protections for "persons" in the Equal Protection and Due Process Clauses almost certainly would have to encompass, at minimum, unlawfully present persons with sufficient connections to the United States. This framework suggests that unlawfully present individuals could be able to establish their level of connectedness in an individualized hearing. Having done so, they could seek protection under several provisions of the Constitution.

At the same time, the court's reliance on *Verdugo's* sufficient connections test is inherently unpredictable, as its application in Fourth Amendment cases demonstrates.¹¹³ Moreover, the court's seemingly capacious understanding of "the people" in theory meant little to the noncitizen-defendant in practice. The panel proceeded to uphold the categorical federal criminal ban and prosecution after applying an unrecognizable form of heightened means-end scrutiny that relieved the government of the burden to closely connect its public safety rationale to a categorical ban on groups of noncitizens.¹¹⁴

2. The "Citizen-Only People"

The Fifth Circuit's decision in *United States v. Portillo-Munoz*¹¹⁵ represents the most full-throated and complete exclusion of noncitizens

111. I say "potential" because the remainder of the Seventh Circuit's approach to noncitizen firearm possession renders its expansive views of "the people" a pyrrhic victory for inclusiveness. Ultimately, the court's holding meant only that it could proceed to heightened scrutiny review of the law.

112. See *Meza-Rodriguez*, 798 F.3d at 669–72.

113. Núñez, *supra* note 26, at 110–15 (collecting and critiquing post-*Verdugo* cases that rely on the lead opinion's test).

114. In that part of its evaluation, the court appeared to conjure exacting judicial scrutiny in name while deferring to the government in ways resembling mere rational basis scrutiny. Concerningly, this lax review of noncitizen exclusion permits courts to rely on unsubstantiated empirical links between immigration status and criminality to justify broad exclusions from Second Amendment rights. This form of analysis implicitly constricts "the people" because it permits group-based assumptions and innuendo to substitute for evidence.

115. 643 F.3d 437 (5th Cir. 2011). Armando Portillo-Munoz entered the country unlawfully in 2005, left, and then reentered in 2009. *Id.* at 439. He had been unlawfully present and working in the United States when he was apprehended at the dairy farm at which he worked with a .22 caliber pistol in his possession. *Id.* At trial, he testified without contradictory evidence that he carried the pistol to protect the chickens on the dairy farm from coyotes. *Id.* Prior to Portillo-Munoz's conviction under § 922(g)(5), he had no criminal history. *Id.* Apparently, neither of his prior unlawful entries was discovered nor charged criminally. For the § 922(g)(5) conviction, he was sentenced to ten months incarceration. *Id.*

from the Second Amendment.¹¹⁶ The Eighth Circuit's more recent opinion in *United States v. Sitladeen* cites *Portillo-Munoz* approvingly to justify its excision of unlawfully present noncitizens from "the people."¹¹⁷ *Portillo-Munoz*, however, proffered little useful or original analysis. Instead, it relied heavily on *Heller's* rhetoric equating "the people" with "citizens" or "Americans."¹¹⁸ Under the Fifth Circuit's adoption of *Heller*, noncitizens could never possess the right to bear arms, regardless of connection and ties. Although both cases involved an unlawfully present noncitizen, the logic of the opinions would apply to any noncitizen—including long-term lawful permanent residents—were Congress to amend § 922(g)(5) to outlaw all noncitizen firearms possession.

The Fifth Circuit's citizen-only interpretation of the phrase relieves courts of the task of weighing a noncitizen's connections to the country or assessing the relative dangerousness or criminality of a noncitizen-defendant. On the other hand, the consequences of applying this version of "the people" consistently throughout the Constitution would be breathtaking. Core Bill of Rights protections would only be accessible to citizens unless extended to any class of noncitizens by the will of political majorities. In turn, excluding noncitizens from guarantees inuring to "the people" would tend to erode their ability to fully avail themselves of other protections for "the accused" or "persons." For example, if noncitizens do not possess constitutionally protected rights against unreasonable searches and seizures, the government may more easily gain convictions in criminal trials.

The only way to cabin the systemic effects of this view of Second Amendment rightsholders would be to distinguish "the people" of the Amendment from "the people" elsewhere in the Constitution. Indeed, the *Portillo-Munoz* majority took this tack precisely to limit the implications of its view of the Second Amendment on the Fourth Amendment. The majority explained that the Second Amendment provided an "affirmative right," in contrast to the "protective right"

116. The Eighth Circuit also adopted this strong reading of *Heller*, rejecting the noncitizen's Second Amendment challenge out of hand by citing the Fifth Circuit's opinion. *United States v. Flores*, 663 F.3d 1022, 1023 (8th Cir. 2011) (citing *Portillo-Munoz* as the rationale for the decision without opinion). There, the noncitizen-defendant had resided in the United States since he was a teenager and had no criminal history, although he had been deported multiple times. Brief of Appellant at 1, 8, *Flores*, 663 F.3d 1022 (No. 11-1550), 2011 WL 2310104. In 2010 when he was charged and convicted under § 922(g)(5), he was working and had a home in Minnesota and was the father to two U.S. citizen children with a U.S. citizen partner. *Id.* The police discovered a firearm in his residence during the service of a search warrant. *Id.*

117. *United States v. Sitladeen*, 64 F.4th 978, 983–84 (8th Cir. 2023).

118. Recent Case, *United States v. Perez*, 6 F.4th 448 (2d Cir. 2021), 135 HARV. L. REV. 1156, 1161 (2022).

guaranteed by the Fourth Amendment.¹¹⁹ This distinction, however, carries dubious weight¹²⁰ and, more importantly, fails to explain why the difference necessitates alternative definitions of rightsholders. As a purely doctrinal matter, it contradicts *Heller*, the very case the Fifth Circuit's opinion venerates and purports to extend. *Heller* expressly maintained that "the people" should be understood consistently throughout the Bill of Rights and thus implicitly rejected any "affirmative" versus "protective" right distinction.¹²¹ To be sure, *Heller*'s claim that the phrase must be consistently understood throughout the Bill of Rights may be wrong.¹²² Differences between the Second Amendment and neighboring provisions may influence how courts understand the scope of "the people" in its respective uses. Arriving at that conclusion, however, merits a more sustainable theory than the one proffered by the appellate court.

3. The "Law-Abiding People"

In *United States v. Carpio-Leon*, the Fourth Circuit similarly excluded undocumented noncitizens categorically from the protection of the Second Amendment.¹²³ And, like other circuits, the Fourth Circuit also took its direction primarily from *Heller*'s formulation that "the people" equates to "law-abiding citizens." The Fourth Circuit, however, placed relatively less emphasis on citizenship status per se, instead harping on the meaning of "law-abiding."¹²⁴ The court noted that the government historically has disarmed and may continue to disarm individuals who are not part of the political community, including

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

120. Sotirios A. Barber, *Fallacies of Negative Constitutionalism*, 75 *FORDHAM L. REV.* 651, 660–61 (2006) ("[The negative constitutionalist] fallacy holds that liberal constitutions seek chiefly to protect rights, with most rights . . . understood as negative rights . . ."); David P. Currie, *Positive and Negative Constitutional Rights*, 53 *U. CHI. L. REV.* 864, 886 (1986) ("From the beginning there have been cases in which the Supreme Court . . . has found in negatively phrased provisions constitutional duties that can in some sense be described as positive.").

121. *District of Columbia v. Heller*, 554 U.S. 570, 644 (2008) (Stevens, J., dissenting) ("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 . . ."); *Portillo-Munoz*, 643 F.3d at 444 (Dennis, J., concurring in part and dissenting in part) ("The majority labels the Second Amendment an 'affirmative right' and the Fourth Amendment a 'protective right.' This distinction, unfortunately, is unpersuasive.").

122. See *infra* Part III ("Expanding 'the People'"); *Heller*, 554 U.S. at 644 (Stevens, J., dissenting).

123. 701 F.3d 974 (4th Cir. 2012). *Carpio-Leon* had lived for over thirteen years without lawful immigration status in the United States with no criminal record. He was married to a U.S. citizen and was father to three citizen children. During the search of his home, ICE agents discovered a .22 caliber rifle and a handgun. *Id.* at 975.

124. *Id.* at 978–79.

“unvirtuous citizens.”¹²⁵ In the court’s view, noncitizens without lawful status, especially those who entered without inspection, could not be law-abiding or virtuous in ways contemplated by “the people” of the Second Amendment.¹²⁶

Focusing on the “law-abiding” descriptor leads to similar problems as focusing on “citizen,” but with a different set of capacious and underappreciated effects. On the one hand, “non-law-abiding” may yield narrower implications than the Fifth Circuit’s approach because it only categorically excludes unlawfully present noncitizens, without necessarily implicating other noncitizens. On the other hand, that designation inherently courts a broader reach. Congress could regulate anyone who falls within the vague contours of the phrase, reaching a breadth of potential groups—regardless of citizenship—who fit the nebulous definition of “unvirtuous” or “non-law-abiding.” In *United States v. Rahimi*, a Fifth Circuit panel recently made this point while striking down the civil domestic violence protective order prohibition on gun possession in § 922(g)(8):

[T]he Government’s proffered interpretation of “law-abiding” admits to no true limiting principle. Under the Government’s reading, Congress could remove “unordinary” or “irresponsible” or “non-law-abiding” people—however expediently defined—from the scope of the Second Amendment. Could speeders be stripped of their right to keep and bear arms? Political nonconformists? People who do not recycle or drive an electric vehicle?¹²⁷

Notably, that court emphasized that domestic violence protective orders are civil rather than criminal infractions.¹²⁸ Similarly, mere unlawful presence in contravention of immigration law is an administrative violation and not a crime.¹²⁹ Further, in striking down § 922(g)(8), a concurring opinion in *Rahimi* suggested that other criminal processes—such as those related to actual threats or battery—would be sufficient to detain and disarm those who presented true threats to victims.¹³⁰ In fact, some judges, including now-Justice

125. *Id.* at 979–80 (internal quotation marks omitted) (quoting *United States v. Yancy*, 621 F.3d 681, 684–85 (7th Cir. 2010)).

126. *Id.* at 981–82.

127. *See United States v. Rahimi*, 61 F.4th 443, 453 (5th Cir. 2023).

128. *Id.* at 452; *see also United States v. Perez-Gallan*, No. PE:22-CR-00427-DC, 2022 WL 16858516, at *4–5 (W.D. Tex. Nov. 10, 2022).

129. *See Fong Yue Ting v. United States*, 149 U.S. 698, 730 (1893) (noting that deportation or banishment from the United States is not “punishment” in the constitutional sense). The government may prosecute unlawful entry and reentry after removal as low-level crimes. 8 U.S.C. § 1226. Yet, at least in the cases involving immigrants and firearms, it appears that the government never did. The Fourth Circuit suggests that *Carpio-Leon* entered unlawfully, but his lack of a criminal record indicates that even if he did, he was never apprehended, prosecuted, or convicted for the crime. *Carpio-Leon*, 701 F.3d at 975.

130. *Rahimi*, 61 F.4th at 464 (Ho, J., concurring).

Barrett, have cautioned that even the felon-in-possession ban is unconstitutional in some applications because of its broad sweep of all prior criminal history and not just a violent criminal past.¹³¹ In the same vein, noncitizens are not exempt from extant, generally applicable permit requirements or civil and criminal prohibitions on firearms purchasing, possession, or use.

4. The "Historical People"

Both the Eighth Circuit¹³² (post-*Bruen*) and the Eleventh Circuit¹³³ (pre-*Bruen*) adopted text and history as their basis for upholding firearms convictions of unlawfully present noncitizens. The Eleventh Circuit, in an opinion issued a few weeks prior to *Bruen*, located "the people" in the middle of other constitutional rightsholders, stating that "'the people' sits somewhere in between—it has 'broader content than "citizens," and . . . narrower content than "persons."'"¹³⁴ Acknowledging uncertainty as to its precise contours, the court initially conceded the possibility of the noncitizen-defendant's inclusion within "the people."¹³⁵ It went on to note, however, that felons and the mentally ill were indisputably part of "the people," yet *Heller* countenanced their exclusion from firearm possession.¹³⁶ As such, the court opined that "being a member of 'the people' . . . is a *necessary* condition to enjoyment of the right to keep and bear arms, but it is not alone *sufficient*."¹³⁷ To enjoy the right to bear arms, noncitizens without lawful immigration status would also have to show that they were not historically excluded from the Second Amendment.

131. *Kanter v. Barr*, 919 F.3d 437, 451 (7th Cir. 2019) (Barrett, J., dissenting) ("[18 U.S.C. § 922(g)(1)'s] dispossession of *all* felons—both violent and nonviolent—is unconstitutional as applied to Kanter, who was convicted of mail fraud . . ."); *see also* *Range v. Att'y Gen. U.S.*, 69 F.4th 96, 101–06 (3d Cir. 2023) (en banc) (holding that defendant was part of "the people" and striking down § 922(g)(1) as applied to him).

132. *United States v. Sitladeen*, 64 F.4th 978 (8th Cir. 2023).

133. *United States v. Jimenez-Shilon*, 34 F.4th 1042 (11th Cir. 2022). Notably, Judge Newsom, who authored the panel opinion as well as a special concurrence, suggests that "tradition" (in the conventional formulation of the "text, history, tradition" approach) is irrelevant, if not misguided. *See id.* at 1051 n.2 (Newsom, J., concurring):

[I]t has never been clear to me what work "tradition" is supposed to be doing in the tripartite "text, history, and tradition" formulation. . . . To the extent that "tradition" is meant to stand in for the original (i.e., historical) public meaning . . . it is duplicative. And to the extent that it is meant to expand the inquiry beyond the original public meaning—say, to encompass latter-day-but-still-kind-of-old-ish understandings—it misdirects the inquiry.

134. *Id.* at 1045 (quoting *United States v. Huitron-Guizar*, 678 F.3d 1164, 1168 (10th Cir. 2012)).

135. *Id.*

136. *Id.* at 1046.

137. *Id.* at 1044.

In its historical inquiry, the Eleventh Circuit held that noncitizens were never part of the population who had a right to bear arms, save for instances where they had affirmed their loyalty to the newly formed republic.¹³⁸ As such, any connections the noncitizen may have accumulated to the United States would have been irrelevant given his unlawful immigration status.¹³⁹ Citing the existence of some restrictions on noncitizens during the Founding era,¹⁴⁰ the panel concluded that noncitizens were never part of “the people” of the Second Amendment.

Soon after the Eleventh Circuit’s decision, the Supreme Court released *Bruen*, which prescribed a particular two-step methodology for determining Second Amendment rights. Section I.C below first describes *Bruen*’s framework and the Eighth Circuit’s recent application of it to a § 922(g)(5) prosecution. It concludes by critiquing the notion that historical inquiry can conclusively or legitimately resolve the question whether noncitizens are part of “the people.”

C. *Bruen*, Historical Inquiry, and “the People”

Although the Eleventh Circuit’s decision in *United States v. Jimenez-Shilon* represented a radical departure from the methodology of the other post-*Heller* appellate decisions, it was a harbinger of the Supreme Court’s prescriptions in *Bruen*. In striking down a state discretionary permitting scheme for concealed public carry, Justice Thomas’s majority opinion in *Bruen* purports to jettison completely the “tiers of scrutiny” approach in favor of text and history.¹⁴¹ While *Bruen* did not directly address any of the categorical prohibitions in § 922(g), the case nevertheless purports to prescribe a general interpretative framework applicable to all Second Amendment queries. Not surprisingly, *Bruen* does not clarify how future courts, including the lower courts, are supposed to engage in historical inquiry without the benefit of professional historians, expert amicus briefs, or judges

138. *Id.* at 1047–48.

139. Like several other noncitizen-defendants, Jimenez-Shilon had significant ties to the United States, having lived more than two decades in the country. He was caught on surveillance video brandishing a gun in a public place and convicted under § 922(g)(5). *Id.* at 1043.

140. *Id.* at 1048 (“Consistent with the English and colonial accounts, various Framing-era sources ‘refer to arms-bearing as a *citizen’s* right’ that was closely associated with national fealty and membership in the body politic.” (quoting Note, *Meaning(s) supra* note 26, at 1093)).

141. N.Y. State Rifle & Pistol Ass’n v. Bruen, 142 S. Ct. 2111, 2118 (2022). There is some dispute and debate as to whether the test is text and history or, alternatively, text, history, and tradition. The *Bruen* majority focused on text and history. Justice Kavanaugh added “tradition” to text and history. *Id.* at 2161 (Kavanaugh, J., concurring). In *Jimenez-Shilon*, the concurrence expressly rejected reliance on “tradition,” arguing that accounting for tradition rendered the methodology incoherent and unworkable. 34 F.4th at 1051 n.2 (Newsom, J., concurring).

trained in historiographical methods.¹⁴² In coming years, courts will struggle to apply that methodology to upcoming cases on magazine capacity bans, potential cases on “assault weapons” or military-style guns, and to the other status-based prohibitions in federal firearms law.¹⁴³ Importantly, text and history (or text, history, and tradition) will presumably dictate questions regarding the “who” of gun possession, including the felon-in-possession and alien-in-possession bans.¹⁴⁴

The deficits of an exclusively originalist, text- or history-based interpretative methodology are legion, as is its transformation and incoherent application in *Bruen*.¹⁴⁵ A general critique of this approach

142. See *United States v. Bullock*, No. 18-CR-65, 2023 WL 4232309, at *15–17 (S.D. Miss. June 28, 2023) (striking down § 922(g)(1) as applied to the defendant and describing Second Amendment litigation as a “pyramid [] turned on its head” because of the abundance of amicus briefs at the Supreme Court but lack of such expert and professional historian input at the lower court); see also Blocher & Ruben, *supra* note 101 (manuscript at 66–71) (noting the institutional competence concerns *Bruen* raises); Miller & Blocher, *supra* note 106 (manuscript at 22) (arguing that *Bruen* contributes to the “drift” of judicial history from actual history); cf. Oral Argument at 7:16, *United States v. Quiroz*, No. 22-50834 (5th Cir. Feb. 8, 2023), <https://youtu.be/ZiH8bHp4B1U> (Higginson, J., questioning U.S. Att’y):

Who’s doing the history that’s dividing courts? . . . How do you interpret Justice Thomas’s instruction that the parties have to compile the history, get the historical evidence, and test it so we don’t just have judges all over the country disagreeing about what history is? . . . Here’s the question: have you consulted with the Solicitor General as to where the history finding should occur so that we can review it as a court of review?

143. See, e.g., Emergency Application for Injunction Pending Appellate Review, Nat’l Ass’n for Gun Rts. v. City of Naperville, No. 22A948 (filed Apr. 26, 2023) (Petition for Emergency Stay to Supreme Court of the United States of city law banning high capacity magazines and certain automatic firearms); *United States v. Quiroz*, 629 F. Supp. 3d 511 (W.D. Tex. 2022) (finding federal prohibition on possession by those under felony indictment unenforceable); *United States v. Price*, No. 2:22-CR-00097, 2022 WL 6968457 (S.D. W. Va. Oct. 12, 2022) (striking down law banning possession of firearms with obliterated serial numbers); *Rigby v. Jennings*, 630 F. Supp. 3d 602 (D. Del. 2022) (finding restrictions on ghost guns likely to be unconstitutional while evaluating a motion for a preliminary and permanent injunction). Note that for many of these rulings, other lower courts post-*Bruen* have upheld the same or similar prohibitions. See generally Alanna Durkin Richer & Lindsay Whitehurst, *Supreme Court Ruling Creates Turmoil over Gun Laws in Lower Courts*, PBS NEWSHOUR (Feb. 18, 2023, 2:05 PM), <https://www.pbs.org/newshour/nation/supreme-court-ruling-creates-turmoil-over-gun-laws-in-lower-courts> [https://perma.cc/6TJX-538F]; Eric Lipton, Shawn Hubler, Nicholas Bogel-Burroughs & Serge F. Kovaleski, *States Rush to Revamp Laws After Supreme Court’s Gun Ruling*, N.Y. TIMES (June 24, 2022), <https://www.nytimes.com/2022/06/24/us/state-gun-laws-permits.html> [https://perma.cc/V48G-YZBS].

144. See, e.g., *Jimenez-Shilon*, 34 F.4th at 1045 (applying text and history (but not “tradition”) to the federal alien-in-possession ban); Blocher & Carberry, *supra* note 25 (manuscript at 3) (focusing on the “who” of gun regulation). The Eighth Circuit recently undertook that inquiry to uphold the prosecution of an unlawfully present noncitizen for possession of a firearm. *United States v. Sitladeen*, 64 F.4th 978, 985 (8th Cir. 2023). Outside of the alien-in-possession context, the Fifth Circuit struck down the federal ban on possession by those with civil domestic violence orders. *United States v. Rahimi*, 61 F.4th 443, 461 (5th Cir. 2023).

145. See, e.g., Blocher & Ruben, *supra* note 101; Patrick J. Charles, *Fugazi Second Amendment*, *supra* note 28, at 624 (2023) (critiquing the *Bruen* majority for its “conveniently cherry-picked” history); Samaha, *supra* note 100 (manuscript at 4–6) (noting that history itself cannot explain several analytic moves in *Bruen*); ERWIN CHERMERINSKY, WORSE THAN NOTHING: THE DANGEROUS FALLACY OF ORIGINALISM (2022); Adam Winkler, *Racist Gun Laws and the*

or its application is beyond the scope of this Article and better left to those immersed in interpretative modes and history.¹⁴⁶ Instead, this Part focuses on the question of how the *Bruen* framework might inform analysis of “the people” and the regulation of noncitizen firearm possession. I argue that even if text and history reasonably could answer the “what” of gun regulation (like the permitting scheme in *Bruen*), the framework fails with regard to questions of “who” may possess guns.¹⁴⁷

In *Bruen*’s reset, Justice Thomas’s majority opinion dismissed the two-part test used by lower federal courts after *Heller* as “one step too many,” only to prescribe another two-part inquiry.¹⁴⁸ Under *Bruen*’s two steps, a court first asks whether the Amendment’s “plain text” covers the conduct regulated by the law.¹⁴⁹ If a right and set of rightsholders fall within the plain text of the Amendment, the second part of *Bruen*’s inquiry then instructs the court to assess whether the government has carried its burden of establishing that the modern regulation has closely analogous or identical historical antecedents.¹⁵⁰ With this new test, *Bruen* minted a novel form of historical inquiry, heretofore unrecognizable within the traditional originalist methodologies.¹⁵¹ Originalism, as the *Bruen* majority envisions it, is the search for historical analogues to present-day regulation, rather than (or perhaps in addition to) an attempt to determine the original public meaning of constitutional text. While that shift is itself remarkable and

Second Amendment, 135 HARV. L. REV. F. 537, 539–41 (2022) [hereinafter Winkler, *Racist Gun Laws*].

146. See, e.g., sources cited *supra* note 145; Saul Cornell, *Cherry-Picked History and Ideology-Driven Outcomes: Bruen’s Originalist Distortions*, SCOTUSBLOG (June 27, 2022, 5:05 PM), <https://www.scotusblog.com/2022/06/cherry-picked-history-and-ideology-driven-outcomes-bruens-originalist-distortions/> [https://perma.cc/484W-HPTU]; Andrew Willinger, *Bruen’s Concurrences: The Questionable Durability of the Bruen Majority, and Ruminations on Originalism and the Limits of Historical Inquiry*, DUKE CTR. FOR FIREARMS L. (July 6, 2022), <https://firearmslaw.duke.edu/2022/07/bruens-concurrences-the-questionable-durability-of-the-bruen-majority-and-ruminations-on-originalism-and-the-limits-of-historical-inquiry/> [https://perma.cc/F35Q-7FZJ].

147. Of course, if a methodology fails to satisfactorily answer “who” questions, one should similarly be skeptical about its ability to satisfactorily answer “what” questions. And if that is so, the methodology is useless and incoherent when used as an exclusive interpretative tool in general. Here, however, I do not defend that broader claim but solely focus on concerns over historical antecedents for noncitizen exclusion from gun rights.

148. *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111, 2127, 2129–30 (2022).

149. *Id.* at 2126.

150. *Id.* at 2130–32.

151. See Blocher & Ruben, *supra* note 101 (manuscript at 3–4) (“One especially notable aspect of the Court’s recent turn to history is that it appears to depart from—or at least extend beyond—standard public meaning originalism, which has become the dominant version of originalist methodology.”).

weighted with devastating interpretative problems,¹⁵² this Article's primary concern is that, even when applied on its own terms, *Bruen's* methodology is ill-equipped to determine questions of rightsholders and prohibitions based on status. It is irredeemably flawed for four interrelated reasons.

First, the theoretical separation between a textual inquiry and a historical one collapses into one undifferentiated query with regard to noncitizen gun regulation (or other prohibitions based on immigration status). Courts might assess whether the plain meaning of "the people" includes noncitizens (or a subset of noncitizens), or they might assess whether Founding-era gun regulations based on citizenship status were sufficient historical analogues of the present-day federal criminal prohibition. At either stage of the inquiry, however, the same historical evidence would motivate decisions to exclude noncitizens. In short, "plain text" and historical antecedents do the same work here, allowing courts to pick and choose relevant antecedents to justify exclusion at either stage of the *Bruen* inquiry.¹⁵³ This point is illustrated by the two most recent appellate court opinions assessing § 922(g)(5): *Sitladeen* and *Jimenez-Shilon*.

In *Sitladeen*, the Eighth Circuit upheld the constitutionality of § 922(g)(5) at *Bruen's* first step.¹⁵⁴ Despite the lack of pervasive evidence that early American law disarmed groups analogous to present-day unlawfully present noncitizens,¹⁵⁵ *Sitladeen* held that "the people" excludes present-day unlawfully present noncitizens. As is typical in § 922(g)(5) cases, the panel opinion is long on explaining why it starts with the textual inquiry but woefully short on explaining why its textual inquiry excludes noncitizens.¹⁵⁶ The absence of any meaningful explanation is understandable. A textual analysis of "the people" who possess the right to keep and bear arms provides little guidance as to the inclusion of noncitizens as we understand them today. For instance, the natural language understanding of "people" could connote the plural of "person," which would certainly include noncitizens as human beings. Alternatively, "the people" might be a term of art that resists a natural language reading. Even so, indeterminacy remains as to what such a term of art might mean. "The

152. See generally *id.* (discussing the myriad of interpretative problems created by *Bruen's* approach).

153. Perhaps for this reason, at least one district court has argued that *Bruen's* step one should evaluate only the conduct regulated, not the status of the individual. *United States v. Bullock*, No. 18-CR-65, 2023 WL 4232309, at *20–21 (S.D. Miss. June 28, 2023).

154. *United States v. Sitladeen*, 64 F.4th 978, 985 (8th Cir. 2023).

155. See *infra* Part II.

156. See *Sitladeen*, 64 F.4th at 985–87.

people” was never clearly defined in the Constitution or settled at the Founding.¹⁵⁷ The phrase’s relationship to citizenship was murky then, as it is today.¹⁵⁸ Consequently, excluding noncitizens from its definition requires further inquiry not justified by language alone.¹⁵⁹

Because the *Sitladeen* opinion purports to reject the noncitizen-defendant’s Second Amendment claim at the first step of *Bruen*’s inquiry, the panel suggests in a footnote that it need not deal with the historical inquiry required by *Bruen*’s second step.¹⁶⁰ Yet, plain text is not as plain as it might appear.¹⁶¹ To exclude noncitizens from “the people,” the Eighth Circuit relied heavily on *Heller*’s citizenship talk, as well as pre-*Bruen* cases like *Portillo-Munoz*, to conclude that unlawfully present noncitizens are not covered by the plain text meaning of “the people.” Those cited cases, however, all employ extratextual standards like “members of the political community” or those with “sufficient connections” to the United States.¹⁶² Moreover, none of the cases explain why a plain text reading of “the people” requires the use of any of those judicially created standards or tests. Certainly none do the work of explaining why “the people” as understood at ratification necessarily excludes present-day unlawfully present noncitizens. By fiat then, *Sitladeen* simply posits the answer by citing to prior case law that held—also by fiat and without explanation—present-day noncitizens are not “the people.”

Another approach is to more forthrightly concede that interpreting plain text, at least with regard to understanding rightsholders, must be informed by something else. Indeed, in *Jimenez-Shilon*, the Eleventh Circuit (pre-*Bruen*) approximated *Bruen*’s first step but looked to the existence of prior regulations to narrow the

157. See generally Note, *Meaning(s)*, *supra* note 26 (noting tensions between competing interpretations of “the people” in the Constitution).

158. See JAMES H. KETTNER, *THE DEVELOPMENT OF AMERICAN CITIZENSHIP, 1608-1870*, at 208–09 (1978); see also Catherine Y. Kim, *Citizenship Outside the Courts*, U.C. DAVIS L. REV. (forthcoming 2023) (on file with author).

159. See Miller, *supra* note 24, at 241 (“No judge uses the text alone to answer difficult Second Amendment questions.”). As it regards the substantive scope of the right, if the Amendment is understood to enshrine a right of self-defense, then the conduct prohibited by § 922(g)(5) and the firearms-deportation statutes fall squarely within it. As such, searching the text of the Amendment for clues as to whether noncitizens generally, or unlawfully present noncitizens specifically, may seek its protection cannot answer the question definitively.

160. *Sitladeen*, 64 F.4th at 986 n.3. Notably, this approach is in tension with the Fifth Circuit’s view in *Rahimi*, where the court first held that “the people” encompassed a wide swathe of claimants before upholding another § 922 prohibition under *Bruen*’s second prong. See Willinger, *supra* note 104.

161. See Blocher & Ruben, *supra* note 101 (manuscript at 16) (“[E]ven a plain text inquiry will involve significant judicial discretion.”).

162. See *supra* Section I.A.

meaning of “the people.”¹⁶³ That court cited Founding-era regulations demonstrating that particular groups were excluded from arms bearing or militia service, including colonial and Founding-era gun laws that discriminated on the basis of race and citizenship status.¹⁶⁴ Those historical antecedents, per the Eleventh Circuit (and more recent district court opinions¹⁶⁵), command the conclusion that noncitizens could never be “the people,” at least not with respect to the right to bear arms.

Again, even had those courts instead assumed that noncitizens were part of “the people,” the discretion and indeterminacy of *Bruen*’s test provides ample room to reject the noncitizen’s claim. The same historical evidence proffered to delimit the plain meaning of “the people” presumably would have been credited by the court as relevant analogues to the modern-day prohibition. In sum, in applying *Bruen*’s “text, informed by history” prescription,¹⁶⁶ judges thus far have conflated both text and history into a muddled inquiry, conveniently picking and choosing from extratextual sources and selective history to arrive at the conclusion that “the people” excludes noncitizens.

Second, assumptions about meaning and interpretation cannot be exported from the Founding era to modern regulations without establishing that the categories and social concerns addressed by past regulations are sufficiently similar.¹⁶⁷ To conduct its second-step historical and analogical inquiry, *Bruen* requires the identification of a “general societal problem that has persisted since the 18th century.”¹⁶⁸ This involves considering the motivation and purposes of modern regulations in relation to proposed historical antecedents.¹⁶⁹

163. See *United States v. Jimenez-Shilon*, 34 F.4th 1042, 1046–48 (11th Cir. 2022).

164. *Id.* See also Adam Winkler, *Heller’s Catch-22*, 56 UCLA L. REV. 1551, 1562–63 (2009); Gulasekaram, *Citizenship*, *supra* note 23, at 1549; and AMAR, *supra* note 26, at 47–49, for a discussion of the historical relationship between the right to bear arms and the right to governance.

165. *United States v. DaSilva*, No. 3:21-CR-267, 2022 WL 17242870, at *1–12 (M.D. Pa. Nov. 23, 2022); *United States v. Carbajal-Flores*, No. 20-cr-00613, 2022 WL 17752395, at *3 (N.D. Ill. Dec. 19, 2022).

166. *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111, 2127 (2022).

167. See Blocher & Ruben, *supra* note 101; cf. Michael C. Dorf, *When Two Rights Make a Wrong: Armed Assembly Under the First and Second Amendments*, 116 NW. U. L. REV. 111, 115 (2021) (“It would be surprising to discover that the original understanding of the First or Second Amendment protected armed assembly in the modern sense because current views of those Amendments are anachronistic as applied to the Early Republic.”).

168. *Bruen*, 142 S. Ct. at 2131–33; see Miller & Blocher, *supra* note 106 (manuscript at 11) (“So how is a court supposed to analyze firearms on subways or airplanes? How should one describe the general societal problem in that context, and with what evidence?”).

169. Miller & Blocher, *supra* note 106 (manuscript at 11) (noting that *Bruen* requires reasoning by analogy but does not provide criteria for doing so); see also *United States v. Rahimi*, 61 F.4th 443, 454 (5th Cir. 2023):

Unfortunately, *Bruen* provides little guidance on how to define the societal problem or assess its pervasiveness and persistence.¹⁷⁰ Nevertheless, applying a reasonable approximation of what *Bruen* might require, it is difficult to show that the contemporary concern with unlawful presence and unauthorized entry has persisted for centuries.

There is little to no evidence that the presence of substantial numbers of unlawfully present noncitizens who illicitly crossed national borders or otherwise violated lawful immigration statutes was a societal problem in the eighteenth or nineteenth centuries. Federal immigration categories, including the concept of unauthorized immigration under modern federal law, find no clear analogue in early American law. For the first one hundred years of the republic, the federal government for the most part did not regulate admissions and did not create immigrant categories at all.¹⁷¹ Federal admissions control as we know it began in the late nineteenth century at the earliest, when the federal government enacted admissions prohibitions on convicts, prostitutes, public charges, and Asian migrants.¹⁷² Indeed, Chinese laborers who circumvented the overtly racist Chinese Exclusion Act might, in hindsight, be understood as the first “illegal aliens.”¹⁷³ Even

When the challenged regulation addresses a “general societal problem that has persisted since the 18th century, the lack of a distinctly similar historical regulation addressing that problem is relevant evidence that the challenged regulation is inconsistent with the Second Amendment.” Moreover, “if earlier generations addressed the societal problem, but did so through materially different means, that could be evidence that a modern regulation is unconstitutional.”

(quoting *Bruen*, 142 S. Ct. at 2131).

170. The Court instead averred that “reasoning by analogy” is a “commonplace task for any lawyer or judge” and instructed lower courts to compare “how and why” past and current regulations restrict the right. *Bruen*, 142 S. Ct. at 2132–33.

171. See Gerald L. Neuman, *The Lost Century of American Immigration Law (1776–1875)*, 93 COLUM. L. REV. 1833, 1834, 1841–80, 1896–1901 (1993). Neuman shows that while the federal government did not regulate admissions, state laws operated as a form of admissions and border control, as well as movement regulation. *Id.* at 1841–80. Neuman notes that, in some cases, the federal government may have approved of some state efforts and federal treaties with foreign nations may have influenced migration. *Id.* at 1896, 1901. Neuman also suggests that while the concept of “illegal alien” was not a part of federal law, it may be possible to conceive of those who violated state and local prohibitions as a form of “illegal alien.” *Id.* at 1894–96, 1899–1900. But there is no indication in Neuman’s work that unlawful presence, including illicit crossing of national borders by noncitizens, was a general societal problem warranting a national response. Indeed, the lack of federal regulation and significant variegation within state rules would suggest the opposite.

172. In 1875, Congress began federally regulating admission into the United States. Page Act of 1875, Pub. L. No. 43-141, 18 Stat. 477 (first federal law to regulate admission, primarily barring the entry of Asian women for “lewd and immoral” purposes). Soon thereafter, in 1882 Congress enacted the Chinese Exclusion Act, Pub. L. No. 47-126, 22 Stat. 58 (1882) (barring immigration of Chinese laborers for an initial period of ten years and later renewed and extended).

173. See generally Emily Ryo, *Through the Back Door: Applying Theories of Legal Compliance to Illegal Immigration During the Chinese Exclusion Era*, 31 LAW & SOC. INQUIRY 109 (2006). Note that Neuman argues that it may be possible to conceive of those in violation of state migration

so, unlawful entry into the United States was not a crime until 1929.¹⁷⁴ And deportation during its first several decades operated expressly as an engine of racial exclusion.¹⁷⁵ Moreover, present-day notions of the “illegal” or “unauthorized” immigrant under federal law are primarily a late twentieth-century legal construction, in large part created by post-1965 immigration reforms.¹⁷⁶ In short, through the 1700s and 1800s, there does not appear to be a useful, comparable societal problem of unlawful migration or an analogue to the specific population targeted by twentieth-century criminal or immigration laws regarding gun possession. Any comparisons that might be made operate at a level of generality that *Bruen* and subsequent lower court cases do not countenance.

In addition, Founding-era regulations were enacted when the Second Amendment did not hold the same substantive scope or interpretation that it does today.¹⁷⁷ Specifically, it did not constrain state-level conduct. Thus, we have no assurance that lawmakers pondered concerns over self-protection, the scope of “the people,” or any other now-relevant considerations about the scope of the right as to noncitizens when enacting the historical regulations cited by federal courts. Drawing from state-level restrictions of the ratification and postratification eras (as courts have done¹⁷⁸) would seem to have limited applicability to present-day federal firearms restrictions.

Third, and relatedly, the Court’s lack of direction or standards for comparing past and current regulations permits federal courts to select contested, “goldilocks,” and “cherry-picked history” to determine

controls prior to the 1880s as a type of “illegal alien,” but such an argument would be at best a crude analogue to the way in which unlawful status and presence are used in present-day federal gun regulations. See Neuman, *supra* note 171, at 1899–1900.

174. Undesirable Aliens Act, Pub. L. No. 70-1018, 45 Stat. 1551 (1929).

175. See ADAM GOODMAN, *THE DEPORTATION MACHINE: AMERICA’S LONG HISTORY OF EXPELLING IMMIGRANTS* 9–71 (Princeton Univ. Press 2020). Even through the present-day, deportation is concentrated on particular racial and religious groups in explicit and implicit ways. *Id.* at 164–96; see also Kevin R. Johnson, *Systemic Racism in the U.S. Immigration Laws*, 97 *IND. L.J.* 1455, 1472–77 (2022); sources cited *supra* note 173.

176. See generally Douglas S. Massey & Karen A. Pren, *Unintended Consequences of US Immigration Policy: Explaining the Post-1965 Surge from Latin America*, 38 *POPULATION & DEV. REV.* 1 (2012) (discussing the effect of the post-1965 immigration reforms); KITTY CALAVITA, *INSIDE THE STATE: THE BRACERO PROGRAM, IMMIGRATION, AND THE I.N.S.* (1992) (chronicling the end of the Bracero program and its effects).

177. See Winkler, *Racist Gun Laws*, *supra* note 145, at 539 (“There is also the problem that many gun laws over the years were enacted without any consideration of the Second Amendment because the Supreme Court had not definitively established that the Second Amendment protected an individual right to bear arms until 2008.”); Dorf, *supra* note 167, at 115–19 (discussing the changing scope of the Second Amendment in relation to whether there is a right to armed assembly).

178. See *United States v. Jimenez-Shilon*, 34 F.4th 1042, 1046–49 (11th Cir. 2022).

the constitutionality of immigrant gun regulations.¹⁷⁹ As historian Patrick Charles argues, the presence of *some* Founding-era colonial- or state-level restrictions hardly demonstrates a “widespread” or prevalent understanding that noncitizens—or unauthorized noncitizens specifically, as we understand the terms today—were excluded from gun possession.¹⁸⁰ And what history exists regarding the legal exclusion of noncitizens in the Founding era remains contested, a fact expressly acknowledged by the Eighth Circuit when it deemed the inquiry a “difficult historical debate.”¹⁸¹ Indeed, the *Bruen* majority, for one reason or another,¹⁸² rejected the mountain of evidence proffered by the State substantiating the common-law and statutory history of public carry restrictions.¹⁸³ If regulation from multiple jurisdictions over the course of several hundred years was deemed insufficient,¹⁸⁴ the isolated examples cited by courts for noncitizen exclusion from the right to bear arms are far more attenuated.¹⁸⁵

Fourth is the problem of legislative motive and the provenance of those early restrictions. As Part II explores in detail, several historic firearms restrictions reflect then-prevalent racial attitudes and xenophobia.¹⁸⁶ Yet, it is that same history that informs the present-day inquiry whether particular groups were historically excluded from firearms possession. As such, uncritical historical inquiry glosses over and locks in gun regulations with that racist pedigree.¹⁸⁷ Federal judges

179. See generally Patrick J. Charles, *Fugazi Second Amendment*, *supra* note 28; Jake Charles, Bruen, *Analogies, and the Quest for Goldilocks History*, DUKE CTR. FOR FIREARMS L. (June 28, 2022), <https://firearmslaw.duke.edu/2022/06/bruen-analogies-and-the-quest-for-goldilocks-history/> [<https://perma.cc/L874-KFRA>] [hereinafter Jake Charles, *Goldilocks History*].

180. See Patrick J. Charles, *Fugazi Second Amendment*, *supra* note 28, at 682.

181. *United States v. Sitladeen*, 64 F.4th 978, 986 n.3 (noting competing historical evidence proffered regarding prohibitions on noncitizens and labeling it a “difficult historical debate”).

182. See Jake Charles, *Goldilocks History*, *supra* note 179 (“The Court makes [the] government search for a goldilocks history that will satisfy judges that a given regulation is sufficiently grounded in history.”).

183. *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111, 2135–50 (2022); see also *United States v. Bullock*, No. 18-CR-65, 2023 WL 4232309, at *2 (S.D. Miss. June 28, 2023) (“In *Bruen*, the State of New York presented 700 years of history to try and defend its early 1900s-era gun licensing law. That was not enough.”).

184. See Miller & Blocher, *supra* note 106, at 57–63 (noting that the state presented 700 years of regulation, documenting the court’s rejection of that history, and picking out history consistent with the *Bruen* majority’s view).

185. *Cf. Bruen*, 142 S. Ct. at 2142, 2153 (declining to give dispositive weight to a few colonial regulations or a “single state statute and a pair of state-court decisions”).

186. See Patrick J. Charles, *Racist History*, *supra* note 24, at 1345–57; Winkler, *Racist Gun Laws*, *supra* note 145, at 537 (“For a significant portion of American history, gun laws bore the ugly taint of racism.”).

187. See Li, *supra* note †, at 1888–92; Jacob D. Charles, *On Sordid Sources in Second Amendment Litigation*, 76 STAN. L. REV. ONLINE (forthcoming 2023) (on file with author).

wrestling with questions of noncitizen gun regulation seem unbothered by this origin story.

Seeking answers from that history without accounting for these deficits hazards replicating the discriminatory and subordinating legal structures of the past. *Dred Scott*, for example, expressly connected the right to bear arms to prevailing legal conceptions of who may be excluded from “the people” and citizenship—namely, the Black population, whether free or enslaved.¹⁸⁸ In a move out of step with modern jurisprudence, Justice Thomas in *Bruen* cites *Dred Scott* with approval to substantiate his claim about antebellum restrictions on the right to carry in public.¹⁸⁹ In doing so, he only meekly gestures at the case’s inherently corrosive core assumptions. Justice Thomas’s rhetorical move exemplifies the problem with the history-and-tradition methodology as it applies to questions of who may possess firearms. It assumes the ability to disentangle a substantive regulation of the “how” and “when” of firearm possession from the baked-in social hierarchies and stereotypes that informed the regulation. It freezes “the people” in that moment, regardless of the moral convictions that produced the contemporaneous understanding of the term, even as *Bruen* commands that judges account for the societal problem the prior regulations intended to address.

When the sole focus of modern regulation is the “who” of gun possession, justifying current laws by myopically focusing on regulations of the past reifies while obscuring discrimination on the basis of race and national origin. Regulations of that period would have been the product of an electorate delimited by race, gender, and class.¹⁹⁰ The output of such a circumscribed collective cannot meaningfully represent the general will of the populace or lend significant democratic

188. *Dred Scott v. Sandford*, 60 U.S. 393, 417 (1857); see *infra* Section II.A.

189. *Bruen*, 142 S. Ct. at 2150–51 (citation omitted):

Even before the Civil War . . . this Court indirectly affirmed the importance of the right to keep and bear arms in public. Writing for the Court in *Dred Scott v. Sanford*, Chief Justice Taney offered what he thought was a parade of horrors that would result from recognizing that free blacks were citizens of the United States. . . . Thus, even Chief Justice Taney recognized (albeit unenthusiastically in the case of blacks) that public carry was a component of the right to keep and bear arms—a right free blacks were often denied in antebellum America;

see Saul Cornell, *Clarence Thomas’ Latest Guns Decision Is Ahistorical and Anti-originalist*, SLATE (Jun. 24, 2022, 9:26 AM), <https://slate.com/news-and-politics/2022/06/clarence-thomas-gun-decision-bruen-anti-originalist.html> [<https://perma.cc/93E3-AKH3>] (critiquing Justice Thomas for citing *Dred Scott* with approval).

190. See Blocher & Ruben, *supra* note 101 (noting the democratic deficits in the electorate that produced gun regulations prior to the late 1800s and 1900s); Joy Milligan & Bertrall L. Ross II, *We (Who Are Not) the People: Interpreting the Undemocratic Constitution*, TEX. L. REV. (forthcoming 2024) (on file with authors).

legitimacy to those enactments. This is especially true with regard to access to weapons, as it seems inevitable that a racially select population of voters would enact prohibitions on any outsiders they considered dangerous or unworthy.¹⁹¹ The subordination of particular groups was the aim of the status-based prohibitions of the past, not their unfortunate corollary.¹⁹² The Fifth Circuit noted this defect when it held the federal ban on possession by individuals with a civil protective order unconstitutional, stating that “[t]he purpose of laws disarming ‘disloyal’ or ‘unacceptable’ groups was ostensibly the preservation of political and social order, not the protection of an identified person from the threat of ‘domestic gun abuse.’”¹⁹³ Justice Thomas’s conjuring of *Dred Scott* ignores this basic point.

Indeed, the *Bruen* majority suggests that the concerns of vulnerable communities required judicial skepticism of the state’s discretionary permitting scheme at issue under the Second Amendment.¹⁹⁴ But if the Justices’ real concern was the racial discrimination motivating the law, then surely extant equal protection standards would suffice to invalidate it.¹⁹⁵ In fact, state courts faced with similar challenges have deployed state equality protections for that very purpose, invalidating alienage distinctions in state gun laws because of discriminatory motive.¹⁹⁶ That approach accords with modern Fourteenth Amendment jurisprudence, which disfavors distinctions based on alienage with regard to the everyday lives and livelihoods of noncitizens, even extending that protection in limited instances to unlawfully present noncitizens.¹⁹⁷

191. See *infra* Sections II.A & B.

192. In *Dred Scott*, the majority acknowledged expressly that the need to disarm and strip slaves and free blacks of constitutional rights was based on their concerns for the white population. 60 U.S. at 417:

It is impossible, it would seem, to believe that the great men of the slaveholding States, who took so large a share in framing the Constitution of the United States, and exercised so much influence in procuring its adoption, could have been so forgetful or regardless of their own safety and the safety of those who trusted and confided in them.

193. *United States v. Rahimi*, 61 F.4th 443, 457 (5th Cir. 2023).

194. See *Bruen*, 142 S. Ct. at 2158 (Alito, J., concurring) (discussing vulnerable groups’ and communities’ need to feel safe); *id.* at 2159 (citing with approval briefs from groups representing black gun owners and women’s legal advocacy groups).

195. See Brief of the NAACP Legal Defense & Education Fund, Inc. & the National Urban League as Amici Curiae in Support of Respondents at 24–26, *Bruen*, 142 S. Ct. 2111 (2022) (No. 20-843). See *generally* *Hunter v. Underwood*, 471 U.S. 222 (1985) (striking down felony disenfranchisement provision of state constitution because it was enacted with racially discriminatory purpose); *Washington v. Davis*, 426 U.S. 229 (1976) (holding that race discrimination claims under the Fourteenth Amendment require a showing of intent).

196. See, e.g., *People v. Rappard*, 104 Cal. Rptr. 535, 537 (Cal. Ct. App. 1972) (striking down state alienage distinction in firearms law under federal and state equal protection guarantees).

197. See *id.*; *Sugarman v. Dougall*, 413 U.S. 634, 641–46 (1973) (holding a law barring noncitizens from being hired for civil service positions unconstitutional); *Plyler v. Doe*, 457 U.S.

To be clear, this final critique does not mean that gun regulations tainted by racism or xenophobia should be discarded reflexively.¹⁹⁸ There may be many reasons for maintaining gun regulations in the present day, even if those laws originally served racist or xenophobic ends. Today, those same laws may yield antistatutory effects for racial minorities and other vulnerable populations.¹⁹⁹ Indeed, the existence of extensive gun prohibitions at the Founding era and again after Reconstruction might be read to indicate that the Constitution contemplates significant firearms regulation.²⁰⁰ One might argue that the historical exclusion of certain groups—even if we could not single out those groups today—justifies the ability of modern legislatures to regulate “dangerous” groups.²⁰¹ Yet, that type of abstraction hazards the precise “level[s] of generality” and indeterminacy problem that historical inquiry and originalism claim to solve.²⁰² At that level of abstraction, historical exclusions could countenance all manners of regulation and would likely lead courts back to a “tiers of scrutiny” approach to determine the scope of the “dangerous” category.²⁰³ At the very least, understood at that level of generality, exclusive appeals to historical antecedents provide no more meaningful restraints on judicial interpretation than any other lens. *Bruen* and *Jimenez-Shilon* fail to recognize these fundamental deficits—let alone provide a satisfactory resolution.

II. PAST REGULATION OF NONCITIZENS’ FIREARM POSSESSION

Even if *Bruen*’s history-focused methodology could coherently resolve questions of immigration status and Second Amendment coverage, the available evidence would not justify upholding present-

202, 230 (1982) (striking down laws barring undocumented children from attending public schools).

198. See Patrick J. Charles, *Racist History*, *supra* note 24, at 1363–68; Blocher & Siegel, *supra* note 34, at 455–60; see also Mark A. Frassetto, *The Nonracist and Antiracist History of Firearms Public Carry Regulation*, 74 S.M.U. L. REV. F. 169, 179 (2021) (“[A] law passed with facially neutral language but intended only to be enforced against a group wrongly considered outside of the people would provide little guidance about the scope of the Second Amendment right.”).

199. See Li, *supra* note †, at 1869–73; Blocher & Siegel, *supra* note 34, at 455–60.

200. See Winkler, *Racist Gun Laws*, *supra* note 145, at 539.

201. See *United States v. Bullock*, No. 18-CR-165, 2023 WL 4232309, at *10–11, *28 (S.D. Miss. June 28, 2023) (explaining how courts might consider “dangerousness” as a factor and citing then-Judge (now Justice) Barrett’s lengthy dissent in *Kanter v. Barr*, 919 F.3d 437, 451 (7th Cir. 2019) (Barrett, J., dissenting from the panel’s decision to uphold a felon-in-possession charge against a nonviolent felon)).

202. Samaha, *supra* note 100 (manuscript at 8).

203. See *id.*; Blocher & Carberry, *supra* note 25 (manuscript at 1) (“But if ‘dangerousness’ is the operative principle for historically informed Second Amendment interpretation, how broadly does it sweep?”).

day restrictions of noncitizens' firearms rights. Taken on its own terms, applying *Bruen's* framework leads to a conclusion diametrically opposed to those consistently reached by the federal courts. Part II takes *Bruen's* prescription seriously and seeks to investigate the origins of firearms regulations based on citizenship and immigration status.

The background and genesis of federal regulation of immigrants and guns provided below helps establish three critical ideas. First, initial regulation of possession by disfavored groups either expressly conflated citizenship with race or relied on the presumption that immigrants were the source of subversive, anti-American ideologies. Second, the laws at issue in contemporary litigation over immigrants and firearms originated in the mid- to late twentieth century, as powerful gun lobbying groups convinced lawmakers to regulate immigrants rather than firearms. Following on the heels of the first comprehensive federal regulation of firearms in 1934, several bills with firearms-specific deportation provisions were introduced in Congress from 1935 to 1939 focusing on the association between noncitizens, gang violence, and organized crime. They eventually made their way into law on the eve of World War II, when the legislative proposals buttressed claims about noncitizen racketeering with worries about armed noncitizens engaged in subversive activities and espionage. Third, this historical context and pre-*Heller* jurisprudence reveal why alien-in-possession restrictions remained unchallenged for several decades and why prior theories of the Second Amendment may have countenanced such restrictions. Notably, throughout the first 217 years of the Second Amendment, questions regarding the relationship between “the people” and the right to bear arms rarely emerged in legislative debate or judicial discourse, save for a notorious invocation in the anticanonical case of *Dred Scott*.

As detailed below, legal consequences for noncitizens' gun possession did not become a pervasive legal fact until the mid-twentieth century,²⁰⁴ the precise period that *Bruen* teaches is irrelevant to historical inquiry.²⁰⁵ This temporal point was recently emphasized by two federal courts striking down the federal prohibition on possession by civil domestic violence protective orders in 18 U.S.C. § 922(g)(8).²⁰⁶ A district court noted that domestic violence prohibitions did not appear in states until the 1970s, while the specific federal gun law at issue,

204. Patrick J. Charles, *Fugazi Second Amendment*, *supra* note 28, at 682; *see also supra* Section I.A.

205. *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2137–55 (2022); Patrick J. Charles, *Fugazi Second Amendment*, *supra* note 28, at 682; Samaha, *supra* note 100.

206. *See United States v. Rahimi*, 61 F.4th 443 (5th Cir. 2023); *United States v. Perez-Gallan*, No. PE:22-CR-00427-DC, 2022 WL 16858516 (W.D. Tex. Nov. 10, 2022).

§ 922(g)(8), was enacted in 1994.²⁰⁷ Prohibitions on noncitizen possession appeared only a few decades prior to the domestic violence order ban, not centuries.²⁰⁸ Applying the *Bruen* methodology faithfully, a court might have to conclude that cases like *Jimenez-Shilon* are not just examples of shoddy historical analysis by judges but that all current noncitizen firearms restrictions—both criminal and deportation related—are invalid because they lack comparable societal problems and specific historical analogues in the Founding period.²⁰⁹

Before proceeding, I should clarify that—similar to the Supreme Court Justices and many others who have undertaken similar analysis—I am not a historian by trade or training. Presented below is evidence from a review of affirmatively enacted laws readily accessible through online databases and compilations, none of which claim to be comprehensive. Further, I make no claim about common understanding among the populace about gun rights or the meaning of citizenship, nor does my citation of enacted laws and policies necessarily reveal information about enforcement practices. Nevertheless, this search for enacted regulations can help inform whether legal prohibitions on noncitizen possession enjoy the dispositive pedigree granted by some federal courts. At minimum, it would seem just as helpful as the judicial or “law office” history²¹⁰ deployed in Second Amendment cases.

A. Early Citizenship Limitations on Firearm Possession

Congress began restricting *firearms* in the mid-twentieth century. Federal regulation of *noncitizens*, however, began much earlier. Congress’s first regulation of “dangerous” noncitizens appeared in the first federal deportation laws. Those regulations, the Alien and Sedition Acts and the Alien Enemies Act of 1798, however, did not target weapons possession.²¹¹ Instead, they delegated to the president the power to remove foreign-born residents who were “dangerous to the peace and safety of the United States.”²¹² The conduct targeted by these

207. *Perez-Gallan*, 2022 WL 16858516, at *4–5 (highlighting that the company Amazon was older than the law).

208. See *infra* Section II.B.

209. See Patrick J. Charles, *Fugazi Second Amendment*, *supra* note 28, at 707.

210. See, e.g., Jack M. Balkin, *Lawyers and Historians Argue About the Constitution*, 35 CONST. COMMENT. 345, 345 (2020); Saul Cornell, Heller, *New Originalism, and Law Office History: “Meet the New Boss, Same as the Old Boss,”* 56 U.C.L.A. L. REV. 1095, 1098–1101 (2009); Alfred H. Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 SUP. CT. REV. 119, 122 (1965) (coining the term “law-office” history).

211. Sedition Act, ch. 74, 1 Stat. 596 (1798); Alien Enemies Act, ch. 66, 1 Stat. 577 (1798) (codified as amended at 50 U.S.C. § 21).

212. Alien Friends Act, ch. 58, § 1, 1 Stat. 570, 571 (1798).

laws was critique of the government and seditious advocacy, not arms bearing.²¹³ The federal government soon abandoned attempts at deportation control.²¹⁴ After the passage of those early laws, for most of the next century, the federal government did not regulate immigration in ways that are familiar today.

Instead, from the late eighteenth to late nineteenth centuries, generations before the incorporation of the Second Amendment, subfederal governments were the primary locus of both migration control²¹⁵ and weapons control.²¹⁶ At the state and local level, certain disfavored groups, including certain noncitizens, were the subject of gun regulation from the time of the Founding, and even earlier.²¹⁷ To be clear, the modern immigration statuses created by federal law have no clear analogue in the Founding era. Nevertheless, some early prohibitions on disfavored groups implicated notions of loyalty and membership in the colonies, and later the newly formed states.

In preconstitutional times, these laws reflected an attempt to disarm those “disaffected” to the cause of the Revolution and others associated with “foreign” or enemy elements, such as Indian tribes and slaves.²¹⁸ During the revolutionary period, colonial law in some

213. See generally JULIA ROSE KRAUT, *THREAT OF DISSENT: A HISTORY OF IDEOLOGICAL EXCLUSION AND DEPORTATION IN THE UNITED STATES* (2020).

214. The Alien Friends Act expired in June 1800. § 6, 1 Stat. at 572. The Alien Enemies Act is still in force today (with modifications) and was, in part, the basis for Japanese internment.

215. See Neuman, *supra* note 171, at 1883 (arguing that state and local regulation of movement across borders or ports of entry operated as immigration control during a period in which the federal government did not enact immigration law).

216. See *infra* notes 218–225.

217. See generally Blocher & Carberry, *supra* note 25; Saul Cornell & Emma Cornell, *The Second Amendment and Firearms Regulation: A Venerable Tradition Regulating Liberty While Securing Public Safety*, 108 AM. J. PUB. HEALTH 867 (2018); Mark A. Frassetto, *supra* note 198.

218. See, e.g., Mark Frassetto, *Firearms and Weapons Legislation up to the Early Twentieth Century* (Jan. 15, 2013) (compilation), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2200991 [<https://perma.cc/L53V-AFJC>]; see also *An Act for . . . Disarming Persons Who Shall Not Have Given Attestations of Allegiance and Fidelity to This State*, ch. 836, §§ 4-5, 1779 Pa. Laws 193, reprinted in IX THE STATUTES AT LARGE OF PENNSYLVANIA FROM 1682 TO 1801, at 346–47 (James T. Mitchell & Henry Flanders 1903):

And where it is very improper and dangerous that persons disaffected to the liberty and independence of this state shall possess . . . any firearms, or other weapons used in war . . . the lieutenant . . . of the militia . . . shall be . . . empowered to disarm any person . . . who shall not have taken any oath or affirmation of allegiance to this or any other state . . . ;

An Act . . . Recommending the Disarming Such Persons as Are Notoriously Disaffected to the Cause of America . . . , ch. 21, 1775–1776 Province Laws 479 (1776) (disarming those who do not execute a declaration affirming support for war against Great Britain); § 23, 1731–1743 S.C. Acts 168 (1740) (“It shall not be lawful for any slave, unless in the presence of some white person, to carry or make use of firearms or any offensive weapon whatsoever”); Act of May 7, 1723, 1723 Conn. Pub. Acts 292 (“No person . . . within this Colony, shall be allowed . . . any action of debt, detainue, or other action whatsoever for any gun or guns . . . trusted to any Indian”); An Act for the Speedy Trial of Criminals, ch. 26, § 32, 1715 Md. Laws 117 (“No negro or other slave within

jurisdictions called for the disarmament of slaves, the free Black population, Indians, loyalists, and certain religious groups.²¹⁹ Some newly formed states continued colonial prohibitions targeting Indians, who were not citizens at the time, or enacted new gun restrictions targeting their possession.²²⁰

In addition to general gun possession or use laws in the newly formed republic, then-extant limitations on state militia membership were tied to both citizenship and racial categories²²¹ in ways that corresponded to then-prevailing conceptions of racial superiority, hierarchy, and loyalty.²²² In South Carolina, for instance, the

this provide shall be permitted to carry any guns"); Acts Respecting the Indians, ch. 58, § 2, 1633 Mass. Laws 37 ("Nor shall any person sell, give or barter . . . any gun or guns, powder, bullets, shot, lead, to any Indian whatsoever, or to any person inhabiting out of this jurisdiction[.]"); THE COMPACT WITH THE CHARTER AND LAWS OF THE COLONY OF NEW PLYMOUTH: TOGETHER WITH THE CHARTER OF THE COUNCIL AT PLYMOUTH, AND AN APPENDIX, CONTAINING THE ARTICLES OF CONFEDERATION OF THE UNITED COLONIES OF NEW ENGLAND, AND OTHER VALUABLE DOCUMENTS 178 (William Brigham ed., Dutton & Wentworth Printers 1836) (1676 act instituting death penalty for providing arms to "Indians" because "it is found that selling of armes . . . to the Indians, is very pernicious and destructive to the English"). See generally Cornell & DeDino, *supra* note 24, at 505–08.

219. Cornell & DeDino, *supra* note 24, at 505–08; see also Meg Penrose, *A Return to the States' Rights Model: Amending the Constitution's Most Controversial and Misunderstood Provision*, 46 CONN. L. REV. 1463, 1478 (2014) ("[T]he Founders perpetuated our English heritage of discriminating between who could be trusted with weapons and who could not. Blacks—both free and slave—Indians, non-Loyalists, Catholics, and other groups were selectively excluded from legal access to weaponry."). King George was condemned by colonists for exciting "domestic insurrections amongst us, and [endeavoring] to bring on the inhabitants of our frontiers, the merciless Indian savages, whose known rule of warfare, is an undistinguished destruction of all ages, sexes, and conditions." THE DECLARATION OF INDEPENDENCE, para. 29 (U.S. 1776); see Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 GEO. L.J. 309, 319 (1991) ("The English distrust of the lower classes, and then certain religious groups, was replaced in America by a distrust of two racial minorities: Native Americans and blacks.").

220. See, e.g., An Act to Restrain Intercourse with Indians, ch. 80, § 4, 1844 Mo. Laws 577 ("No person shall sell, exchange or give, to any Indian, any . . . gun"); An Act to Restrain the Evil Practices Arising from Negroes Keeping Dogs, and to Prohibit Them from Carrying Guns or Offensive Weapons, ch. 81, 1806 Md. Laws 44 ("It shall not be lawful for any free negro or mulatto to go at large with any gun, or other offensive weapon"); A Law Respecting Slaves, § 4, 1804 Ind. Acts 108 ("[N]o slave or mulatto whatsoever shall keep or carry any gun"); A Law for the Regulation of Slaves, 1799 Miss. Laws 113 ("No Negro or mulatto shall keep or carry any gun"); § 5, 1798 Ky. Acts 106 ("No negro, mulatto, or Indian whatsoever shall keep or carry a gun"); see also Riley, *supra* note 25, at 1683–1701.

221. See Riley, *supra* note 25, at 1683–1701; see, e.g., An Act to Regulate the Militia, § 1, 1844 R.I. Pub. Laws 501, 503 ("Every able bodied white male citizen in this state . . . shall be enrolled in the militia"); An Act in Addition to an Act, entitled "An Act for Regulating the Militia Within this State," 1795 N.H. Laws 525 ("Every free, able bodied, white male citizen of this state, resident therein, who is . . . fifteen years and under forty years of age . . . shall be enrolled in the militia").

222. See, e.g., Act of June 22, 1793, § 2, *reprinted in* 2 THE LAWS OF THE COMMONWEALTH OF MASSACHUSETTS, FROM NOVEMBER 28, 1780 TO FEBRUARY 28, 1807, at 579 (Boston, J.T. Buckingham 1807) (limiting militia membership to 18 to 45 year old "free, able-bodied white male citizen[s]" of Massachusetts or any other state); Act of April 9, 1807, § 2, *reprinted in* AN

exclusively “white” militia was required by law to patrol and police congregations of “slaves, free negroes, mulattoes, and mustizoes.”²²³ Moreover, it appears that “citizen” as used in those statutes may have referenced state citizenship in many instances and not necessarily national citizenship under federal naturalization law.²²⁴

As some of the militia laws and general prohibitions on possession by Indians suggest, many restrictions of the late eighteenth to mid-nineteenth centuries were less focused on citizenship status than on the racial hierarchies and corresponding legal norms of the time that were tied to citizenship.²²⁵ This conflation reached its nadir with the anticanonical case of *Dred Scott*. There, the Court explicitly invoked the link between “the people” and citizenship and tied both to race and access to constitutional rights, including the right to bear arms:

The words “people of the United States” and “citizens” are synonymous terms, and mean the same thing. They both describe the political body who, according to our republican institutions, form the sovereignty, and who hold the power and conduct the Government through their representatives. . . .

. . . .

. . . [I]t cannot be believed that the large slaveholding States regarded [members of the “African race”] as included in the word citizens, or would have consented to a Constitution which might compel them to receive them in that character from another

ABRIDGEMENT OF THE LAWS OF PENNSYLVANIA FROM 1700 TO 1811, at 366 (Farrand, Hopkins, Zantzinger & Co. 1811) (providing same limitation on militia membership as Massachusetts); Act of May 10, 1794, § XXV, 1794 S.C. Acts 286, *reprinted in* A DIGEST OF THE LAWS OF THE UNITED STATES & THE STATE OF SOUTH-CAROLINA, NOW OF FORCE, RELATING TO THE MILITIA, at 119–20 (Thomas D. Condy 1830) [hereinafter DIGEST OF THE LAWS OF SOUTH CAROLINA] (conscripting all “free white aliens” into patrol and militia duty to allay concerns that “aliens or other transient persons” were not contributing to the “care and watchfulness of the community in which they reside . . .”); Act of Dec. 20, 1800, § I, 1800 S.C. Acts 287, *reprinted in* DIGEST OF THE LAWS OF SOUTH CAROLINA, 119–20 (empowering militia to enter and break up any congregations of “slaves, free negroes, mulattoes and mustizoes” because existing laws for “keeping [those groups] in due subordination” had been found insufficient).

223. § I, 1800 S.C. Acts 287.

224. *See, e.g.*, An Act in Addition to an Act, Entitled “An Act for Regulating the Militia Within This State,” 1795 N.H. Laws 525 (“Every free, able bodied white male citizen of this state . . .”).

225. *See, e.g.*, An Act to Amend the Criminal Law, § XIII, 1865 S.C. Acts, *reprinted in* REPORTS AND RESOLUTIONS OF THE GENERAL ASSEMBLY OF THE STATE OF SOUTH CAROLINA PASSED AT THE ANNUAL SESSION OF 1865, at 14 (Columbia, Julian A. Selby 1865) (“Persons of color constitute no part of the Militia of the State . . .”); An Act to Prohibit the Sale of Arms and Ammunition to Indians, § 1, 1853 Or. Laws 257 (“If any white citizen, or other person than an Indian shall sell . . . to any Indian . . . any gun . . . or other kind of firearms . . . any person so offending shall be deemed guilty . . .”); An Act Concerning Slaves, art. 2562, 1840 Tex. Gen. Laws 171, *reprinted in* OLIVER C. HARTLEY, A DIGEST OF THE LAWS OF TEXAS 781 (Philadelphia, Thomas, Cowperthwait & Co. 1850) (enacted on Feb. 5, 1840) (prohibiting slaves from carrying guns without written consent of their master); An Act to Restrain the Evil Practices Arising from Negroes Keeping Dogs, and to Prohibit Them from Carrying Guns or Offensive Weapons, ch. 81, § II, 1806 Md. Laws 44 (“It shall not be lawful for any free negro or mulatto to go at large with any gun, or other offensive weapon . . .”); § 5, 1798 Ky. Acts 106 (“No negro, mulatto, or Indian whatsoever shall keep or carry any gun . . . or other weapon whatsoever, offensive or defensive . . .”).

State. For if they were so received . . . it would exempt them from the operation of the special laws and from the police regulations which they considered to be necessary for their own safety. It would give to persons of the negro race . . . the right to enter every other State whenever they pleased . . . to go where they pleased at every hour of the day or night without molestation . . . and it would give them the full liberty of speech . . . upon all subjects upon which its own citizens might speak; to hold public meetings on political affairs, and to keep and carry arms wherever they went.²²⁶

In the *Dred Scott* majority's imagination, "the people" were a homogenous entity, defined by race and limited only to those who could participate in self-government. Only that racially select group could be citizens, and only citizens could wield core constitutional rights like the right to bear arms. More pointedly, *Dred Scott* constructed the relationship as contingent and hydraulic. *Because* citizenship included the freedom to keep and bear arms, Dred Scott could not be a citizen.

In the wake of the Civil War, both the Civil Rights Act and the Freedmen's Bureau Act attempted to undo *Dred Scott's* effects.²²⁷ Those federal enactments purported to ensure the equal rights of all *citizens* and expressly included the right to bear arms in the litany of protections.²²⁸ The Fourteenth Amendment's overruling of *Dred Scott* expanded citizenship to all born in the United States, regardless of race, and recognized that citizens were imbued with the privileges and immunities of national citizenship. Citizenship status alone, however, did not necessarily denote full membership or rights—the various Black Codes adopted by states and localities during Reconstruction continued to target firearms ownership by Black Americans, relegating them to an inferior class despite the Fourteenth Amendment and other federal enactments.²²⁹ This state-level discrimination did not directly implicate

226. *Dred Scott v. Sanford*, 60 U.S. 393, 404, 416–17 (1857) (emphasis added).

227. See Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27, 27 (expanding national citizenship beyond *Dred Scott's* definition, and providing rights to enforce contracts, purchase and alienate property, and access courts as "enjoyed by white citizens"); An Act to Establish a Bureau for the Relief of Freedmen and Refugees, ch. 90, 13 Stat. 507 (1865).

228. See Freedmen's Bureau Act of 1866, ch. 200, § 14, 14 Stat. 173, 176–77 ("[I]n every State or district . . . the constitutional *right to bear arms*, shall be secured to and enjoyed by all the *citizens* of such State or district without respect to race or color, or previous condition of slavery." (emphasis added)); § 1, 14 Stat. at 27 ("That all persons born in the United States . . . are hereby declared to be citizens of the United States . . . [and] shall have the same right . . . to full and equal benefit of all laws and proceedings for the security of person and property . . .").

229. See, e.g., An Act to Protect the Owners of Firearms, §§ 1-2, 1868 Or. Laws 18, 18–19 ("Every white male citizen of this state above the age of sixteen years, shall be entitled to have . . . the following firearms . . ."); An Act to Amend the Penal Laws of the State (Mississippi Black Codes), § 1, 1865 Miss. Laws ("No freedman, free negro, or mulatto, not in the military service of the United States government, and not licensed . . . by the board of police of his or her county, shall keep or carry fire-arms of any kind . . ."); An Act to Amend the Criminal Law (South Carolina Black Codes), § XIII, 1865 S.C. Acts 14 ("Persons of color constitute no part of the Militia of the State, and no one of them shall, without permission . . . be allowed to keep a fire-arm, sword or other military weapon . . ."); An Act to Amend Chapter 107, Section 66, of the Revised Code, Relating to Free Negroes Having Arms, ch. 107, sec. 66, § 1, 1860 N.C. Sess. Laws 68 (criminalizing

“the people” of the Second Amendment because, at the time, the Second Amendment was interpreted only to limit Congressional action.²³⁰ Thus, states possessed significant latitude to regulate any manner of firearm possession, with neither the Second Amendment nor extant equal protection jurisprudence to constrain them.

In the late nineteenth century, Congress finally turned to keeping out certain foreigners through major federal immigration law. When Congress first began prohibiting Chinese immigrants and those deemed to be coming for immoral purposes, it also prohibited entry of those who committed “crime[s] . . . involving moral turpitude.”²³¹ Although this provision did not single out weapons possession, on a few occasions the government attempted to use it to deport noncitizens for gun possession crimes.²³² Courts, however, held that simple possession of a firearm was not a crime involving moral turpitude,²³³ an outcome that would later provide one impetus for Congress enacting firearms-specific deportation legislation.²³⁴

As per the Court’s accounting in *Bruen*, events beyond the ratification period, and certainly anything beyond the late 1800s, are too recent for historical comparison. In that case, developments after 1900 were not relevant to the Court’s approach to history.²³⁵ As such, any further review of federal or state enactments in this Article would appear unnecessary for constitutional interpretation. Nevertheless, for the sake of completeness and to illuminate previously unexplored relationships between the regulation of immigrants and firearms, this Article presents further evidence of legislative developments post-1900.

At the close of the 1800s and into the first years of the 1900s, the number of foreign-born residents reached peak levels, with immigration from southern and eastern Europe increasing dramatically.²³⁶ By the

possession of firearms by “any free negro”). See generally Cottrol & Diamond, *supra* note 25, at 1324–27 (describing various racial restrictions on the right to bear arms).

230. See *McDonald v. City of Chicago*, 561 U.S. 742 (2010) (incorporating the Second Amendment against states); *United States v. Cruikshank*, 92 U.S. 542 (1875) (holding that the Second Amendment only limited the federal government).

231. Immigration Act of 1891, ch. 551, § 1, 26 Stat. 1084, 1084.

232. See, e.g., *United States ex rel. Andreacchi v. Curran*, 38 F.2d 498 (S.D.N.Y. 1926) (holding that a conviction for carrying a concealed weapon did not constitute a crime involving moral turpitude under federal immigration law); *Ex parte Saraceno*, 182 F. 955 (S.D.N.Y. 1910) (same).

233. See *Andreacchi*, 38 F.2d at 499; *Saraceno*, 182 F. at 957; E. W. Puttkammer, *Legislation Affecting the Deportation of Aliens*, 3 U. CHI. L. REV. 229, 233 (1936).

234. See Puttkammer, *supra* note 233; *infra* Section II.B.

235. *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111, 2137–55 (2022). Note that New York’s Sullivan Law struck down in *Bruen* as inconsistent with historical practice was enacted in 1911.

236. Campbell J. Gibson & Emily Lennon, *Historical Census Statistics on the Foreign-Born Population of the United States 1850-1990* (U.S. Census Bureau, Population Div., Working Paper

turn of the century, fear of foreigners, violence associated with their presence, and their presumed political ideologies heightened, resulting in federal lawmakers more aggressively regulating admission.²³⁷ These fears coalesced with the assassination of President William McKinley in 1901. He was shot with a pistol by Leon Czolgosz, an anarchist and an American citizen who authorities and media reports mistakenly identified as an immigrant.²³⁸ The resulting political attention further conflated immigrants with dangerous foreign ideologies, leading Congress to enact deportation laws focused on post-entry social control.²³⁹ The 1903 Immigration Act crystallized these fears of antidemocratic, dangerous foreigners by preventing the admission and naturalization of "anarchists."²⁴⁰

These trends continued into the first decades of the twentieth century. In the 1910s and 1920s, along with the creation of the national origin quota system for admission,²⁴¹ Congress enacted laws to deport noncitizens based on criminal behavior.²⁴² This set of enactments added crimes involving explosives to the list of deportable crimes, alongside wartime offenses and "crime[s] . . . involving moral turpitude."²⁴³ In 1918, with heightened concerns surrounding the demographic changes

No. POP-WP029, 1999), <https://www.census.gov/library/working-papers/1999/demo/POP-twps0029.html> [<https://perma.cc/K3H8-TZ27>] (select the links to tables 1 and 2).

237. See David Cole, *Enemy Aliens*, 54 STAN. L. REV. 953, 994–95 (2002); Charles Jaret, *Troubled by Newcomers: Anti-immigrant Attitudes and Action During Two Eras of Mass Migration to the United States*, J. AM. ETHNIC HIST., Spring 1999, at 10–11.

238. Cole, *supra* note 237, at 994:

Czolgosz was a United States citizen, but he had a foreign-sounding name, and that was enough to spur Congress to enact immigration laws barring entry to anarchists and other aliens who advocated "the overthrow by force or violence of the Government of the United States or of all government or of all forms of law."

239. See DANIEL KANSTROOM, DEPORTATION NATION: OUTSIDERS IN AMERICAN HISTORY (2010). Kanstroom contrasts deportation laws intended as "extended border control" from those intended as "post-entry social control." *Id.* at 4–6. As extended border control, deportation laws cover those who should have been excluded or denied admission in the first instance; as social control, they monitor and shape behavior while noncitizens are in the country. *Id.*

240. An Act to Regulate the Immigration of Aliens into the United States, Pub. L. No. 57-162, § 2, 32 Stat. 1213, 1214 (1903) (also known as the "Anarchist Exclusion Act," prohibiting entry of "anarchists, or persons who believe in or advocate the overthrow [of the government] by force or violence . . .").

241. The National Origins Act privileged admission from northern and western Europe while deterring or eliminating migration from other parts of the world. Immigration Act of 1924, Pub. L. No. 68-139, 43 Stat. 153.

242. See An Act Making It a Felony with Penalty for Certain Aliens to Enter the United States of America Under Certain Condition in Violation of Law, Pub. L. No. 70-1018, 45 Stat. 1551 (1929); An Act to Exclude and Expel from the United States Aliens Who Are Members of the Anarchistic and Similar Classes, Pub. L. No. 65-221, 40 Stat. 1012 (1918); Immigration Act of 1917, Pub. L. No. 64-301, §§ 3, 19, 39 Stat. 874, 875, 889.

243. Immigration Act of 1891, Pub. L. No. 51-551, 26 Stat. 1084; §§ 3, 19, 39 Stat. at 874–75, 889.

to the immigrant population from the turn of the century through the lead-up to World War I, Congress passed the Alien Anarchists Exclusion Act, reflecting the national drive toward using immigration law as part of the war effort.²⁴⁴ Accordingly, the Act banned “anarchists” and those advocating or teaching the overthrow of American government from entering or remaining in the country.²⁴⁵

At the state and local level, mass immigration into cities by new immigrants and accompanying social displacement raised fear of crime and violence. By the 1920s, for example, California and other states responded to the influx with an early alien-in-possession gun prohibition.²⁴⁶ But as of the first few decades of the twentieth century, the federal government had yet to focus on firearms restrictions at all, let alone immigrant possession.

B. Regulation of “Subversive” Aliens Versus Regulation of Firearms in the Mid-twentieth Century

The federal government did not begin to regulate firearms comprehensively until 1934,²⁴⁷ and specific prohibitions on immigrant possession appeared a few years later. These immigrant-specific laws were a product of targeted legislative and advocacy campaigns intended to cast noncitizens as a subversive force associated with ideologies antithetical to a constitutional and republican form of government. The logic was simple and effective: Rather than regulate firearms, Congress

244. Julia Rose Kraut, *Global Anti-anarchism: The Origins of Ideological Deportation and the Suppression of Expression*, 19 IND. J. GLOB. LEGAL STUD. 169, 191 & n.131 (2012).

245. Immigration Act of 1918, Pub. L. No. 65-221, 40 Stat. 1012.

246. See, e.g., *In re Rameriz*, 226 P. 914 (Cal. 1924) (upholding, against a state constitutional challenge, a 1923 state law, Act of June 13, 1923, ch. 339, § 2, 1923 Cal. Stat. 695, 696, banning firearm possession by an “unnaturalized foreign-born person”); An Act . . . Prohibiting Possession or Use by [Foreign Born Residents of New Mexico and Adjoining States] of Shotguns or Rifles Within the State of New Mexico, §§ 1-4, 1921 N.M. Laws 201, 201–02 (“It shall be unlawful for any unnaturalized, foreign born resident of New Mexico, or of the adjoining states . . . to use or have in his possession . . . any shotgun or rifle of any kind.”); Foreign-Born Unnaturalized Citizens, ch. 124, § 1, 1919 Colo. Sess. Laws 416, 416–17 (prohibiting any “unnaturalized foreign-born resident” from hunting, as well as owning firearms); An Act . . . Making It Unlawful for Any Such Foreign Born Resident to Either Own or Be Possessed of a Shot-Gun or Rifle or Other Firearms of Any Make, ch. 500, § 1, 1917 Minn. Laws 839, 839–40 (“That it shall be unlawful for any foreign born resident of this state who has not become of the citizen of the United States . . . to hunt for or capture or kill . . . any [wild animal] . . . and to that end it shall be unlawful for any such foreign born resident within this state to either own or be possessed of a shot gun or rifle, or other firearms”); Act of May 25, 1911, ch. 195, sec. 1, § 1897, 1911 N.Y. Laws 442, 443 (“Any person not a citizen of the United States, who shall have or carry firearms, or any dangerous or deadly weapons in any public place, at any time, shall be guilty of a felony.”); An Act Relating to the Carrying of Firearms, ch. 52, § 1, 1911 Wash. Sess. Laws 303, 303 (prohibiting “any person who is not a citizen of the United States” from possessing firearms).

247. See National Firearms Act of 1934, Pub. L. No. 73-474, 48 Stat. 1236.

should regulate the source of the true danger—immigrants. Rather than register firearms, Congress should register immigrants. These campaigns explicitly built on the notion from prior decades that foreigners were anarchists and subversives; they construed noncitizens as existential threats to “the people.” Moreover, the legislative record reveals that some lawmakers and stakeholders believed that Congress could regulate noncitizens’ firearm possession to prevent mass casualties against the polity, even as they were reluctant to target possession for self-defense and hunting. Such legislative drives did not raise serious constitutional concerns, especially given the diminished role of the Second Amendment in defining firearms rights and the immaturity of constitutional equality claims for noncitizens at the time of these enactments.

By the 1920s and 1930s, in the wake of World War I and heightened fears of antigovernment immigrants, Congress began to consider gun control legislation in earnest.²⁴⁸ In response to nascent legislative proposals, national firearms advocacy groups like the United States Revolver Association (“USRA”) began to organize more effectively and gained popularity and influence. Their publicity campaigns characterized extensive gun regulation as an anti-American product of foreign ideologies.²⁴⁹ Specifically, the USRA promoted the idea that firearms regulation should focus on foreigners while protecting the gun rights of citizens. To that end, Karl Frederick, a USRA official (and later President of the National Rifle Association (“NRA”)), published model firearms regulations in the early 1920s that promoted conceptions of the dangerous, antidemocratic foreigner²⁵⁰ and advanced the idea that states and the federal government should permit “none but citizens” to carry firearms.²⁵¹ In line with that philosophy, beginning in 1922 and for the next few years thereafter, U.S. Senator Arthur Capper repeatedly introduced a USRA-backed bill that equated noncitizens to criminals and banned possession by both

248. MICHAEL A. FOSTER, CONG. RSCH. SERV., *FEDERAL FIREARMS LAWS: OVERVIEW AND SELECTED LEGAL ISSUES FOR THE 116TH CONGRESS* 1–2 (2019), <https://crsreports.congress.gov/product/pdf/R/R45629> [<https://perma.cc/EUC7-V42Y>].

249. See PATRICK J. CHARLES, *ARMED IN AMERICA: A HISTORY OF GUN RIGHTS FROM COLONIAL MILITIAS TO CONCEALED CARRY 190–92* (2018) [hereinafter PATRICK J. CHARLES, *ARMED IN AMERICA*]; PATRICK J. CHARLES, *VOTE GUN: HOW GUN RIGHTS BECAME POLITICIZED IN THE UNITED STATES* 35–42 (2023) [hereinafter PATRICK J. CHARLES, *VOTE GUN*] (citing, among other sources, *Sane Regulation of Revolver Sales: Why Revolver Sales Should Be Uniform*, BULL. NO. 2 (U.S. Revolver Assoc., New York, N.Y.), Jan. 24, 1923, reprinted in CHARLES L. GILMAN PAPERS, box 2 (Minn. Hist. Soc’y 1923)).

250. See PATRICK J. CHARLES, *VOTE GUN*, *supra* note 249, at 35, 37, 39–40 (quoting the model regulation: “Aliens and persons who have been convicted of a felony are not permitted to possess a pistol or revolver.” (quotation omitted)).

251. *Id.* at 37.

within the District of Columbia.²⁵² Although the Capper Bill did not pass, these two legislative movements—one centering on immigrants as existential threats and the other concerned with gun violence—converged by the mid- to late 1930s.

In 1934, Congress passed the first national firearms law, the National Firearms Act.²⁵³ In the lead-up to and wake of the Act, the NRA's campaigns and literature characterized gun control as unpatriotic.²⁵⁴ In the organization's view, the drive for broader gun control was traitorous, and their literature equated firearm registration as the *modus operandi* of despised "foreign" groups like Nazis, communists, and socialists.²⁵⁵ By implication then, "the people" would need to be armed against those foreign individuals, political parties, and ideologies. Accordingly, the NRA focused on maintaining expansive gun rights for citizen sportsmen, hunters, and private owners by imagining that they could be called upon to defend the nation against those foreign threats. Ultimately, despite their opposition to extensive regulation, the NRA endorsed the compromises in the National Firearms Act, including the Act's regulation of machine guns and sawed-off shotguns.²⁵⁶

On the heels of the National Firearms Act, Congress began to more seriously and consistently consider legislation to deport based on firearm possession due to the asserted connections between noncitizens and organized crime.²⁵⁷ The legislative hearings and reports on

252. S. 4012, 67th Cong. § 5 (1922) (titing section 5 of S. 4012 as "Aliens and Criminals Must Not Possess Arms"); see PATRICK J. CHARLES, *ARMED IN AMERICA*, *supra* note 249, at 192–93.

253. See National Firearms Act of 1934, Pub. L. No. 73-474, 48 Stat. 1236. Note that prior to 1934, Congress's only other major gun-related legislation was its 1927 prohibition on the mailing of concealable firearms through the postal service. See FOSTER, *supra* note 248, at 1 & n.7 (noting that the mailing prohibition is now codified at 18 U.S.C. § 1715).

254. See PATRICK J. CHARLES, *VOTE GUN*, *supra* note 249, at 48–49 (describing NRA talking points opposing the Department of Justice's attempts to promote gun regulation).

255. See *id.* at 40–41; see also PATRICK J. CHARLES, *ARMED IN AMERICA*, *supra* note 249, at 199–202, 209; *Guns as Crime's Worst Foe Cited by Rifle Officer*, *REPUBLICAN TRIB.*, July 26, 1932, at 1 (statement of C.B. Lister) ("It is time the people rid themselves for good and all of the Chinese theory of passive resistance, with its blood brother, disarmament of the honest citizen."); C.B. Lister, *A Soldier Speaks*, *AM. RIFLEMAN*, Dec. 1949, at 8 ("[T]he chances of effective action by fifth column groups is almost nil unless the great body of loyal citizenry is convinced that resistance is useless, is disarmed or is unfamiliar with their weapons."); C.B. Lister, *Simple Arithmetic*, *AM. RIFLEMAN*, Nov. 1949, at 10 ("Both the Communist and the thug prefer dealing with a disarmed citizenry.").

256. PATRICK J. CHARLES, *VOTE GUN*, *supra* note 249, at 50–51, 56.

257. See, e.g., An Act to Authorize the Prompt Deportation of Criminals and Certain Other Aliens, and for Other Purposes, H.R. 6391, 75th Cong. § 1 (1937) (providing for deportation of noncitizen for a conviction for "possessing or carrying any firearm" within five years of the institution of deportation proceedings); A Bill to Authorize the Prompt Deportation of Criminals and Certain Other Aliens, H.R. 5573, 75th Cong. § 1 (1937) (providing for deportation of noncitizens "convicted of possessing or carrying any concealed or dangerous weapon" and for possessing or carrying an automatic or semiautomatic weapon). Even as early as 1935 and 1936,

deportation bills introduced from 1935 to 1937, for example, evince worries that noncitizens acting as “gunmen” for “racketeer” violence would use firearms to inflict mass destruction on the American populace.²⁵⁸ Notably, in considering those bills, commenters expressed concern that the blanket coverage of any type of firearm would reach beyond the mass destruction context and instead target noncitizens who, like citizens, sought to use firearms to hunt or defend their workplace and home.²⁵⁹ Despite the concerns that a general firearms-deportation law would infringe upon self-defense capabilities, proponents argued that immigration officials needed a broad law to get at racketeers and criminal aliens but would use discretion to avoid prosecuting noncitizens who possessed firearms for other reasons.²⁶⁰

Although those initial bills failed to pass,²⁶¹ efforts to regulate noncitizen possession found success in 1940, as concerns about Nazism,

in the immediate wake of the 1934 National Firearms Act, a few proposals known as the “Kerr-Coolidge” bills made it to the House floor. *See* S. 2969, 74th Cong. (1936) (bill introduced by Senator Coolidge with provision to deport noncitizen for “crime of possessing or carrying any concealed or dangerous weapon”); H.R. 8163, 74th Cong. (1935) (bill introduced by Representative John Kerr with similar concealed weapon deportation provision); JOHN KERR, COMM. ON IMMIGR. & NATURALIZATION, DEPORTATION OF CRIMINALS, PRESERVATION OF FAMILY UNITS, PERMIT NONCRIMINAL ALIENS TO LEGALIZE THEIR STATUS, H.R. REP. NO. 74-1110, at 4 (1935) (report from Representative John Kerr stating that the exclusion of gun possession from “crimes involving moral turpitude” has permitted “many vicious racketeers, gangsters, and extortionists” to avoid deportation, thereby necessitating new immigration legislation that specifically targets concealed weapons); *see also* Puttkammer, *supra* note 233, at 233–34 (lauding the Kerr-Coolidge bills, arguing, “[they] inflict [] no hardship on the law-abiding alien and [are] a greatly needed weapon against the alien gunman and racketeer”).

258. *See Deportation of Aliens: Hearings Before the Subcomm. of the S. Comm. on Immigr., 75th Cong. 113* (1937) [hereinafter *Deportation Hearings*] (statement of Edward Shaughnessy, Acting Comm’r of Immigration and Naturalization) (stating that “[w]e do not want to deport [a man who has a revolver for protection],” rather, “[w]e want to deport the alien who takes a machine gun and raises havoc with it,” while advocating for a broadly written law that provides the Immigration Service with enough discretion to get at the bill’s target, noncitizens); *id.* at 138 (statement of Chester E. Taylor, Secretary, Industrial and Americanization Department, Young Men’s Christian Association, Orange, N.J.) (“I have serious doubts upon that question of deporting a man found possessing or carrying a firearm. It seems to me the only possible reason for it would be that it might enable the Department of Labor to more easily apprehend some of the gangsters when perhaps they could not get them any other way.”); *id.* at 160 (statement of Read Lewis, Director, Foreign Language Information Service, N.Y.C.) (stating that he was worried about the application of the bill to noncitizens who possessed firearms for protection and advocating for adding language to reach only “the gangster and racketeer”); *see also, e.g., Deportation Bill Passed by House*, N.Y. TIMES, June 11, 1937, at 9 (noting that proponents of H.R. 6391 argued that it would help deport “23,000 ‘alien gunmen and racketeers’”).

259. *See, e.g., Deportation Hearings, supra* note 258, at 183–84 (statement of Rep. Martin Dies) (sponsoring and supporting H.R. 5573, 75th Cong. (1937), stating that Congress needs a bill to get at aliens fomenting “discord in the United States” and noting that noncitizens were justified in having firearms for self-defense and hunting, but no justification existed for owning a “machine gun” or engaging in “gang warfare”).

260. *See, e.g., id.*

261. H.R. 6391 passed the House on June 10, 1937 but died in the Senate without getting out of committee. H.R. 5573 did not pass the House.

socialism, and fascism grew and war loomed closer on the horizon. The NRA's linkage of gun violence with national security threats and antidemocratic foreign influences intensified in 1939 and 1940, persuading lawmakers in ways that appeals to alien "gunmen" and "racketeers" alone had failed to do in the years prior. In the lead-up to the United States' participation in World War II, the U.S. Department of Justice proposed gun regulation as a way of addressing foreign threats inside the country, noting that several foreign-born persons who had been identified as national security threats were also members of the NRA.²⁶² As part of the horse trading and political dealmaking necessary to preserve citizens' gun rights, the NRA responded by backing laws calling for federal prohibitions on guns in the hands of "undesirable aliens" and "Fifth Columnists."²⁶³ In addition, they advocated for the monitoring of immigrants,²⁶⁴ formally banned noncitizens from NRA membership, called on states to prohibit noncitizen possession, and urged NRA members to monitor the borders for unlawful immigrant crossings.²⁶⁵

As the NRA became the nation's single most impactful gun lobbying organization, their policy positions exerted significant influence on lawmakers. As historian Patrick Charles documents, the NRA wielded its influence strategically, countering legislative proposals for firearms registration by promoting registration of migrants instead.²⁶⁶ To deflect attention from comprehensive firearms regulation that would affect citizens' gun possession, the NRA backed laws to register all noncitizens and bar their gun possession.²⁶⁷ Not surprisingly then, the first federal firearms-specific deportation laws

262. See *supra* notes 257–258; PATRICK J. CHARLES, VOTE GUN, *supra* note 249, at 64–68.

263. PATRICK J. CHARLES, VOTE GUN, *supra* note 249, at 65–70; NAT'L RIFLE ASS'N, THE PRO AND CON OF FIREARM LEGISLATION 2–3 (1940). The term "fifth column" means "a group of secret sympathizers or supporters of an enemy that engage in espionage or sabotage within defense lines or national borders." *Fifth Column*, MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/fifth%20column> (last visited Sept. 20, 2023) [<https://perma.cc/G57V-Z5Q2>]. In the midcentury firearms context, the reference was specifically to Nazi or Axis supporters and sympathizers in the United States.

264. PATRICK J. CHARLES, VOTE GUN, *supra* note 249, at 74.

265. See NAT'L RIFLE ASS'N, *supra* note 263, at 1, 16 (noting that active NRA membership was confined to "adult citizens of the United States," in a publication distributed to "legislators . . . interested in making a thorough study of the problems involved in regulating . . . firearms"); see also PATRICK J. CHARLES, VOTE GUN, *supra* note 249, at 74 ("There were two types of migrant regulations that the organization [the NRA] put forward in lieu of firearms controls. The first was a federal law requiring the registration of all migrants. The second was state laws prohibiting the possession of firearms by someone who was not a U.S. citizen.").

266. PATRICK J. CHARLES, VOTE GUN, *supra* note 249, at 66–78.

267. *Id.* at 74.

were introduced as part of the first comprehensive federal immigrant registration law, the Alien Registration Act of 1940.²⁶⁸

In addition to calling for registration and fingerprinting of noncitizens, the 1940 Act modified several grounds for deportation, adding one for possession or use of automatic weapons and sawed-off shotguns.²⁶⁹ Notably, the deportation provisions of the Act focused on the same firearms regulated by the National Firearms Act, with proponents arguing that the provision covered only those arms that were capable of effecting mass damage on Americans.²⁷⁰ The several floor debates, proffered amendments, and committee reports reveal that the overwhelming, if not sole, concern of the 1940 Act was “subversive” activities by foreigners.²⁷¹ Members of Congress spent several days over the course of a year debating the provisions that sought to punish the advocacy of certain ideas within the armed forces and the publishing or teaching of “anarchist” and “communist” ideas in opposition to the U.S. government. What they did relatively less of, however, was discuss the

268. See Alien Registration Act of 1940, ch. 439, 54 Stat. 670; Gulasekaram, *Citizenship*, *supra* note 23.

269. Sec. 20, § 19(b)(3), 54 Stat. at 672:

Any alien who, at any time after entry, shall have been convicted of possessing or carrying in violation of any law any weapon which shoots or is designed to shoot automatically or semiautomatically more than one shot without manual reloading, by a single function of the trigger, or a weapon commonly called a sawed-off shotgun.

(modifying parts of the Immigration Act of 1917).

270. See, e.g., 84 CONG. REC. 10358 (1939) (statement of Rep. Hobbs):

Our guests in this country have no right to abuse our hospitality by arming themselves with that kind of paraphernalia. . . . We maintain that these guests of ours in our national home are perfectly welcome to live here if they will not insist upon having or carrying machine guns or similar death-dealing weapons. Such weapons are made for one purpose only—to take human life;

84 CONG. REC. 9537 (1939) (statement of Rep. Smith) (“It is a little difficult for me to understand why Members of Congress should object to the deportation of those folk who come here from foreign countries and indulge in the use of machine guns and sawed-off shotguns upon our population.”).

271. For House discussion of H.R. 5138 (later enacted as the Alien Registration Act of 1940), see 86 CONG. REC. 9029–36 (1940); 86 CONG. REC. 8340–47 (1940); 84 CONG. REC. 10445–56 (1939); 84 CONG. REC. 10354–85 (1939); and 84 CONG. REC. 9532–41 (1939). The Senate similarly held discussions and focused on the bill’s potential to target disloyalty and subversive activities. See generally 86 CONG. REC. 8345 (1940) (discussing free speech issues with regulating advocacy); *Crime to Promote Overthrow of Government: Hearing Before the Subcomm. of the S. Comm. on the Judiciary*, 76th Cong. 6, 12 (1940) [hereinafter *Overthrow Hearings*]. President Franklin Roosevelt’s statements upon signing the bill focused on questions of noncitizen loyalty and federalism concerns. See Franklin D. Roosevelt, *Statement on Signing the Alien Registration Act*, AM. PRESIDENCY PROJECT (June 29, 1940), <https://www.presidency.ucsb.edu/documents/statement-signing-the-alien-registration-act> [https://perma.cc/TSL9-F8LF]. For media coverage leading up to the 1940 Act focusing on the concern of espionage and “Fifth Columnists,” see *Control of Aliens Nears Senate Vote: Subcommittee Approves Their Registration or Deportation Within Four Months*, N.Y. TIMES, May 26, 1940, at 1, 6 (discussing the purpose of the Act as controlling interference with the military and rooting out “Fifth Columnists” in the federal government, labor unions, schools, and industries); *House Passes the Bill to Deport All Aliens Urging ‘Any’ Change in Our Government*, N.Y. TIMES, Mar. 24, 1939, at 13.

firearms-deportation provision.²⁷² The instances in which they did reveal that the firearms provisions were tied to the Act's primary concern with "subversive" and anti-American foreigners.²⁷³

By the early years of the Cold War, federal deprivation of noncitizens' constitutional rights reached a nadir. In 1952, Congress consolidated various immigration laws into the INA, codifying preexisting exclusions on the basis of national origin and race and also expanding deportation grounds.²⁷⁴ In that same period, the NRA further leaned into the narrative of the dangerous, anti-American foreigner who should be disarmed versus the virtuous citizen who, with firearms, might protect American values. In 1958, the NRA began a recurring column in the *American Rifleman* (a periodical NRA publication for its members) entitled "The Armed Citizen," which routinely mythologized the need for armed citizens prepared to protect the country from foreign threats.²⁷⁵

In 1968, in the wake of the assassinations of Martin Luther King, Jr. and Robert F. Kennedy, as well as significant urban unrest, Congress passed two public safety-minded pieces of federal legislation: the Omnibus Crime Control and Safe Streets Act of 1968 and the Gun Control Act of 1968.²⁷⁶ These Acts aimed to prohibit the interstate sale and purchase of firearms by specific groups and dealers. Listed among the prohibited groups were aliens who were "illegally or unlawfully in the United States."²⁷⁷ This provision was recodified two decades later in 1986 at 18 U.S.C. § 922(g)(5) as part of the Firearms Owners' Protection Act.²⁷⁸ The other subsections of 18 U.S.C. § 922(g) criminalize

272. See generally *supra* notes 270–271.

273. *Overthrow Hearings*, *supra* note 271, at 12 (statement of Rep. Sam Hobbs) ("It is the purpose of this act to protect from the advocacy of disloyalty and disobedience."). See generally *supra* notes 270–271; PATRICK J. CHARLES, *VOTE GUN*, *supra* note 249.

274. As part of that codification, Congress once again provided for deportation of those convicted of possessing particular firearms (automatic firearms and "sawed-off" shotguns). Immigration and Nationality Act, ch. 477, § 241(a)(14), 66 Stat. 163, 204 (1952) (providing for the deportation of any "alien" who "at any time after entry, shall have been convicted of possessing or carrying . . . any weapon which shoots . . . automatically or semiautomatically more than one shot without manual reloading, by a single function of the trigger, or a weapon commonly called a sawed-off shotgun").

275. PATRICK J. CHARLES, *ARMED IN AMERICA*, *supra* note 249, 209–10.

276. Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 197; Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1213.

277. § 1202(a)(5), 82 Stat. at 236.

278. Firearm Owners' Protection Act, Pub. L. No. 99-308, 100 Stat. 449 (1986). In addition, FOIPA was passed the same year and by the same Congress as the Immigration Reform and Control Act ("IRCA"). Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359.

possession by felons,²⁷⁹ those who have renounced U.S. citizenship,²⁸⁰ and those dishonorably discharged from the armed forces.²⁸¹

C. The Militia, Second Amendment, and Immigrants

The pervasive regulation of noncitizen firearm possession during the mid- to late twentieth century reflects both the fears and political climate of the period, as well as the state of constitutional doctrine at the time. Even though the 1940 Alien Registration Act's primary focus was to tamp out certain types of advocacy, First Amendment concerns were rarely seriously debated.²⁸² Then-extant incitement jurisprudence helps explain that void.²⁸³ Courts were only just beginning to understand the massive implications for dissent and advocacy permitted by the relatively lax judicial policing of speech regulations of the time.²⁸⁴ Only in 1969, with *Brandenburg v. Ohio*'s rethinking of speech protections, would the Court force federal and state governments to meet a rigorous threshold before imposing criminal liability for advocacy that did not rise to the level of incitement.²⁸⁵

279. 18 U.S.C. § 922(g)(1).

280. 18 U.S.C. § 922 (g)(7).

281. 18 U.S.C. § 922 (g)(6).

282. The legislative record is generally devoid of any significant First Amendment discussion, save for isolated mentions that did not seem to alter any statutory language. *See, e.g.*, 86 CONG. REC. 8344–45 (1940) (Sen. Danaher's (CT) remarks regarding provisions that punish teaching, advocacy, or encouraging overthrow of government noting that the Supreme Court has amply protected speech and organizing in times of peace and advocating for inclusion of language that would specify that the provision would only apply in times of war or national emergency to avoid First Amendment problems). Media reports sometimes mentioned that advocacy groups were concerned with the civil liberties implications of comprehensive registration or deportation based on advocacy. *See, e.g., Aliens Now Face a Closer Watch*, N.Y. TIMES, July 7, 1940, at 53 (“[T]he program [of registering and fingerprinting aliens] has been severely criticized by many persons and organizations, who hold that the step may provide a threat to individual liberty and civil rights in America.”); *House Passes the Bill to Deport All Aliens Urging ‘Any’ Change in Our Government*, *supra* note 271 (“In reporting the bill, the Immigration Committee said: . . . ‘Opposition to the bill was also made by an organization whose principal objection was that if it was enacted into law it would suppress expressions of opinion on essential political issues by aliens’”).

283. *See, e.g.*, *Dennis v. United States*, 341 U.S. 494 (1951) (applying the “clear and present danger” test to allow conviction for forming the American Communist Party); *Schenk v. United States*, 249 U.S. 47 (1919) (setting out the “clear and present danger” test and upholding the application of the Espionage Act of 1917 to members of the Socialist Party for sending out literature critiquing the military conscription during a time of war).

284. *See, e.g.*, *Gitlow v. New York*, 268 U.S. 652, 672 (1925) (Holmes, J., dissenting from the decision upholding a state law prohibiting advocating the overthrow of the government and counseling for a more stringent application of the “clear and present danger” test).

285. *See* 395 U.S. 444 (1969).

As a federal enactment, the 1940 Act was a candidate for Second Amendment inquiry.²⁸⁶ Yet, like the muted free speech inquiry, the Second Amendment was never raised in the 1940 debate surrounding the firearms-specific deportation provision. Accordingly, the question whether the provision violated the right to bear arms or, more specifically, whether it implicated “the people” of the Second Amendment did not surface.²⁸⁷

Even in debates of prior iterations of the firearms-deportation provision, the constitutional right to keep and bear arms was only obliquely mentioned on a few occasions. In one instance, Senator Royal Copeland of New York raised the concern only to dismiss the idea that the Constitution guaranteed an individual right or prevented government regulation.²⁸⁸ The Senator’s understanding was consistent with prevailing jurisprudence. In upholding provisions of the 1934 National Firearms Act, the Supreme Court in *Miller* held that the right protected by the Second Amendment only extended to the ability to keep and bear arms in relationship to an organized militia.²⁸⁹ Although neither constitutionally required nor limited in practice, noncitizens could be excluded from government-controlled military forces. Thus, noncitizens lacked the ability to frame challenges to either deportation or criminal provisions through an individual-rights lens. Further, they would not have been able to raise other constitutional challenges to immigrant gun regulations either.²⁹⁰ The equal protection jurisprudence that might have curtailed discrimination on the basis of immigration status did not develop fully until the mid-1970s and early 1980s.²⁹¹ Indeed, pre-*Heller*, one appellate court upheld the alien-in-

286. See *United States v. Cruikshank*, 92 U.S. 542 (1875) (holding that the Second Amendment only limited the federal government).

287. See 86 CONG. REC. 9,029–36 (1940); 86 CONG. REC. 8,340–47 (1940); 84 CONG. REC. 10,445–56 (1939); 84 CONG. REC. 10,354–85 (1939); 84 CONG. REC. 9,532–41 (1939).

288. *Deportation Hearings*, *supra* note 258, at 113 (statement of Sen. Royal Copeland during testimony of Edward Shaughnessy, Acting Comm’r of Immigration and Naturalization) (“I doubt exceedingly if a man has the constitutional right to carry a gun. In our crime committee investigation that was discussed at length, and I have reached the conclusion that there is no constitutional inhibition.”).

289. *United States v. Miller*, 307 U.S. 174, 178 (1939):

In the absence of any evidence tending to show that possession or use of a ‘shotgun having a barrel of less than eighteen inches in length’ at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument.

290. *Cf. Korematsu v. United States*, 323 U.S. 214 (1944).

291. See, e.g., *Plyler v. Doe*, 457 U.S. 202 (1982) (striking down, as a violation of equal protection, a state law denying unauthorized children a free primary public school education); *Graham v. Richardson*, 403 U.S. 365 (1971) (striking down state welfare laws that discriminated on the basis of alienage). *But see Mathews v. Diaz*, 426 U.S. 67, 78–80 (1976) (noting that the federal government may make rules for noncitizens that it could not make for citizens).

possession criminal ban against an equal protection challenge by an unlawfully present noncitizen, applying rational basis scrutiny. The court reasoned that the right to possess a gun was “clearly not a fundamental right” and “illegal aliens are not a suspect class.”²⁹²

Bruen prescribes plain-text and historical inquiry as the two-part solution to evaluating present-day firearms restrictions. Even assuming the coherence of such an approach to questions of the “who” of gun possession, a methodology reliant on the timing and existence of immigrant gun regulation fails to justify current federal laws. The concepts of unlawfully present migrants, as defined by present-day federal law, and immigration or criminal consequences for noncitizens’ firearm possession are mid- to late twentieth-century constructions. Moreover, current federal regulation of immigrant gun possession was created to address perceived existential threats to the republic during a time when the Second Amendment protected weapons connected to organized state defense.

If a search through the past alone cannot (and should not) provide the necessary theory to support such restrictions, can any other theory or interpretative methodology nevertheless save federal law’s restrictions on noncitizen possession? Part III explores this possibility.

III. EXPANDING “THE PEOPLE”

Until *Heller*, courts could avoid thorny debates over the scope of Second Amendment rightsholders. *Heller*’s wholesale reformulation of the Second Amendment, including its ultra vires musings on “the people,” forced that inquiry to the fore. Subsequent federal court cases explicated “the people” clumsily, endeavoring to imbue the phrase with substantive meaning but undertheorizing the workability and consequences of their frameworks. In essence, federal courts have broadened the right, but primarily for those who previously could have exercised it; those who were categorically disarmed prior to *Heller*—felons and noncitizens, for example—remained so.²⁹³ Courts achieve

292. See *United States v. Toner*, 728 F.2d 115, 128–29 (2d Cir. 1984).

293. To be sure, this legal ground is shifting and unstable. See, e.g., *United States v. Rahimi*, 61 F.4th 443 (5th Cir. 2023) (holding § 18 U.S.C. § 922(g)(8) unconstitutional); *United States v. Quiroz*, No. PE:22-CR-00104-DC, 2022 WL 4352482 (W.D. Tex. Sept. 19, 2022) (striking down as unconstitutional 18 U.S.C. § 922(n), which prohibits those under felony indictment from possessing firearms); see also Brendan Pierson, *5th Circ. Skeptical of Ban on Gun Purchases by People Facing Felony Charges*, REUTERS (Feb. 8, 2023, 5:33 PM), <https://www.reuters.com/>

this result despite the lack of any persuasive textual or historical justification for it. Still lacking is a coherent theory of “the people” that might help guide Second Amendment analysis when Congress or states regulate based on immigration status.

One such theoretical approach prescribes intratextual comparisons to adjacent uses of “the people” in the Constitution to discern its meaning within a particular phrase.²⁹⁴ Specifically, as the Supreme Court and commentators have repeatedly done, one might compare “the people” of the Second Amendment to “the people” of the First and Fourth Amendments.²⁹⁵ Not only were those adjacent provisions in the Bill of Rights ratified at the same moment, they also use the phrase unadorned by other limitations or descriptions. Thus, “the people” of the Bill of Rights need not be reconciled with other appearances of the word “people” in the Constitution, such as “We the People” in the preamble and “the People of the several States” in Article I. The unadorned phrase also appears in the Ninth and Tenth Amendments. Those Bill of Rights provisions, however, are widely understood to be structural dictates that acknowledge the federalism balance and possibilities for exercising sovereignty in our system of government.²⁹⁶ Thus, their utility for identifying specific groups of rightsholders is limited.

Notably, this interpretative mode does not require that the phrase carry a consistent meaning in all its uses, even within the Bill of Rights. It may yield that result, but alternatively, based on the purpose and context of its use in adjacent provisions, it may also carry a different meaning. Section III.A below starts by considering the possibility that “the people” refers to the same set of rightsholders in all its Bill of Rights uses. Here, I argue that the need for expansive Fourth

legal/litigation/5th-circ-skeptical-ban-gun-purchases-by-people-facing-felony-charges-2023-02-08/
[<https://perma.cc/C2AJ-NB42>].

294. On intratextualism as a mode of interpretation, see generally Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747 (1999).

295. See, e.g., *District of Columbia v. Heller*, 554 U.S. 570 (2008) (using the Fourth Amendment to understand the Second Amendment); Dorf, *supra* note 167, at 113 (examining the nexus of assembly rights and arms rights); Blocher, *supra* note 24, at 413–23 (2009); Darrell A.H. Miller, *Guns as Smut: Defending the Home-Bound Second Amendment*, 109 COLUM. L. REV. 1278 (2009) (noting that the Supreme Court has treated the First and Second Amendments as related). *But see* Gregory P. Magarian, *Speaking Truth to Firepower: How the First Amendment Destabilizes the Second*, 91 TEX. L. REV. 49 (2012) (casting some doubt as to the appropriateness of First Amendment comparisons and arguing that a robust free expression right might obviate some Second Amendment rationales).

296. See, e.g., Elizabeth Anne Reese, *Or to the People: Popular Sovereignty and the Power to Choose a Government*, 39 CARDOZO L. REV. 2051, 2071–78 (2018); Franita Tolson, *The Popular Sovereignty Foundations of the Right to Vote* (2014), https://digitalcommons.law.umaryland.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1186&context=schmooze_papers [<https://perma.cc/Z9G7-PKWE>].

Amendment protections in particular would counsel for broad inclusiveness of “the people” vis-à-vis immigrant status throughout the Bill of Rights.

In contrast, Section III.B credits the possibility that the amendments may serve varied rightsholders, depending on each amendment’s purpose and structure. It acknowledges the ways in which immigrants’ First and Fourth Amendment rights are not coterminous with citizens’ rights.²⁹⁷ Yet those deficits primarily inhere in admissions and deportation decisions. Further, they are based on the state-centered understandings of those amendments, specifically on each provision’s respective relationship to protection *of* the state or protection *from* the state. Importing rationales for excluding noncitizens from particular applications of the First and Fourth Amendments fails to justify broad criminal and removal consequences for noncitizen firearm possession.

Section III.C then turns to *Heller* and *Bruen*’s insistence that the Second Amendment is unmoored from state-centered foundations. Here, I argue that when the right to bear arms is divorced from its militia or collective context (and instead tied to notions of self-defense and home protection), rationales imported from the First and Fourth Amendments for tying gun rights to citizenship wither. Possibilities that citizens may one day utilize firearms in defense of, or from, the state make for compelling self-mythologies but cannot sustain the weight of constitutional interpretations that foreclose the right of self-protection to noncitizens. Importantly, I maintain that a capacious definition of “the people” without regard to immigration status does not imply an unlimited range of rightsholders. Section III.C concludes by identifying why the right may still be defeasible for some groups of persons—like children, the mentally ill, or at least some categories of felons—even if it should not be for immigrants.

297. To be clear, neither my description of noncitizens’ rights under those amendments nor my comparative analysis should be understood as a normative defense of the current jurisprudence and its resulting deficits for noncitizens. It is perplexing, for example, that the Court has ignored both its standard for incitement when assessing free speech cases in the immigration context and its concerns with religious discrimination when noncitizens’ free exercise concerns are concerned. See *Holder v. Humanitarian L. Project*, 561 U.S. 1, 43–44 (2010) (Breyer, J., dissenting) (critiquing the majority for not mentioning and not applying *Brandenburg v. Ohio* to a statute punishing noncitizens for providing “material support” in the form of charitable donations to terrorist organizations as defined by the law); *Trump v. Hawaii*, 138 S. Ct. 2392 (2018) (upholding President Trump’s ban on migration from several majority-Muslim countries and discounting substantial evidence of discriminatory motive that seemed to satisfy the religious discrimination standard articulated in cases like *Church of Lukumi Babalu Aye v. City of Hialeah*). Without defending that jurisprudence, but working within its constraints, I ask whether it nevertheless can help construct a theory of “the people” of the Bill of Rights.

A. The Unified People of the Bill of Rights

Heller starts from the premise that “the people” holds the same meaning in its various Bill of Rights uses. As the *Verdugo* lead opinion and *Heller* majority note, the First, Second, and Fourth Amendments were written and ratified contemporaneously.²⁹⁸ Further, other constitutional provisions, including ones adjacent to the First, Second, and Fourth Amendments and ratified contemporaneously with them, identify “the owner,” “the accused,” and “persons” as rightsholders.²⁹⁹ In combination, this ratification history and adjacent text suggest that “the people” might identify a distinct set of rightsholders across the First, Second, and Fourth Amendments.

Concluding that “the people” in those provisions should be read uniformly, however, still fails to clarify whether “the people” might be uniformly expansive or uniformly constricted vis-à-vis immigration statuses. Here, I argue that if “the people” of the three amendments is to be read consistently, “the people” almost certainly must be read in the broadest manner possible to avoid impractical legal procedures and inconsistent outcomes, especially in criminal cases. Imagining a Fourth Amendment in which “the people” was limited to citizens or a subset of virtuous citizens illustrates the point.

First, in comparison to the First and Second Amendments, the Fourth Amendment governs a great number of everyday interactions between individuals and law enforcement. In the United States, law enforcement officers make over ten million arrests each year.³⁰⁰ In each, the Fourth Amendment governs standards for arrests, searches, and seizures. Those arrests, searches, and seizures are often preludes to criminal prosecution. If those protections guaranteed to “the people” do not inure to all persons, the constitutionality of a search would depend on ex ante confirmation of the subject’s status prior to police stops and searches.³⁰¹ Alternatively, all searches would be subject to variable application of the exclusionary rule ex post, based solely on the immigration status of the searched individual.

Second, beyond the practical concerns, such exercise of governmental authority would be arbitrary, at least when measured

298. *Heller*, 128 S. Ct. at 2790–91; *United States v. Verdugo-Urquidez*, 494 U.S. 259, 264–66 (1990).

299. U.S. CONST. amends. III, V, VI; *Verdugo*, 494 U.S. at 265–66.

300. *Crime in the United States*, FBI: UNIF. CRIME REPORTING, <https://ucr.fbi.gov/crime-in-the-u.s> (last visited Sept. 20, 2023) [<https://perma.cc/9TB3-M87U>] (to see the data for total arrests per year from 1995 through 2019, first select the relevant year, then select the “Crime in the U.S.” link, and finally select “Browse by National Data” under the “Persons Arrested” subsection).

301. See Núñez, *supra* note 26, at 113, 122–24.

against the conduct that provokes or justifies the search. The same governmental conduct under the same law applied to the same individual conduct would result in different criminal outcomes, attributable only to the immigration status of the defendant. A criminal defendant's immigration status may yield the separate possibility of a removal prosecution down the line. It does not, however, change the rationale for imposing criminal consequences or criminal punishment for their illegal conduct in the first place.

Third, as a practical matter, a meager Fourth Amendment for noncitizens would diminish citizens' rights as well. Searches and seizures of mixed-status immigrant households or vehicles with multiple passengers of varied immigration status would erode constitutional safeguards for citizens and lawful permanent residents. These consequences would be amplified when searches and seizures result in criminal processes. The criminal protections in the Fifth, Sixth, and Seventh Amendments would remain available to noncitizen-defendants, making the search and seizure stage the sole part of the criminal process in which immigration status would dictate a different constitutional standard.³⁰²

These problems of variegation and arbitrariness become exacerbated even if courts adopt a more malleable, case-by-case inquiry into "the people" of the type suggested by the *Verdugo* lead opinion (or *Heller's* adoption and modification of the same).³⁰³ Even the lead opinion in *Verdugo* suggests that immigration status alone cannot determine Fourth Amendment coverage.³⁰⁴ As a result, in criminal proceedings raising a Fourth Amendment question, the presence of a noncitizen-defendant (or at least an unlawfully present one) would necessitate a preliminary hearing or mini trial as to that individual's connections to the national community.³⁰⁵ Neither the prospective detainee nor law enforcement officials would know whether Bill of Rights protections applied until a judicial determination in each individual case. *Heller's* whittling away of the *Verdugo* test by requiring connection to a "political community" removes uncertainty but remains

302. See, e.g., *Wong Wing v. United States*, 163 U.S. 228 (1896) (applying Fifth and Sixth Amendment protections to strike down a federal statute authorizing hard labor punishment without a trial before noncitizens were deported).

303. See Núñez, *supra* note 26, at 106–08 (documenting unpredictable application of *Verdugo's* "sufficient connections" test).

304. *Verdugo*, 494 U.S. at 265 (positing that those who are part of the "national community" or who have "sufficient connection[s]" to the country are part of "the people").

305. For example, the Seventh Circuit in *Meza-Rodriguez* engaged in this initial determination prior to concluding that the noncitizen-defendant was part of "the people." *United States v. Meza-Rodriguez*, 798 F.3d 664, 670–72 (7th Cir. 2015).

indeterminate and still allows for several potential categories of rightsholders.³⁰⁶

Accordingly, for Fourth Amendment purposes, it makes little sense to restrict “the people” on the basis of immigration status as a matter of fairness in criminal process or practicality. To the extent that such concerns also dictate constitutional scope,³⁰⁷ they militate in favor of reading the phrase to mean something close to all “persons.” Indeed, unvirtuous citizens and former felons retain Fourth Amendment rights and are not categorically excluded from exercising First Amendment rights either. Thus, under the assumption that the rightsholders of the three amendments are the same, noncitizens, including unlawfully present ones, would be a part of “the people” in each. To be sure, uncertainty about the application of the Constitution to immigration questions would still remain. For example, this understanding may not resolve whether constitutional protections apply in administrative proceedings, like admissions and removal decisions. But even if noncitizens could only raise the Second Amendment in criminal prosecutions, removing the alien-in-possession predicate would eliminate a trigger for deportation provisions.

B. The Unique People of the Bill of Rights

Despite the Court’s insistence in several cases, it is not clear that the Constitution compels a uniform definition of “the people” across its various uses, even within the Bill of Rights. Even if some textualists might insist that the same phrase must hold the same meaning in its various uses, legal historian Jack Rakove reminds us that it is plausible and not irrational to interpret the phrase differently within adjacent constitutional provisions.³⁰⁸ Indeed, although Justice Scalia’s opinion in *Heller* assumed consistency in meaning among “the people” of the Bill of Rights, Justice Stevens’s dissent claimed otherwise.³⁰⁹

Accordingly, “the people” might alternatively denote unique rightsholder groups depending on the amendments’ respective purposes

306. Note, *Meaning(s)*, *supra* note 26, at 1087 (noting that the descriptor members of “the political community” might include “(1) registered voters; (2) eligible voters . . . ; (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”).

307. *Cf.* Jacob D. Charles, *Defeasible Second Amendment*, *supra* note 25, at 54 (asking whether Second Amendment rights for felons are “void, or merely voidable?”).

308. Jack N. Rakove, *The Second Amendment: The Highest Stage of Originalism*, 76 CHL.-KENT L. REV. 103, 113 (2000).

309. *District of Columbia v. Heller*, 554 U.S. 570, 644–46 (2008) (Stevens, J., joined by Souter, Ginsburg, & Breyer, JJ., dissenting).

and relationships to state authority. In this respect, a key divergence between the amendments is their respective foci on relationships between individuals and the government³¹⁰ versus relationships between individuals. The rights designated for “the people” in the First and Fourth Amendments are entitlements people possess only in relationship to the government or governmental exercise of coercive authority. Those protections serve to restrict state regulation of expressive activity by private individuals or to discipline state enforcement efforts against private individuals. The First Amendment does not prohibit private individuals and entities from curtailing the speech of other private individuals.³¹¹ Similarly, the Fourth Amendment does not apply to the search or seizure of a private individual by another private individual. Remedies for unlawful private searches and seizures must be found in tort or criminal law regulating the relations between individuals. These constitutional limitations on government actions to individuals (but not between individuals) could plausibly justify greater protections for permanent members of the polity who are bound to live under the Constitution for the long term.

Examining the Second Amendment under this rubric reveals a set of conditions under which the right to bear arms might be limited to citizens or subclasses thereof. Case law and commentary reflect three valences for the right to bear arms: (1) *protection of the state*, a right to participate in community-based protection of the state against existential threat;³¹² (2) *protection from the state*, a right to discipline the state against tyrannical uses of power;³¹³ and (3) *protection from private violence*, a right of personal protection for individuals against

310. See, e.g., *id.* at 646 (Stevens, J., dissenting) (“[T]he Fourth Amendment describes a right *against* governmental interference rather than an affirmative right *to* engage in protected conduct, and so refers to a right to protect a purely individual interest.”).

311. To be sure, the First Amendment governs the type of liability that states can impose on defamatory speech or speech that inflicts emotional distress, which implicates expression between private parties.

312. See, e.g., Bertrall L. Ross II, *Inequality, Anti-republicanism, and Our Unique Second Amendment*, 135 HARV. L. REV. F. 491, 493 (2022) (“Scholars have shown . . . that the Declaration protected a qualified right to bear arms for the collective defense and public safety of the state’s frontier . . .”).

313. See, e.g., *id.* at 494 (“[T]he poorer, democratic masses obtained the right to use violence through the Second Amendment to protect themselves from any future aristocratic oppression.”); Williams, *supra* note 26, at 892–96 (“[A] purpose of the Second Amendment was to allow the people, organized into militias, to make a revolution against a corrupt federal government . . .”). It is worth noting that tyranny also might originate from the federal government against a state government. In this reading, the Second Amendment primarily functions as a federalism provision.

other individuals.³¹⁴ The first two implicate the state's relationship with individuals while the third one does not.³¹⁵

This Section assesses “the people” of the Second Amendment under the first two state-centered possibilities. When the Second Amendment is understood primarily as a *right to protect the state from existential threat*, as assessed in Subsection III.B.1, the First Amendment provides the best analogy. There, the Court has permitted the regulation of noncitizen speech, association, and political activity when such activity presents existential threats to the state. Yet, the preconditions and limitations for diminishing expression rights cannot justify federal law's broad and categorical exclusion of noncitizens from gun rights. In comparison, Subsection III.B.2 assesses the consequences of interpreting the Second Amendment primarily as a *right of protection from the state*. Here, the best analogy is Fourth Amendment jurisprudence, which has permitted immigration-status distinctions only in highly limited circumstances and has generally eschewed status-based distinctions in domestic law enforcement matters. Again, however, the preconditions and limitations for diminishing search and seizure rights cannot justify federal law's blanket exclusion of certain noncitizens from gun rights.

Section III.C that follows theorizes the scope of “the people” when the Second Amendment is read—as *Heller*, *McDonald*, and *Bruen* insist it must—as a *right of protection from interpersonal violence*. When state-centered justifications no longer undergird the right to bear arms, a noncitizen's legal status in relation to the state would seem to matter little, if at all.

314. See, e.g., Jacob D. Charles & Darrell A.H. Miller, *Violence and Nondelegation*, 135 HARV. L. REV. F. 463, 466–71 (2022). It is possible also that the Second Amendment might be read as a federalism-preserving measure, either as a separate purpose or in combination with the antityranny/insurrectionist view, with the right to bear arms available for state militias to resist federal tyranny. See THE FEDERALIST NO. 46, at 295–96 (James Madison) (Clinton Rossiter ed., 2003) (“To these [a standing federal army] would be opposed a militia amounting to near half a million citizens with arms in their hands, officered by men chosen from among themselves, fighting for their common liberties and united and conducted by governments possessing their affections and confidence.”); see also Dorf, *supra* note 167, at 127 (“[T]he Court [in *Heller*] cited Colonial and Early Republic Era state provisions protecting a right to bear arms that specifically identified protecting the state among their purposes.”). Adding the federalism concern, however, likely would not change the analysis vis-à-vis noncitizens and “the people,” but it would add significant confusion as to whether “the people” is defined in relationship only to the individual state or to the national sovereign.

315. Of course, the Constitution and Bill of Rights protections only restrict government conduct. As such, even in the third valence, I mean governmental restrictions on the ability of private individuals to protect themselves from other private individuals.

1. Noncitizens and Protection of the State

When the right to keep and bear arms is tethered to the protection of *the state*, the strongest case can be made for constricting “the people” on the basis of citizenship or permanent membership in the polity. Current First Amendment jurisprudence that countenances differential treatment of noncitizens with regard to particular types of regulations relies on this principle. Notably, however, the differences in judicially recognized protections exist with respect to expression and religion rights, neither of which are textually constrained to “the people.” To the extent distinctions based on immigration status within these First Amendment provisions are relevant, noncitizens’ speech rights are limited with regard to admissions, removal, naturalization, and political participation. In other words, these restrictions are premised on an existential threat to the project of democratic self-governance and the constitutional republic. Thus, looking to First Amendment law cannot justify current federal criminalization of noncitizens’ gun rights outside the context of immigration law, even if the Second Amendment primarily concerns the right of the state to protect itself.

The First Amendment’s text reserves the right to peaceably assemble and the right to petition the government for redress of grievances to “the people.”³¹⁶ Neither has been the subject of extensive judicial commentary, at least relative to the other First Amendment protections.³¹⁷ Plausibly, petitioning the government is political in nature. Under this view, petitioning is a right associated with raising grievances to government officials so that the institutions created by the state might consider and address those concerns as part of the project of self-governance. This grounding in self-governance raises the possibility that “the people” who may petition might be limited to citizens if the state so chose. Such a reading would accord with the line of so-called “alienage” case law in equal protection jurisprudence that has generally disfavored state and local discrimination on the basis of citizenship, except when those entities are regulating the sovereign functions of the state or with regard to positions with significant discretionary governmental authority over citizens.³¹⁸

316. U.S. CONST. amend. I.

317. See generally Dorf, *supra* note 167 (surveying history and cases regarding the right to peaceably assemble, to ask whether combining First and Second Amendment rights would constitutionalize a right of armed assembly).

318. See *Sugarman v. Dougall*, 413 U.S. 634 (1973) (finding a state law that only permitted citizens to be permanently employed in the competitive class of civil service to violate the Equal Protection Clause of the Fourteenth Amendment); *Graham v. Richardson*, 403 U.S. 365 (1971)

Despite this theoretical possibility, neither courts nor federal or state officials appear to have limited petitioning right to citizens, either currently or historically. Legal scholarship reveals that, in the early years of the republic, petitioning was an “absolute right” available for exercise by Native Americans, slaves, and women—groups that neither were citizens nor could participate in the political process.³¹⁹ This inclusiveness would appear to reflect the understanding that even if potential petitioners could not participate in self-governance, all persons should be able to present grievances and persuade officials or voters to redress them. Accordingly, historical application of the petition clause would not support limiting “the people” based on immigration status. Further, there does not appear to be any doctrinal or historical reason to read the right to assemble narrower than the right to petition.

Of course, the rights to assemble and petition are far from the most significant or controversial provisions of the First Amendment. The most commonly disputed and litigated rights—free expression and religious liberty—are not limited to any particular class of rightsholders. Instead, the Constitution flatly bars Congress from enacting laws that infringe those rights. The Supreme Court has yet to stake out a clear position on the expression rights of immigrants.³²⁰ It is clear, however, that immigration status influences the ability to exercise the full extent of expression rights and, in some circumstances, religious rights. While these limitations are not tied to interpretations

(holding that the Equal Protection Clause was violated by state welfare laws that discriminated on the basis of alienage).

319. See Maggie Blackhawk, *Lobbying and the Petition Clause*, 68 STAN. L. REV. 1131, 1136–37 (2016):

Women, African Americans, and Native Americans had all engaged with colonial and state governments through the petition process as a matter of course, and these unenfranchised and politically powerless communities transitioned smoothly to petitioning Congress after the Founding. . . . Congress treated each petition on equal footing—no matter the petition’s source and without regard to the political power of the petitioner . . . ;

Michael J. Wishnie, *Immigrants and the Right to Petition*, 78 N.Y.U. L. REV. 667, 683–84 (2003) (“[E]xamination of the history of petitioning at the time of the Founding demonstrates that the 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.”); Gregory A. Mark, *The Vestigial Constitution: The History and Significance of the Right to Petition*, 66 FORDHAM L. REV. 2153, 2182 (1998) (stating that petitioning was used by marginalized groups, including “women, blacks (whether free or slave), Native Americans, and, perhaps, even children.”).

320. Jennifer Lee Koh, *Executive Discretion and First Amendment Constraints on the Deportation State*, 56 GA. L. REV. 1473, 1476 (2022); Kagan, *When Immigrants Speak*, *supra* note 27, at 1237–40; Michael Kagan, *Do Immigrants Have Freedom of Speech?*, 6 CALIF. L. REV. CIR. 84–93 (2015).

of “the people,” they nevertheless might illuminate the conditions precedent to excluding noncitizens from Bill of Rights protections.

To summarize this body of law, Congress and the courts primarily have diminished noncitizens’ speech rights in the admission, removal, and naturalization contexts, meaning they limit noncitizens’ speech rights with regard to civil matters and not criminal prohibitions. In these civil areas, noncitizens might face consequences for advocacy and associational conduct viewed as antithetical to the American system of government or as terroristic security threats. Outside of that context, federal law criminalizes political expenditures by certain noncitizens. As a general theory then, federal law curtails noncitizen speech protections when that expression or association implicates existential concerns for our constitutional order or threatens to distort self-governance for citizens.

Federal immigration law has long evinced a preoccupation with the advocacy and associations of noncitizens, often using those factors as the basis for exclusion or deportation standards. As chronicled by Professor Julia Rose Kraut, the Alien Friends Act and Enemies Acts of 1798 permitted federal executive officials to banish noncitizens who criticized, or were perceived as undermining, the federal administration.³²¹ The most constitutionally suspect aspects of the enactments lapsed without federal court review. The Alien Enemies Act is still in force today, owing at least in part to the conditions for its use being infrequent and unlikely.³²²

As noted in Part II, by the 1900s, Congress enacted immigration laws aimed at political ideologies coded as “foreign,” seeking to exclude and deport “anarchists” and those teaching overthrow of government.³²³ Subsequent laws targeted association with and advocacy for communism and totalitarianism. In cases challenging removals under those provisions, the Court either applied the lax First Amendment protections of the era or avoided squarely ruling on the extent of noncitizens’ rights. As an example of the former, in *United States ex rel. Turner v. Williams*, the Court in 1904 upheld the removal of a noncitizen accused of being an anarchist.³²⁴ Ultimately, the Court relied

321. KRAUT, *supra* note 213, at 15–16.

322. *Id.* at 15–23.

323. *See, e.g.*, An Act to Regulate the Immigration of Aliens into the United States, Pub. L. No. 57-162, § 2, 32 Stat. 1213, 1214 (1903) (allowing the exclusion of, among other classes, “polygamists, anarchists, or persons who believe in or advocate the overthrow by force or violence of the Government of the United States”); *id.* § 38, 32 Stat. at 1221 (“That no person who disbelieves in or who is opposed to all organized government, or who is a member of or affiliated with any organization entertaining and teaching such disbelief . . . shall be permitted to enter the United States . . .”).

324. 194 U.S. 279 (1904).

on the theory of a sovereign's absolute right to exclude noncitizens as part of its "power of self-preservation" that took precedence over the First Amendment.³²⁵

Even though the expression right is not limited to "the people," the Court nevertheless interpreted Turner's claim through that lens. The majority stated that the noncitizen "*does not become one of the people . . . by an attempt to enter, forbidden by law.*"³²⁶ This framing suggests that individuals in the United States somehow transform into "the people" through a process or with the collection of certain attributes that then allows them full First Amendment protection. In this sense, *Turner* is the decades-early progenitor of *Verdugo's* "sufficient connections" test. More to the point, the Court in *Turner* seemed perplexed as to how an individual excluded by Congress could raise a free expression right. This reasoning is frustratingly circular. It implies that because Congress had provided for Turner's exclusion on the basis of his ideology and affiliation, he was not a part of "the people" who could raise an objection to his deportation from the country on the basis of ideology and affiliation.

In later decades, the Court became more attuned to constitutional concerns, even as it allowed the federal government to continue excluding and deporting those who advocate certain ideas.³²⁷ In *Bridges v. Wixon*, for example, the Court rejected the removal of Harry Bridges, a lawfully present permanent resident who the federal government was attempting to remove for his Communist party affiliation.³²⁸ The majority opinion avoided a First Amendment holding,³²⁹ but Justice Murphy's concurring opinion provided the most full-throated judicial recognition of immigrants' free speech rights to date, opining that the core protections provided by the First, Fifth, and Fourteenth Amendments extended to citizens and to lawfully present resident aliens.³³⁰ Other parts of his opinion cast a broader net, applying the Bill of Rights based simply on being a human being within the territory of the United States and as a precondition for a legitimate

325. *Id.* at 290, 294 (citing Chinese and Japanese exclusion cases).

326. *Id.* at 292 (emphasis added).

327. See *supra* Section I.B; see, e.g., *United States ex rel. Vajtauer v. Comm'r of Immigr.*, 273 U.S. 103 (1927); see also *Kessler v. Strecker*, 307 U.S. 22, 27–33 (1939) (finding the government's construction of specific deportation statutes to be overbroad without questioning the constitutionality of the statutes).

328. 326 U.S. 135, 156–57 (1945).

329. The majority sidestepped a First Amendment ruling by interpreting the statute to require "substantial" reasons for burdening expression but found the government's evidence insubstantial. *Id.* at 147–48.

330. *Id.* at 161 (Murphy, J., concurring). Notably, his opinion was not limited to permanent residents, instead more generally focusing on all those who entered "lawfully." *Id.*

constitutional republic: "It protects them as long as they reside within the boundaries of our land. It protects them in the exercise of the great individual rights necessary to a sound political and economic democracy."³³¹

The dialectic between absolute sovereign power over noncitizens versus diminishing prized constitutional liberties continued to play out through the twentieth century and still persists today. Soon after *Bridges*, and partly in response to it, the Court in *Harisiades v. Shaughnessy* upheld the removal of three long-term lawful permanent residents based on prior affiliation with the Communist Party.³³² Like *Turner*, the Court adverted to the notion of national self-preservation as trumping the right of free expression and, unlike *Bridges*, did not find statutory or procedural offramps to avoid the constitutional question. Of course, both *Turner* and *Harisiades* were decided during decades when First Amendment expression and associational protections for any person, regardless of immigration status, were not as robust as modern standards.³³³ Those cases predated the constitutional revolution in First Amendment law, due process, and equal protection of the mid- to late twentieth century. Both were decided in the same period when the Supreme Court declined to expand other constitutional rights like due process vigorously, at least in the admissions and removal contexts.³³⁴

Today, the INA still maintains admissions or removal consequences for those with certain associations and affiliations or who have advocated or taught certain ideas,³³⁵ mostly grounded in the legal fiction that deportation is not "punishment" for constitutional

331. *Id.* at 157, 166 (Murphy, J., concurring).

332. 342 U.S. 580, 595–96 (1952). Each of the three permanent residents in *Harisiades* had been living lawfully in the United States for over thirty years, and each had prior membership or affiliation with the American Communist Party. *Id.* at 584–85.

333. *See, e.g.*, *Dennis v. United States*, 341 U.S. 494, 514–15 (1951) (applying the "clear and present danger" test to allow conviction for forming the American Communist Party); *Schenk v. United States*, 249 U.S. 47, 52 (1919) (setting out the "clear and present danger" test and upholding the application of Espionage Act of 1917 to members of the Socialist Party for sending out literature critiquing the military conscription during a time of war).

334. *Compare* *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 214–16 (1953) (denying a due process claim by a returning lawful resident because of alleged security concerns over his alleged trip behind the "Iron Curtain"), *with* *Landon v. Plasencia*, 459 U.S. 21, 32–33 (1982) (holding that the government owed due process protections to a permanent resident returning from a short trip to Mexico and accused of aiding the unlawful entry of noncitizens). *See generally* T. Alexander Aleinikoff, *Federal Regulation of Aliens and the Constitution*, 83 AM. J. INT'L L. 862, 869 (1989) (arguing that *Harisiades* does not mean that deportation is unconstrained by the First Amendment and noting that the case was decided at a time when general First Amendment jurisprudence used a less stringent standard).

335. *See, e.g.*, 8 U.S.C. § 1182(a)(3).

purposes.³³⁶ In *Reno v. American-Arab Anti-Discrimination Committee* (“AADC”), the Court rejected a selective prosecution claim brought by two permanent residents and six nonimmigrants who were placed in removal proceedings for their political speech and affiliations.³³⁷ Subsequently, the federal government relied on AADC to argue that noncitizens have no free expression rights in removal proceedings.³³⁸ In addition, in *Holder v. Humanitarian Law Project*, the Supreme Court upheld the “material support or resources” for terrorism provisions of the federal criminal code³³⁹ while ignoring the doctrinal standard federal courts otherwise apply to evaluate when expression veers into proscribable “incitement.”³⁴⁰ These deficits persist through the naturalization process. For example, immigration statutes bar naturalization if the noncitizen had certain associations or advocated particular ideologies in their past.³⁴¹ Permanent residents are compelled to pledge fealty to the “principles of the Constitution” and take an oath—which may contain ideas that they disagree with, sometimes as a matter of religious conviction.³⁴²

336. See *Fong Yue Ting v. United States*, 149 U.S. 698, 709 (1893); see also Peter L. Markowitz, *Straddling the Civil-Criminal Divide: A Bifurcated Approach to Understanding the Nature of Immigration Removal Proceedings*, 43 HARV. C.R.-C.L. L. REV. 289 (2008).

337. 525 U.S. 471 (1999). At its most narrow, AADC does no more than uphold the jurisdiction-stripping provisions of federal immigration law, which deprived the Court of the power to review the noncitizens’ claims. Still, the majority continued on in dicta to suggest that the noncitizens’ expression rights were not coterminous with those of citizens. See *id.* at 487–88.

338. Kagan, *When Immigrants Speak*, *supra* note 27, at 1244–45 (discussing the government’s brief in *Pineda-Cruz v. Thompson*, a case decided by the District Court for the Western District of Texas). In addition, as Professor Jennifer Lee Koh notes, the selective prosecution holding and the Court’s avoidance of a definitive free speech ruling have combined to produce another free speech deficit for immigrants. Immigrants have also been the subject of retaliation for their speech, depending on the whims of enforcement officials. Leaving core rights at the discretion of enforcement authorities means, in essence, that noncitizens do not possess the constitutional guarantee and remain at the mercy of changing political climates. Koh, *supra* note 320.

339. 561 U.S. 1, 40 (2010). Although *Holder* dealt with the “material support” provision of the U.S. criminal code, 18 U.S.C. § 2339B (added as part of the PATRIOT Act that applies to both citizens and noncitizens), the provision also renders inadmissible and deportable noncitizens for that conduct. See 8 U.S.C. § 1182(a)(3)(B)(iv)(VI).

340. See 561 U.S. at 44 (Breyer, J., dissenting). As Justice Breyer’s dissent pointed out, the majority opinion avoided consideration of *Brandenburg v. Ohio*, which established the constitutional standard for discerning the line between protected speech and incitement to illegal activity. *Id.* (Breyer, J., dissenting) (“No one contends that the plaintiffs’ speech to these organizations can be prohibited as incitement under *Brandenburg*.”).

341. 8 U.S.C. § 1424; see also 8 U.S.C. § 1427(a).

342. 8 U.S.C. § 1448 (describing the oath of naturalization, which includes vowing to take up arms in defense of the nation); see, e.g., *In re Naturalization No. 8314 of Kassas*, 788 F. Supp. 993, 994 (M.D. Tenn. 1992) (upholding the INS’s denial of naturalization for a Syrian-born noncitizen who claimed his religious beliefs prevented him from bearing arms against those of Islamic faith); *In re Williams*, 474 F. Supp. 384, 387 (D. Ariz. 1979) (denying a Panamanian permanent resident’s petition for naturalization because she intended to disobey laws that conflicted “with her Christian conscience and interpretation of the Bible”); see also *Schneiderman v. United States*, 320 U.S. 118, 160–61 (1943) (rejecting the government’s attempt to revoke the citizenship of a naturalized citizen

Finally, outside removal and naturalization, the federal code criminalizes political expenditures for or against candidates in elections by nonimmigrants and unauthorized migrants (the same groups covered by the federal alien-in-possession ban).³⁴³ Recently, the Supreme Court upheld the federal ban on noncitizen political expenditures, permitting the government to single out noncitizens for their political activity.³⁴⁴ The Court did so despite having held a few years earlier that speaker identity—at least with regard to corporations and not-for-profit entities with ideological missions—could not be the basis for speech restrictions.³⁴⁵

Federal firearms restrictions on noncitizens regulate domestic conduct in circumstances unrelated to the preservation of a republican form of government and punish through both criminal and immigration consequences. By contrast, deficits in expression rights inhere almost exclusively in the civil context.³⁴⁶ In the criminal context, election law's expenditure ban intends to protect election integrity and minimize distortions in self-governance by foreign actors.³⁴⁷ When federal and state governments regulate aspects of self-government, including the right to vote or serve in elected public office, the Court has

because he had omitted mention of his former membership in the Communist Party, reasoning that membership alone did not imply his inability to be attached to the principles of the Constitution).

343. 52 U.S.C. §§ 30109(d), 30121(a)(1)(A), 30121(b) (banning all nonpermanent residents from making a "contribution or donation . . . in connection with any Federal, State, or local election" with penalties including imprisonment and monetary fines).

344. *Bluman v. Fed. Election Comm'n*, 132 S. Ct. 1087 (2012) (upholding a noncitizen political expenditure ban without writing an opinion); *see also* Kagan, *When Immigrants Speak*, *supra* note 27, at 1253–55. As Kagan details, the Court's rulings combined with the breadth of federal prohibitions likely mean that an unlawfully present noncitizen who prints and distributes literature urging citizens and lawmakers to change immigration laws has no protection from federal criminal prosecution. *Id.*

345. *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 365 (2010).

346. To be sure, the civil penalties can be devastating. A noncitizen might be denied a visa to reunite with family members based on association or speech, or denied naturalization in a country they plan to make their home because of their religious beliefs. The Court's jurisprudence, however, has always rested on a legal distinction between civil and criminal consequences, rigorously scrutinizing the latter but allowing governmental leeway when only the former is at stake. *See, e.g.*, *Demore v. Kim*, 538 U.S. 510, 523–30 (2003) (upholding the detention of a noncitizen pending deportation proceedings, noting the civil nature of the incarceration); *Wong Wing v. United States*, 163 U.S. 228, 235, 237–38 (1896) (striking down the imposition of hard labor before deportation because it was "punishment" but suggesting some detention pending deportation would be constitutional).

347. This is not to suggest that expenditure restrictions are normatively or constitutionally justifiable. Indeed, as Professor Michael Kagan has argued persuasively, the language and rationale of *Citizens United* undermine the constitutionality of the expenditure constraints on noncitizens. *See* Kagan, *When Immigrants Speak*, *supra* note 27, at 1255–59.

countenanced citizenship restrictions.³⁴⁸ By contrast, when state governments have attempted to exclude noncitizens in jobs or matters unrelated to sovereign self-definition, the Court has repeatedly struck down alienage discrimination, including one instance in which the exclusion affected only unlawfully present persons.³⁴⁹

The upshot of this background is that the Court has wavered on the free expression rights of noncitizens, but any retrenchment exists almost exclusively in the context of admissions and removal decisions and relates to concerns over preservation of the constitutional system itself. To be sure, the first firearms-specific deportation provisions in 1940 traded on the idea that armed noncitizens were existential threats, inextricably linking the need for a firearms-deportation provision to an overarching legislative concern with subversive foreign ideologies and activities.³⁵⁰ If the right to bear arms is primarily about protecting the state from existential threat by an organized collective, it is plausibly a political right akin to office holding and voting.³⁵¹ Like office holding and voting then, perhaps only those who have the right to participate in self-governance might be eligible to wield firearms. Indeed, citizens who have passed the naturalization process would have expressly promised to take up armed defense of the nation,³⁵² while a noncitizen has made no such promise. And unlike permanent members of the political community, many noncitizens can seek refuge and protection from their country of nationality in times of tumult or existential threat.

Yet, even prior to *Heller*, when the Second Amendment was reasonably bound to state defense rationales,³⁵³ long-standing federal policies did not limit defense of the nation to citizens. Since the early years of the republic, dating back to the Revolutionary War, noncitizens served in the military.³⁵⁴ In fact, unlawfully present noncitizens were

348. *Foley v. Connelie*, 435 U.S. 291, 295–96 (1978) (upholding a state law restricting the state police force to citizens, stating, “it is clear that a State may deny aliens the right to vote, or to run for elective office, for these lie at the heart of our political institutions”).

349. *See Plyler v. Doe*, 457 U.S. 202, 227–30 (1982) (striking down a state law denying free public primary school education to undocumented persons); *Nyquist v. Mauclet*, 432 U.S. 1, 12 (1977) (striking down a state law that barred noncitizens from receiving financial aid from the state for higher education).

350. *See supra* Part II.B.

351. *See* Gulasekaram, *Aliens with Guns*, *supra* note 23, at 905–16.

352. 8 C.F.R. § 337.1(a) (2023).

353. *See supra* Part I; *see, e.g.*, *United States v. Miller*, 307 U.S. 174, 178 (1939) (stating that the Constitution gave the power to “assure the continuation and render possible the effectiveness of [a militia] to execute the Laws of the Union, suppress Insurrections and repel Invasions.” (quoting U.S. CONST. amend. II) (internal quotation marks omitted)).

354. Deenesh Sohoni & Yosselin Turcios, *Discarded Loyalty: The Deportation of Immigrant Veterans*, 24 LEWIS & CLARK L. REV. 1285, 1291–94 (2020); Candice Bredbenner, *A Duty to*

conscripted into military service in times of national need.³⁵⁵ During World War I, nearly twenty percent of draftees and more than eighteen percent of the total army were foreign-born.³⁵⁶ To be sure, federal statutory permissions (and incentives) for noncitizen participation in national defense need not be coextensive with constitutional coverage. At the very least, however, the fact that Congress and the federal executive branch have allowed noncitizens' to participate in armed defense of the nation—and even eagerly solicited it—demonstrates that the political branches consider noncitizens critical to national preservation, even while other federal policies frame them as existential threats to the same.

2. Noncitizens and Protection *from* the State

Less so than as a state-protective right, when the Second Amendment is understood primarily to facilitate protection *from a tyrannical state*, citizenship might be relevant to rightsholders.³⁵⁷ Under this theory, perhaps only permanent members of a political community maintain a right to armed insurrection against that tyrannical political structure.³⁵⁸

Even apart from questions of immigration status, as Professor David C. Williams reminds us,³⁵⁹ the antityrannical “people” assumes certain prerequisites for arms bearing. In particular, “the people” accorded an antityranny arms right were not the entirety of the citizenry, but a subset.³⁶⁰ As envisioned at the Founding, the collective entrusted with resisting state tyranny was sufficiently homogenous, shared common interests, and dedicated itself to a shared vision of the common good.³⁶¹ James Madison and John Jay echo this sentiment in the Federalist Papers. Madison extolled the “advantage of being armed,

Defend?: The Evolution of Aliens' Military Obligations to the United States, 1792 to 1946, 24 J. POL'Y HIST. 224 (2012).

355. See, e.g., Selective Service Act of 1917, Pub. L. No. 65-12, § 2, 40 Stat. 76, 77–78.

356. *Citizenship and Immigration During the First World War*, U.S. CITIZENSHIP & IMMIGR. SERVS. DEPT' HOMELAND SEC. 226 (2017), https://www.uscis.gov/sites/default/files/document/newsletters/WWI_18x24_USCIS.pdf [<https://perma.cc/EBN3-2U4T>].

357. See generally Williams, *supra* note 26, at 892–95.

358. Professor David C. Williams, for example, has explored a version of this argument. *Id.* at 881 (“[T]he citizenry is not a collection of independent individuals but an organic and unified entity. The constitutional right to arms belongs to this body of the people, organized into a universal militia, so that it can resist a corrupt federal government.”).

359. *Id.* at 882.

360. *Id.*; see also AMAR, *supra* note 26, at 48, 258–59 (noting that only “First-Class Citizens” were permitted to vote, bear arms, or serve on juries).

361. Williams, *supra* note 26, at 882–85 (arguing that theorists often “conjure with the People” but do not demonstrate that such a unified body exists in modern times).

which the Americans possess over the people of almost every other nation,” because the body of citizens organized into militias could resist federal tyranny.³⁶² But “the people” he imagined were, as Jay specified, a homogenous and like-minded collective:

With equal pleasure I have as often taken notice that Providence has been pleased to give this one connected country to one united people—a people descended from the same ancestors, speaking the same language, professing the same religion, attached to the same principles of government, very similar in their manners and customs³⁶³

Under those circumstances, “the people” as a select subset of the citizenry might be the sole collective with the right to armed overthrow of a tyrannical government. But, that collective of citizens depends on a notion of civic republicanism that no longer exists—if it ever really did—in our current pluralistic and individualistic national community.³⁶⁴ Certainly, after the Fourteenth Amendment, the idea that only “first-class” citizens hold constitutional rights or that citizenship should function as a proxy for race could no longer be advanced explicitly.³⁶⁵

In sum, simply holding the legal status of “citizen” cannot make one part of the collective “people” with the exclusive right of armed protection from the state. Undoubtedly, even in our modern-day pluralistic and diverse society, those with permanent membership and the legal status of “citizen” might choose to reconstitute themselves as “the people” for armed resistance to state tyranny. Short of a citizenry reconstructed into one bound by shared civic republican values, however, an antityranny Second Amendment bears no meaningful relationship to immigration status.

Instead, a theory of firearms possession as a disciplining check on would-be tyrants in modern times seems to call for widespread firearm possession regardless of immigration status. A tyrannical government presents danger to both citizen and noncitizen alike, and perhaps more so to noncitizens given that citizens are likely participants in a tyrannical scheme and immigrants are among the vulnerable groups often targeted for discrimination by tyrannical governments.³⁶⁶

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

363. THE FEDERALIST NO. 2, at 32 (John Jay) (Clinton Rossiter ed., 2003).

364. Williams, *supra* note 26, at 922–24.

365. *See id.* at 882–83 (“In other words, the People have their unity in opposition to the hypothesized ‘Other’ (Jews, Blacks, bankers, etc.) that seeks to oppress the People.”). *See generally* AMAR, *supra* note 26.

366. *See, e.g.*, Ross, *supra* note 312, at 494 (“[T]he poorer, democratic masses obtained the right to use violence through the Second Amendment to protect themselves from any future aristocratic oppression.”); *see also* DARRELL A.H. MILLER, BRENNAN CTR. FOR JUST., AFRICAN AMERICANS AND THE INSURRECTIONARY SECOND AMENDMENT (2021), <https://www.brennancenter.org/our->

Armed insurrection, of course, is a literal interpretation of the Second Amendment's purpose. For many reasons, including the absence of a unified, civic republican "people" and the development of robust free speech protections,³⁶⁷ perhaps the Second Amendment rightsholders should not be interpreted solely and specifically with reference to arms bearing. Rather, the Amendment's antityranny valence might be understood as a right of protection from state overreach more generally. If so, the Fourth Amendment provides an appropriate comparison. That Amendment's purpose also is to provide constitutional assurances against warrantless and unchecked government enforcement.

The Fourth Amendment's core protection against unreasonable searches and seizures inures to "the people,"³⁶⁸ and courts have excluded noncitizens from that group in specific locations³⁶⁹ and circumstances. The clearest distinction in noncitizens' Fourth Amendment protection manifests in the remedies available in removal proceedings for search and seizure violations. In *Immigration &*

work/research-reports/african-americans-and-insurrectionary-second-amendment [https://perma.cc/K4KP-PZJ6]. Miller concludes his article with a powerful rejoinder to those who extol the insurrectionary model:

It is Black struggles, Black tolerances, and Black forbearance that set the baseline for the legitimate use of political violence in America. It is theirs to claim, and only theirs. No one gets to cut in line; no one today possesses a greater right to alter or abolish government through violent means. And as long as African Americans continue to foreswear violence as a tool of political change in favor of nonviolence and a peaceful political solution—as they've done in Norfolk, Virginia, in 1865, in Greensboro, North Carolina, in 1960, and in Atlanta, Georgia, in 2021—then that grace continues to expose the lie of any lesser claim.

Id. at 8.

367. See, e.g., Margarian, *supra* note 295, at 87–88 (arguing that the First Amendment's protection of robust political debate renders the Second Amendment's protection of insurrectionism unnecessary and dangerous).

368. Notably, the Fourth Amendment's formulation utilizes "the people" in conjunction with "persons," protecting the "right of *the people* to be secure in their *persons*" from unreasonable searches and seizures. U.S. CONST. amend. IV (emphasis added). This formulation allows for the possibility of reading "the people" in its natural language form, as plural of "person." To be sure, this straightforward, plain-language understanding is complicated by the definite article "the," which arguably differentiates common, natural language uses of "people" from "the people." See, e.g., Note, *Meaning(s)*, *supra* note 26, at 1089 (citing Akhil Reed Amar, *Second Thoughts*, 65 LAW & CONTEMP. PROBS. 103 (2002)).

369. See Núñez, *supra* note 26, at 100–10. It is important to note that the border is a location of Fourth Amendment exceptionalism, whether one is a citizen or not (albeit with the added consequence of removal for noncitizens). In other words, standards for government searches at the border are more lax than similar searches occurring within the border. Because those legal requirements are lowered for all border encounters based on location, Fourth Amendment border exceptionalism is mostly irrelevant to defining the rightsholders in most applications of that right. See generally Stanford Law School, *Searching Computers at the Border*, YOUTUBE (Mar. 3, 2022), <https://www.youtube.com/watch?v=WflaKYW1jUI>; HILLEL R. SMITH, CONG. RSCH. SERV., DO WARRANTLESS SEARCHES OF ELECTRONIC DEVICES AT THE BORDER VIOLATE THE FOURTH AMENDMENT?, <https://crsreports.congress.gov/product/pdf/LSB/LSB10387> (last updated Mar. 17, 2021) [https://perma.cc/5K5Q-T697].

Naturalization Service v. Lopez-Mendoza, the Supreme Court ruled that the exclusionary rule—the primary means of rectifying the effects of unlawful searches—does not apply to deportation proceedings.³⁷⁰ Even so, under *Lopez-Mendoza*, it remains possible for noncitizens to challenge the inclusion of evidence from egregious violations that undermine standards of fundamental fairness.³⁷¹ Importantly, the Court did not question the application of the Fourth Amendment generally, instead focusing solely on the remedy of excluding unlawfully obtained evidence. And the “egregious violation” exception has been used with success in immigration proceedings. The narrowness of *Lopez-Mendoza*’s holding and the breadth of its exception allow for Fourth Amendment violations to be enforced in immigration cases, essentially equalizing application regardless of immigration status or type of proceeding. This understanding also accords with *Almeida-Sanchez v. United States*, a five-decades-old case in which the Supreme Court ruled that the government’s warrantless search of a Mexican national in the United States violated the Fourth Amendment.³⁷²

The Fourth Amendment case of *Verdugo* represents the Court’s most fulsome engagement with the rightsholders signified by “the people,” with the lead opinion concocting a multifactored test to determine the phrase’s scope.³⁷³ Despite all the attention it has garnered, however, the lead opinion’s test for “the people” was unnecessary to the case’s resolution.³⁷⁴ Instead, a majority of Justices in *Verdugo* assumed the applicability of the Fourth Amendment to claims by noncitizens in most domestic circumstances. For example, Justice Kennedy’s concurrence critiqued the lead opinion’s decision to address the scope of “the people”³⁷⁵ and instead assumed that had the search of the noncitizen-defendant’s home occurred in the United States, the Fourth Amendment would have applied. Other Justices

370. 468 U.S. 1032, 1050 (1984).

371. *Id.* at 1050–51; see *Maldonado v. Holder*, 763 F.3d 155, 159 (2d Cir. 2014) (applying the egregious violation standard); *Bridges v. Wixon*, 326 U.S. 135, 153–54 (1945) (as per the Fifth Amendment’s Due Process Clause, the government must use evidence in a fundamentally fair manner in a removal proceeding).

372. 413 U.S. 266, 267 (1973) (holding that the warrantless search of the petitioner’s automobile, which the Court did not consider to be a border search or its functional equivalent, violated the Fourth Amendment given that there was no probable cause or consent).

373. See *supra* Section I.A.

374. See *United States v. Verdugo-Urquidez*, 494 U.S. 259, 275–98 (1989) (Kennedy, J., concurring; Stevens, J., concurring in the judgment; Brennan & Marshall, JJ., dissenting; Blackmun, J., dissenting). See *generally* Note, *Meaning(s)*, *supra* note 26.

375. See *supra* notes 77 and 79. Although Kennedy’s opinion was styled as a concurrence, it reads like concurrence only in the judgment, with significant deviations from the lead opinion’s reasoning. See *Verdugo-Urquidez*, 494 U.S. at 276 (Kennedy, J., concurring) (“I cannot place any weight on the reference to ‘the people’ in the Fourth Amendment as a source of restricting its protections.”).

would have decided the case based on the reasonableness of the search (which implies the ability of noncitizens to raise the Fourth Amendment) or the need to apply constitutional guarantees any time the federal government asserts its coercive authority (again, allowing noncitizens to raise the Fourth Amendment when they are the objects of enforcement). These alternative readings endorsed by a majority of Justices would support coverage of all noncitizens when the government regulates conduct occurring within the United States. In other words, outside the context of removal hearings (in which the differences are technical and insubstantial), noncitizens and citizens alike are treated as “the people” of the Fourth Amendment. As such, *Verdugo* sheds little light on the application of the Fourth Amendment to domestic law enforcement, regardless of immigration status.

In sum, as a specific right of armed insurrection, “the people” implies citizens only under a constrained, bygone, and idealized vision of citizenry. Otherwise, immigration status bears only a tangential relationship to the need to be armed for antityrannical purposes. As a more general right against state overreach, noncitizens’ exclusion from the Second Amendment fare no better. The categorical criminal prohibitions of the alien-in-possession ban are inapposite to the Fourth Amendment’s limitations on “the people.” Because searches and seizures are often the preludes to criminal prosecution, in domestic criminal prosecutions, federal courts have assumed noncitizens, including unlawfully present ones, are part of “the people” who may raise Fourth Amendment claims.³⁷⁶ Otherwise, Fourth Amendment applicability has turned on the impracticality of extraterritorial application or been limited to the ancillary question whether a particular remedy for search and seizure violations is available in an administrative proceeding—not the central question whether noncitizens are protected by the Fourth Amendment.

C. Noncitizens and Other Peoples in a Right of Personal Protection

Despite the possibility that the right to keep and bear arms could, in theory, serve to mediate the relationship between individuals and the state, the Court’s recent jurisprudence belies these state-centered hypotheses. At the very least, national defense and insurrectionary mythologies fail to capture the animating ethos of present-day rationales for robust arms rights emphasized by the

376. See, e.g., *Almeida-Sanchez*, 413 U.S. at 267; see also *Verdugo-Urquidez*, 494 U.S. at 275–98 (Kennedy, J., concurring; Stevens, J., concurring in the judgment; Brennan & Marshall, JJ., dissenting; Blackmun, J., dissenting).

Supreme Court. Without hesitation, *Heller* and *Bruen* relegate state-related rationales and instead revel in the Second Amendment's facilitation of armed protection *from interpersonal violence* between individuals in their private capacity.³⁷⁷ Those opinions are replete with claims about the need for individuals to be able to carry handguns publicly for the purpose of self-defense:

[H]andguns . . . are indisputably in “common use” for self-defense today. They are, in fact, “the quintessential self-defense weapon.” Thus, even if [certain colonial laws] prohibited the carrying of handguns because they were considered “dangerous and unusual weapons” in the 1690s, they provide no justification for laws restricting the public carry of weapons that are unquestionably in common use today.³⁷⁸

The Court's doubling down on the centrality of intrapersonal conflict as the motivating principle for the right to bear arms renders both the First and Fourth Amendment comparisons tenuous, if not wholly inapposite. In turn, the state-centered justifications for limiting the venues or instances for those rights also wither in the Second Amendment context.

When the right to bear arms is wholly decoupled from organized community protection of, or from, the state, the right becomes one possessed by private individuals to deter or counter private violence perpetrated by other private individuals.³⁷⁹ So conceived, formal membership or government consent to a person's presence should matter little, if at all, in determining the ambit of constitutional protection. “The people” includes all those who may need arms for protection of their self, their loved ones, or their home. Indeed, in such a conception the rights of noncitizens and citizens are inextricably linked. Many immigrant families—including ones with unauthorized members—are mixed-status families.³⁸⁰ For those households, depriving noncitizens of self-defense rights means depriving citizens of the type of protection *Heller* and *Bruen* locate at the core of the Second Amendment.

Of course, even a capacious “the people” admits to limits. To decouple self-defense imperatives from immigration status does not

377. See generally Darrell A.H. Miller, *Self-Defense, Defense of Others, and the State*, 80 LAW & CONTEMP. PROBS. 85, 85–86 (2017).

378. N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2143 (2022) (citations omitted).

379. According to one judge, for example, “[o]ur Founders firmly believed in both the fundamental right to keep and bear arms and the fundamental role of government in combating violent crime.” United States v. Rahimi, 61 F.4th 443, 462 (5th Cir. 2023) (Ho, J., concurring).

380. In California, for example, over 2.3 million U.S. citizens are estimated to live with undocumented family members. *Mixed-Status Families: Many Californians Live in Households with Family Members Who Have Different Citizenship or Immigration Statuses*, CAL. IMMIGRANT DATA PORTAL, <https://immigrantdata.org/indicators/mixed-status-families> (last visited Sept. 20, 2023) [<https://perma.cc/TJ64-CZUL>].

mean that all humans in need of self-defense should possess relatively unrestricted gun rights. Indeed, as scholars have noted, children, felons, and the mentally ill might require the type of interpersonal protection imagined by *Heller* and *Bruen*.³⁸¹ Yet, we maintain a general societal consensus and broad agreement that firearms are rightly restricted from those groups. The Court itself has countenanced these exclusions, revealing that its conception of “the people” clearly does not protect these groups.³⁸²

The existence of these presumptively disfavored groups leaves three possibilities for understanding the scope of “the people” and noncitizens vis-à-vis other excluded groups. First, it may be that, despite the Court’s insistence, “the people” should be read to the extent of its natural language meaning. If so, as natural persons, children, felons, and the mentally ill could only be denied the right to bear arms under the same circumstances and using the same methodology as any other claimant. Second, it may be that “the people” of the Second Amendment is capacious but defeasible based on some combination of majoritarian preferences and historical antecedent, even when it primarily serves as a right of armed self-defense. Third, it may be that “the people” is defeasible based on certain group characteristics but must include noncitizens when the right is based in self-defense.³⁸³

The first possibility is quite radical and would advance an arms right out of step with other constitutional protections. Few seriously believe that children should have firearms rights on par with most adults,³⁸⁴ and little historical evidence (if that is the governing methodology) supports robust firearms rights for children.³⁸⁵ Similarly, no one seriously believes that those with significant mental illnesses or diminished capacities should be able to wield firearms. We believe this even if there is little or no record of disarming children, the mentally

381. See Eric Ruben, *An Unstable Core: Self-Defense and the Second Amendment*, 108 CALIF. L. REV. 63, 74–75 (2020); Jacob D. Charles, *Defeasible Second Amendment*, *supra* note 25, at 60–62; C. Kevin Marshall, *Why Can't Martha Stewart Have a Gun?*, 32 HARV. J.L. & PUB. POL'Y 695, 695–98 (2009).

382. *District of Columbia v. Heller*, 554 U.S. 570, 627 (2008).

383. Jacob D. Charles, *Defeasible Second Amendment*, *supra* note 25, at 65.

384. *Id.*; see also Katherine Hunt Federle, *The Second Amendment Rights of Children*, 89 IOWA L. REV. 609, 668–69 (2004).

385. Saul Cornell, *“Infants” and Arms Bearing in the Era of the Second Amendment: Making Sense of the Historical Record*, YALE L. & POL'Y REV. INTER ALIA (Oct. 26, 2021, 2:45 PM), https://yalelawandpolicy.org/inter_alia/infants-and-arms-bearing-era-second-amendment-making-sense-historical-record [<https://perma.cc/P4WV-6387>] (critiquing as historical and nonoriginalist *Hirschfeld v. ATF*, 5 F.4th 407 (4th Cir. 2021), and initially concluding that a federal prohibition on the sale of handguns to eighteen-to-twenty-one-year-olds was unconstitutional, before the case was later mooted). Importantly, at least one court post-*Bruen* has struck down bans that target individuals over eighteen but under twenty-one years of age. See *Fraser v. ATF*, No. 22-CV-410, 2023 WL 3355339, at *22–23 (E.D. Va. May 10, 2023).

ill, or felons in early American law.³⁸⁶ Indeed, other constitutional rights are also not equally available to every group in every context.³⁸⁷ Thus, to suggest that “the people” must include noncitizens is not to advance the corollary that any natural person or human being may exercise Second Amendment rights.

As to the second possibility, if present-day, widely adopted majoritarian preferences are sufficient to exclude particular groups from “the people,” *Bruen*’s methodological intervention is even more bankrupt than it was at first glance. Little theoretical or historical support would be needed to justify ad hoc exclusions from gun rights, other than prevailing sensibilities about who should and should not own firearms. And, if that is sufficient, nothing distinguishes those forms of regulating the “who” of gun prohibitions from other widespread preferences regarding the types of permissible firearms and ammunition or licensing and permitting schemes. In short, such use of “text and history” would be exposed as a methodology of convenience selectively deployed to vindicate particular ideological commitments.

In the end, this Article advances the third view that “the people” must include noncitizens as part of “the people,” even if it is possible to justify the exclusion of other natural persons (such as children or the mentally ill) from the right to bear arms. This is not to claim that those other groups’ Second Amendment protections are “void” but merely that they are “voidable.”³⁸⁸ All those groups would be covered by a self-protection imperative and thus presumptively possess the right to bear arms. The remaining question is whether the government may nevertheless take that right of protection away from a particular group.³⁸⁹ That question—the question of “defeasibility” in Professor Jacob Charles’ framing—would depend on reason giving and rationales.

Importantly, reason giving is not merely a vestige of a bygone pre-*Bruen* era whence means-end inquiry ruled the day. Indeed, even in a post-*Bruen* world, the purposes behind gun restrictions still matter. The *Bruen* majority expressly instructed judges to look to the “how and why” of a past gun regulation as compared to its modern-day counterpart to determine whether it relevantly burdens the right of

386. See generally Marshall, *supra* note 381.

387. For example, although children in schools are persons or people in a natural language sense, their First Amendment rights are not coextensive with adults. Purveyors of sexual speech can be restricted from selling that speech to children. Certain locations, such as prisons where felons might be sentenced, have diminished First and Fourth Amendment protections.

388. See Jacob D. Charles, *Defeasible Second Amendment*, *supra* note 25, at 53–55.

389. See *id.* at 54 (noting the distinction between asking whether prohibited persons’ Second Amendment rights are nonexistent or “just defeasible” and framing it as a question of “coverage” versus “protection”).

self-defense.³⁹⁰ Take, for example, the Fifth Circuit's recent *Rahimi* opinion striking down the federal ban on possession by those under civil domestic violence orders. In applying *Bruen*'s methodology, the appellate court sought not only to compare the mere *existence* of historical analogues to modern-day possession bans but, more pointedly, to compare the *reasons* for the enactment of those historical analogues against the *reasons* for their modern-day counterparts.³⁹¹ The court's conclusion that the history of relevant regulation was not "analogous enough" or "relevantly similar" to the modern-day equivalent at issue relied in part on opining that the respective laws were enacted for different purposes in the different eras.³⁹² To be sure, this use of a law's purpose is not exactly the same as examining a law's purpose in means-end scrutiny. Nevertheless, the *Rahimi* court's application of "text and history" highlights the continued importance of both what the regulation intends to accomplish and how it goes about it, even in a post-*Bruen* world.³⁹³ Fundamentally, those are the same inquiries central to means-end scrutiny.³⁹⁴

As a right of self-defense, immigration status bears no relationship to either the need for protection or the ability to wield a firearm safely in the way status as a minor or being mentally ill might. Here, it is worth recalling that between *Heller* and *Bruen*, most federal courts upheld § 922(g)(5) under intermediate scrutiny, purporting to measure Congress's public safety rationales against the categorical exclusion of noncitizens from firearms rights.³⁹⁵ Those inquiries in the underlying case law were devoid of empirical evidence connecting immigrant status with dangerousness or fitness for firearm possession. Instead, as some federal judges themselves have recognized, courts essentially watered down the inquiry to rational basis review.³⁹⁶ Even more problematic, courts engaged in innuendo and stereotype as

390. *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2133 (2022). Moreover, as the dissent and others point out, determining "how and why" and reason giving are the hallmarks of the "tiers-of-scrutiny" approach the Court went out of its way to dismiss. *Id.* at 2179 (Breyer, J., dissenting).

391. *United States v. Rahimi*, 61 F.4th 443, 454–60 (5th Cir. 2023).

392. *Id.*

393. *Id.* at 454 ("The Supreme Court distilled two metrics for courts to compare the Government's proffered analogues against the challenged law: *how* the challenged law burdens the right to armed self-defense, and *why* the law burdens that right." (first citing *Bruen*, 142 S. Ct. at 2133; then citing *McDonald v. City of Chicago*, 561 U.S. 742, 767 (2010); and then citing *District of Columbia v. Heller*, 554 U.S. 570, 559 (2008))).

394. *See Bruen*, 142 S. Ct. at 2177 (Breyer, J., dissenting).

395. *See id.* at 2125–27.

396. *United States v. Perez*, 6 F.4th 448, 457, 459 (2021) (Menashi, J., concurring in the judgement) (arguing that the majority was "watering down" heightened scrutiny by deferring to policy judgments that may not be substantiated).

substitutes for demonstrated connection between a public safety goal and the need to categorically dispossess certain immigrants of firearms.³⁹⁷ A good faith inquiry into government rationales might yield more nuanced group exclusions from gun rights and a more coherent reason for rendering certain groups' self-defense rights voidable and others not.

Undoubtedly, those challenging felon-in-possession bans might similarly challenge broad, categorical possession bans on all felons.³⁹⁸ To be sure, such broad bans also fail to account for variation in types of felonious conduct, lumping all prior felons together regardless of whether their prior conduct demonstrates public safety threats sufficient to deprive them of armed self-protection.³⁹⁹ Fundamentally, these challenges to felon-in-possession bans ask courts to carefully evaluate the actual dangerousness of persons before rendering their self-defense rights defeasible. It is worth noting that because text and history are unlikely to be able to resolve this question satisfactorily,⁴⁰⁰ courts may have to advert back to some form of an interest-balancing approach to evaluate such claims.

Fundamentally, this Article's argument—that “the people” must hew close to natural language readings and cannot exclude based on immigrant status alone—advances the same proposition. It is not within the purview of this Article to consider the relationship between felon-in-possession bans and alien-in-possession bans in meaningful depth. Nor is it to make the case that both must be held unconstitutional. My more modest claim is that if armed self-defense is the governing rationale for gun possession rights, then making the right defeasible to certain groups of persons must closely track the inability of governments to ensure the safe, noncriminal use of the firearm.

397. Pratheepan Gulasekaram, *“The People”, Citizenship, and Firearms*, DUKE CTR. FOR FIREARMS L. (Jan. 13, 2022), <https://firearmslaw.duke.edu/2022/01/the-people-citizenship-and-firearms/> [https://perma.cc/42ZX-54LH].

398. See *Range v. Att’y Gen.*, U.S., 69 F.4th 96, 106 (3d Cir. 2023) (en banc) (rejecting application of § 922(g)(1) “felon-in-possession” ban to defendant with a false statement conviction and ruling that defendant is part of “the people” despite that conviction); Jacob D. Charles, *Defeasible Second Amendment*, *supra* note 25, at 63.

399. See, e.g., *Range*, 69 F.4th at 102–04 (distinguishing types of criminal conduct for purposes of determining inclusion within “the people”); *Kanter v. Barr*, 919 F.3d 437, 451 (7th Cir. 2019) (Barrett, J., dissenting); *Binderup v. Att’y Gen.*, U.S., 836 F.3d 336 (3d Cir. 2016) (en banc).

400. See Nelson Lund, *The Proper Role of History and Tradition in Second Amendment Jurisprudence*, 30 FLA. J.L. & PUB. POL’Y 171, 175, 181–86 (2020); Marshall, *supra* note 381, at 698–707.

CONCLUSION

The Second Amendment currently has a “people” problem. It is one entirely of the federal courts’ own making. Since *Heller*, courts have repeatedly expanded the substantive scope of the right to keep and bear arms while constricting “the people” to justify the diminution of firearms rightsholders. The simple solution is to read most persons within the ambit of the Second Amendment for as long as it is understood to vindicate a right of armed self-protection from interpersonal violence.⁴⁰¹

Despite my focus on expanding “the people” of the Second Amendment to embrace noncitizens, my primary motivation for this Article is not to unbridle the right to keep and bear arms or to promote immigrant gun possession. Indeed, the text and structure of the Second Amendment contemplate that Congress can and will engage in firearms regulation.⁴⁰² Using that authority, Congress might still criminalize gun crimes committed by noncitizens based on criteria independent of immigration status alone. Further, Congress might design eligibility standards for firearm possession, like waiting periods or extensive background checks, that might disparately impact noncitizens without categorically excluding them. Moreover, equitable firearms regulation can serve harm reduction and antisubordination ends, for noncitizens and citizens alike, without diminishing the Second Amendment.⁴⁰³ As others have argued in the context of race and guns, the mere fact that regulation of a particular instrument (here, firearms) might have been used as a tool of subordination and dominance does not mean reflexively that the instrument should be deregulated.⁴⁰⁴ A deregulatory agenda instead likely disproportionately benefits those who already own firearms and are likely to wield and use them in the future—a group that is overwhelmingly both white and male.⁴⁰⁵

401. Even if the Second Amendment protects all persons, Congress and states might still regulate large groups of persons. For example, children are persons, but it is unlikely that the Amendment forbids age restrictions for firearm sale and purchase. Jacob D. Charles, *Defeasible Second Amendment*, *supra* note 25, at 64–65.

402. Winkler, *Racist Gun Laws*, *supra* note 145, at 544.

403. *Cf. Kanter*, 919 F.3d at 451 (Barrett, J., dissenting):

[The government] has [not] introduced data sufficient to show that disarming all nonviolent felons substantially advances its interest in keeping the public safe. Nor have they otherwise demonstrated that Kanter himself shows a proclivity for violence. Absent evidence that he either belongs to a dangerous category or bears individual markers of risk, permanently disqualifying Kanter from possessing a gun violates the Second Amendment.

404. *See Blocher & Siegel*, *supra* note 34, at 451; Winkler, *supra* note 145, at 544; Li, *supra* note †.

405. Kim Parker et al., *supra* note 30; FILINDRA, *supra* note 30 (manuscript at 2–8).

Rather, my motivating concern is that “the people” of the Second Amendment will be deployed as a trojan horse to further advance anti-immigrant constitutionalism. Accordingly, focusing on “the people” who may bear arms is meant to highlight the ways in which noncitizens have been treated as second-class persons in our constitutional order, including within the Second Amendment. In the end then, noncitizen gun possession is but one part of the larger project of expanding constitutional equality in multiple dimensions. As a matter of regulating the domestic and everyday lives of noncitizens outside the context of immigration concerns, with regard to a tangible tool of self-protection, equality must be recognized through the clause intended to secure it or through a more inclusive consideration of the persons the Constitution protects. Meaningfully theorizing “the people” of the Constitution is a critical part of that intervention.