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Pratheepan Gulasekaram

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GUNS AND MEMBERSHIP IN THE AMERICAN POLITY

Pratheepan Gulasekaram*

INTRODUCTION

The gun is mythic in the American imagination. James Madison extolled its transformative and signifying powers when he argued in the Federalist Papers that “the advantage of being armed” is a characteristic that “Americans possess over the people of almost every other nation.”¹ This “advantage,” in the hands of militiamen, has provided the foundation for our nation’s creation stories,² but it has also been the catalyst for some of our nation’s most inexplicable tragedies.³ Vacillating be

* Assistant Professor, Santa Clara University School of Law (J.D., Stanford Law School). Thanks to the editors of the *William & Mary Bill of Rights Journal* and their 2012 symposium on Noncitizen Participation in the American Polity for the opportunity to present the ideas included in this Article. This Article is my third in a series exploring the relationship between the Second Amendment and noncitizens. For my prior scholarship on this issue, please see “*The People*” of the Second Amendment: Citizenship and the Right to Bear Arms, 85 N.Y.U.L. REV. 1521 (2010) and *Aliens with Guns: Equal Protection, Federal Power, and the Second Amendment*, 92 IOWA L. REV. 891 (2007).

¹ THE FEDERALIST NO. 46, at 296 (James Madison) (Clinton Rossiter ed., 2003).

² See Saul Cornell & Nathan DeDino, *A Well Regulated Right: The Early American Origins of Gun Control*, 73 FORDHAM L. REV. 487, 492 (2004) (“Historians have long recognized that the Second Amendment was strongly connected to the republican ideologies of the Founding Era, particularly the notion of civic virtue.”).

³ See, e.g., THE ASSASSINATION OF PRESIDENT LINCOLN AND THE TRIAL OF THE CONSPIRATORS 17–21 (Benn Pitman ed., 1865) (discussing the assassination of President Abraham Lincoln); REPORT OF THE PRESIDENT’S COMMISSION ON THE ASSASSINATION OF PRESIDENT KENNEDY 18–25 (1964), available at <http://www.archives.gov/research/jfk/warren-commission-report/chapter-1.html> (summarizing the commission’s findings relating to the John F. Kennedy assassination); Peter J. Boyer, *The Children of Waco*, THE NEW YORKER, May 15, 1995, at 38, available at <http://www.pbs.org/wgbh/pages/frontline/waco/childrenofwaco1.html> (discussing reflections on the Waco Massacre and the legacy left behind); Emma Goldman, Editorial, *The Tragedy at Buffalo*, FREE SOC., Oct. 1901, available at <http://ublib.buffalo.edu/libraries/exhibits/panam/law/images/tragedyatbuff.html> (reflecting upon the assassination of President McKinley); Evan Thomas, *The Worst Week*, NEWSWEEK, Nov. 10, 2007, at 44, 46, available at <http://www.newsweek.com/id/69542/page/3> (telling the story of Martin Luther King Jr.’s assassination); Gordon Witkin, *The Nightmare of Idaho’s Ruby Ridge*, U.S. NEWS & WORLD REP., Sept. 3, 1995, at 24, available at http://www.usnews.com/usnews/news/articles/950911/archive_032768.htm (discussing the violent firefight between Randy Weaver and federal agents, the events leading up to it, and its aftermath); *The Man Who Loved Kennedy*, TIME, Feb. 21, 1969, at 18, available at <http://www.time.com/time/magazine/article/0,9171,838974,00.html> (recounting the opening days of Sir-ban Bishara Sirhan’s trial for the assassination of Robert F. Kennedy); Michael Perry, *Massacre Sparks Foreign Criticism*

tween these poles of heroism and heartbreak, firearms have remained at the center of the nation's political, legal, and historical consciousness. All along, one aspect of Madison's contention perseveres: the gun—its availability to the civilian population,⁴ its use for both public and private ends,⁵ and the violence associated with it⁶—has steadfastly remained uniquely American.⁷

Access to, and use of, firearms has helped define ideas of membership in America. The gun played a vital role in the genesis tales of the Republic itself. It was a bullet fired into a British officer by a militia man in Lexington, Massachusetts on April 19, 1775, that is credited with igniting the war for independence;⁸ it was the gun that helped tame the wilderness and battle American Indians in stories of the expanding nineteenth-century frontier;⁹ and firearms were credited with shoring up the struggle for political and racial equality during Reconstruction after the Civil War.¹⁰ In all of these manifestations—as a tool of resistance to tyranny, an instrument of imperialism, a method of survival and self-protection, and a pathway to political inclusion—the gun facilitated formation of, and inclusion in, the American polity.

Concomitantly, however, the gun has also demarcated the borders of exclusion as well. Despite a thriving firearms trade with Indians,¹¹ several colonial and early state laws reflected discomfort with the idea of arming them, sometimes forbidding

of U.S. Gun Culture, REUTERS (Apr. 17, 2007), <http://www.reuters.com/article/domesticNews/idUSL1752333820070417> (describing the Virginia Tech shooting as the deadliest shooting in the nation's history).

⁴ *Factbox: Guns and Gun Ownership in the United States*, REUTERS (Apr. 17, 2007), <http://www.reuters.com/article/2007/04/17/us-usa-crime-shootings-guns-idUSN1743414020070417> (detailing that an estimated 34% of U.S. citizens own guns and over 200 million guns are in private hands).

⁵ Richard Slotkin, *Equalizers: The Cult of the Colt in American Culture*, in *GUNS, CRIME, AND PUNISHMENT IN AMERICA* 54, 55 (Bernard E. Harcourt ed., 2003) (“The difference between the United States and Europe is that our culture grants a far broader license to private individuals to use violence for private ends.”).

⁶ JAMES B. JACOBS, *CAN GUN CONTROL WORK?* 8, 10–11 (2002) (asserting that “[t]he United States has much more violent crime, with and without firearms, than the other Western democracies,” but also noting that much violent crime is “committed *without any weapon[s]*”); Robert Weisberg, *Values, Violence, and the Second Amendment: American Character, Constitutionalism, and Crime*, 39 *HOUS. L. REV.* 1, 10–11 (2002) (“[A]mong ‘peer’ nations [the United States] is exceptional for having the highest homicide rate [W]e are probably exceptional in terms of the number of guns in private hands.”).

⁷ See, e.g., Richard Hofstadter, *America as a Gun Culture*, 21 *AM. HERITAGE* 4, 84 (Oct. 1970) (“Why is it that in all other modern democratic societies those endangered ask to have such men disarmed, while in the United States alone they insist on arming themselves?”).

⁸ See LEE KENNETT & JAMES LAVERNE ANDERSON, *THE GUN IN AMERICA* 57 (1975).

⁹ Hofstadter, *supra* note 7, at 7, 10, 82.

¹⁰ KENNETT & ANDERSON, *supra* note 8, at 153–55.

¹¹ Angela R. Riley, *Indians and Guns*, 100 *GEO. L.J.* 1675, 1685 (2012) (“Despite European ambivalence about the exchange of firearms with the Native population, the gun trade grew from embryonic to thriving in only a few decades.”).

or limiting such trade.¹² Guns that were sold to Indians were often inferior, ensuring that whites would maintain an advantage over them.¹³ Similarly, possession by slaves and free blacks was heavily regulated.¹⁴ According to federal law, the militia of the several states was to be comprised only of white citizens, and some state constitutions made clear that “negroes, mulattoes, and Indians” were excluded from such participation.¹⁵ In the mid-nineteenth century, a majority of the Supreme Court seemed bemused by the idea that a freed slave could be a citizen of the United States.¹⁶ To consider him such, the *Dred Scott* majority opined, would mean not only that blacks could travel and speak as they wished, but could also own guns.¹⁷ Surely, the Court reasoned, the founding fathers would not have been so unmindful of the safety of white citizens to have permitted such an absurd consequence.¹⁸

Even after the Civil War and the Reconstruction Amendments, Black Codes in several states attempted to strip newly freed slaves from firearm possession, facilitating the ability of state and local militia forces and armed groups to terrorize the

¹² THE PUBLIC RECORDS OF THE COLONY OF CONNECTICUT 139–40 (J. Hammond Trumbull, ed., 1850) (creating a restriction against selling ammunition to Indian tribe members); RECORDS OF THE GOVERNOR AND COMPANY OF THE MASSACHUSETTS BAY IN NEW ENGLAND 392 (Nathaniel B. Shurtleff, ed., 1853) (banning the sale of ammunition or guns to Indian tribe members); Riley, *supra* note 11, at 1686–87 (citing examples of colonial laws intended to tamp down firearms trade with Indian tribes).

¹³ Riley, *supra* note 11, at 1691 (“Such fears [of violence against whites by Indians] were commonly expressed by leaders who realized that guns had important utility in Indian-white relations, but who were ever mindful of the potential tipping point whereby Indians could become too powerful a military force. One ‘compromise’ was to engage in trade of guns with Indians but ensure that the traded weapons were inferior to those owned by whites.”).

¹⁴ CLAYTON E. CRAMER, ARMED AMERICA 26 (2006); KENNETT & ANDERSON, *supra* note 8, at 50 (describing early laws preventing blacks from gun ownership).

¹⁵ KY. CONST. of 1850, art. VII, § 1 (“The militia of this Commonwealth shall consist of all free able-bodied male persons (negroes, mulattoes, and Indians excepted) . . .”); Act of May 8, 1792, ch. 33, § 1, 1 Stat. 271, 271 (1992) (“Be it enacted . . . [t]hat each and every free able-bodied white male citizen of the respective states . . . who is or shall be of the age of eighteen years, and under the age of forty-five years . . . shall severally and respectively be enrolled in the militia . . .”).

¹⁶ *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 421 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

¹⁷ *Id.* at 417 (noting that if Scott were a “citizen” then courts would have to permit him the rights of citizenship: “It would give to persons of the negro race . . . the right to . . . go where they pleased at every hour of the day or night without molestation . . . the full liberty of speech . . . to hold public meetings upon political affairs, and to keep and carry arms wherever they went” (emphasis added)).

¹⁸ *Id.* 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.”).

newly freed population.¹⁹ And, coincident with large-scale immigration and the first comprehensive federal immigration laws, several turn of the century gun statutes excluded noncitizens from gun possession based on notions of foreigners' proclivity towards violence.²⁰ Even in present day, over twenty states and the federal government maintain alienage restrictions in their firearms statutes, differentiating between citizens and noncitizens for certain aspects of firearm purchase and possession.²¹ And, firearms offenses are among the crimes listed under the Immigration and Nationality Act²² that place noncitizens in danger of deportation.²³

Recent Supreme Court cases have exacerbated confusion over the inclusiveness of the Second Amendment. *District of Columbia v. Heller*²⁴ established that the right to bear arms inured to individuals, based in part on the utility of handguns for self-defense.²⁵ Yet, in doing so, the case also potentially narrowed the constitutional meaning of "the people," interpreting the right to bear arms as one held by "Americans," "law-abiding citizens," and "members of the political community."²⁶ *McDonald v. City of Chicago*²⁷ amplified the import of *Heller*'s curious description by ruling that

¹⁹ 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, 1324–27 (1995).

²⁰ See, e.g., *Ex Parte Rameriz*, 226 P. 914, 915, 921 (Cal. 1924) (upholding the constitutionality of a statute that declared "no unnaturalized foreign-born person . . . shall own or have in his possession . . . any . . . firearm capable of being concealed upon the person"), *abrogated by* *People v. Rappard*, 104 Cal. Rptr. 535, 537 (Cal. Ct. App. 1972) (striking down the same statute); KENNETT & ANDERSON, *supra* note 8, at 178 (discussing New York's alien-in-possession law); *Concealed Pistols*, N.Y. TIMES, Jan. 27, 1905, at 6 (arguing for concealed weapons laws in cities "filled with immigrants").

²¹ See Pratheepan Gulasekaram, *Aliens with Guns: Equal Protection, Federal Power, and the Second Amendment*, 92 IOWA L. REV. 891, 894–96 & nn.11–14 (detailing all state gun statutes with some form of alienage distinction).

²² 8 U.S.C. § 1101 (2006).

²³ 8 U.S.C. § 1227(a)(2)(C) (2006) (listing "firearms offenses" as deportable crimes); 8 U.S.C. §§ 1101(a)(43)(C), (E) (2006) (defining "aggravated felonies" that subject immigrants to removal).

²⁴ 128 S. Ct. 2783 (2008).

²⁵ *Id.* at 2818.

²⁶ *Id.* at 2816–21. Although some might view *Heller*'s language in this regard as a colloquial usage intended to refer generally to the polity or a way of describing to whom civil rights inure, I reject this view. *Heller* cites *United States v. Verdugo-Urquidez* for its reference to the "political community," but in the *Verdugo-Urquidez* case, the Court instead used the term "national community" to describe who may claim Fourth Amendment protections. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990). The conscious use of "political community" implies voting and participation rights—i.e., rights associated with citizenship—in a way that "national community" does not. Further, citizenship is a statutorily defined term with a specific meaning, and is used in the Constitution eleven times for specific purposes. For further details, see Pratheepan Gulasekaram, "The People" of the Second Amendment: *Citizenship and the Right to Bear Arms*, 85 N.Y.U. L. REV. 1521, 1534–37 (2010).

²⁷ 130 S. Ct. 3020 (2010).

the Second Amendment was incorporated against states and localities,²⁸ but failing to agree on an interpretative methodology. Justice Thomas's critical fifth vote was based on his belief that the Fourteenth Amendment's Privileges or Immunities Clause is the catalytic mechanism for incorporation.²⁹ By its text, that clause only applies to "citizens of the United States."³⁰ Taking *Heller* and *McDonald* at face value, both holdings would seem to expand gun rights by limiting extreme state regulation, while simultaneously contracting the universe of those who may own guns and claim the Second Amendment's protections.

Post-*Heller/McDonald* cases continue and augment the tension inherent in gun rights and citizenship posited by the Supreme Court. Recently, in *United States v. Portillo-Munoz*,³¹ a case involving the conviction of an undocumented immigrant under the federal alien-in-possession statute,³² the Fifth Circuit ruled, based on *Heller*, that undocumented noncitizens were categorically barred from the Second Amendment's protection.³³ It also surprisingly opined that "the people" of the Second Amendment might be a narrower class of persons than "the people" of the Fourth Amendment.³⁴ The Fifth Circuit's willingness to consider "the people" who have the right to bear arms as a more select group than "the people" who are free from unreasonable searches and seizures highlights the unique undercurrent of gun rights as a symbol of belonging in America.³⁵ The Supreme Court denied certiorari, both allowing the Fifth Circuit's strained reading to stand, and prolonging confusion of the scope of those who may claim the right to bear arms.³⁶

Not surprisingly then, a paradox of inclusion and exclusion lies at the heart of firearms and claims to membership in the American polity. These historical developments, textual quandaries, and doctrinal quirks suggest that something deeper than interpretative disagreement is bubbling beneath the surface in contests over who should and should not have access to guns. Professor Mark Tushnet incisively identified this nascent force when he observed that "[t]he Second Amendment is one of the arenas in which we as Americans try to figure out who we are,"³⁷ and that gun policy disputes have "become deeply enmeshed in the *culture* wars between liberals and conservatives, between people who live in cities and people who live in the

²⁸ *Id.* at 3046.

²⁹ *Id.* at 3058–88 (Thomas, J., concurring).

³⁰ U.S. CONST. amend. XIV, § 1 ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . .").

³¹ 643 F.3d 437 (5th Cir. 2011), *cert. denied*, 132 S. Ct. 1969 (2012).

³² 18 U.S.C. § 922(g)(5)(A) (2006).

³³ *Portillo-Munoz*, 643 F.3d at 440.

³⁴ *Id.* at 440–41 (opining that the Second and Fourth Amendments served different purposes, and therefore "the people" need not be interpreted similarly in each).

³⁵ Gulasekaram, *supra* note 26, at 1577–78.

³⁶ *Portillo-Munoz*, 132 S. Ct. 1969 (2012) (denying writ of certiorari).

³⁷ MARK V. TUSHNET, *OUT OF RANGE* xiv (2007).

country.”³⁸ His intuition is echoed by Professors Dan Kahan and Donald Braman who argue that attitudes and orientations towards gun policy are not about imperfect information or a dearth of accurate statistical work about the dangers or advantages of firearm possession, but are “in truth, disputes among citizens who subscribe to competing norms and to the conflicting cultural visions that those norms construct.”³⁹

This Article uses these observations as a starting point to explore the relationship between gun rights and notions of belonging in the American polity. Discussing group-based gun prohibitions, Professor Tushnet correctly observed that under current law, “it’s actually quite hard to come up with examples of selective prohibitions that might be unconstitutional but that wouldn’t be caught by the Equal Protection Clause.”⁴⁰ Despite its non-obviousness, one such example is the area of alienage and gun possession. Tushnet explained that people are motivated to donate to anti-regulation legislative campaigns by the National Rifle Association (NRA) because those people believe “a cultural struggle over national self-definition—is at stake.”⁴¹ Just as attitudes over gun rights characterize who we are philosophically and culturally, so too, immigration and citizenship are the most basic and literal forms of national composition and self-definition. Thus, while they seem to be disparate topics, citizenship and gun control are culturally, politically, and legally linked.

At the legal intersection of guns and citizenship, current alien gun laws in both federal and state statutory schemes have survived the twentieth century’s expanded constitutional protections for noncitizens. I provided a survey of the various federal and state laws on the issue and an analysis of judicial evaluation of the same in my first paper in the series, *Aliens with Guns: Equal Protection, Federal Power, and the Second Amendment*.⁴² Following that, I provided a closer look at the constitutional interpretation problems posed by *Heller*’s citizenship language in my second paper in the series, “*The People*” of the Second Amendment: *Citizenship and the Right to Bear Arms*.⁴³

Here, in my third exploration at the nexus of guns and citizenship, I reflect on the paradoxical nature of gun rights and membership, focusing on the exclusionary and inclusionary nature of firearms in the American historical, cultural, and legal narrative.

First, this Article will briefly elucidate the nature of the constitutional conflict with regards to citizenship and the right to bear arms. In Part II, it elaborates on the dual nature of firearms vis-à-vis membership, highlighting how guns have helped define who is, and who is not, a member of the American polity.

³⁸ *Id.*

³⁹ Dan M. Kahan & Donald Braman, *More Statistics, Less Persuasion: Cultural Theory of Gun-Risk Perceptions*, 151 U. PA. L. REV. 1291, 1297 (2003).

⁴⁰ TUSHNET, *supra* note 37, at 120.

⁴¹ *Id.* at 77.

⁴² Gulasekaram, *supra* note 21.

⁴³ Gulasekaram, *supra* note 26.

Next, Part III attempts to map group-based exclusions in gun rights onto broader theories explaining Americans' attitudes towards gun control. Specifically, this Article will use Professors Kahan and Braman's "cultural theory of risk" explanation of firearm policy preferences⁴⁴ to show how and where citizenship distinctions in gun rights fit into cultural orientations on gun control.

In Part IV, this Article will show how competing perspectives on the inclusiveness of the Second Amendment lead to the current variation in policies affecting noncitizens and gun rights, arguing that alien gun laws offer uneasy but acceptable compromises for both conservative gun control opponents and liberal gun control proponents. Finally, Part V concludes by considering some broader implications of the idea of guns as a unique marker of American identity.

Fundamentally, the competing constitutional and policy perspectives on gun control generally, and noncitizen possession specifically, draw on deeply held beliefs about constitutional values and historical traditions to stake their claim about the centrality of guns to American identity.⁴⁵ Accordingly, citizenship restrictions in gun laws and the limited reach of "the people" in the Second Amendment are not important because the restrictions are especially weighty or because millions of immigrants are clamoring for equal firearms rights;⁴⁶ indeed, given the ethos of private arms ownership in many immigrant-sending countries,⁴⁷ the issue likely does not have immediate practical salience.⁴⁸ Even now, with greater availability, gun owners are still likely to be white, male, from rural areas, and protestant.⁴⁹

Rather, as with most controversies in the great American gun debate, the restriction and interpretation are important because of the symbolic and legal values they vindicate.⁵⁰ Such emblematic and philosophical debates are an inherent part of Second Amendment controversies; even the gun enthusiasts' major victory in *Heller* appears to have little practical effect on gun laws, with most restrictions upheld despite the case's grand pronouncements.⁵¹ Thus, this Article's inquiry follows in this tradition,

⁴⁴ Kahan & Braman, *supra* note 39, at 1323 (arguing that cultural orientations predict gun views, not facts).

⁴⁵ See Hofstadter, *supra* note 7, at 82–83.

⁴⁶ Gulasekaram, *supra* note 21, at 1578–79.

⁴⁷ See generally Arie Bauer et al., *A Comparison of Firearms—Related Legislation on Four Continents*, 22 *MED. & LAW* 105 (2003).

⁴⁸ And, although *Heller* and *McDonald* appear to allow regulation of all noncitizens, see *McDonald v. City of Chicago*, 130 S. Ct. 3040, 3047 (2010); *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008), most current alienage restrictions in state and federal law are nuanced: while some restrict all noncitizen possession, some only restrict noncitizen concealed carry. See also Gulasekaram, *supra* note 21, at 895 nn. 11–12. Some restrict only particular noncitizens (e.g., temporary or undocumented noncitizens). *Id.* at 895–96.

⁴⁹ See Hofstadter, *supra* note 7, at 7.

⁵⁰ Franklin E. Zimring, *Continuity and Change in the American Gun Debate*, in *GUNS, PUNISHMENT, AND CRIME* 29, 32 (Bernard Harcourt, ed., 2003).

⁵¹ Adam Winkler, *Heller's Catch-22*, 56 *UCLA L. REV.* 1551, 1553 (2009) ("[B]ased on a census of all the post-*Heller* Second Amendment cases to date, it appears that the newfound

elucidating the symbolic importance of citizenship distinctions in gun rights, contemplating how the American polity views itself and outsiders, and discussing the dynamics of intergroup and interpersonal interactions in the American Republican tradition.

I. THE PEOPLE AND SECOND AMENDMENT RIGHTS

Noncitizens are uniquely situated with regards to rights and benefits, including gun rights. Unlike racial groups, constitutional and statutory expansions do not necessarily have to include noncitizens.⁵² The Constitution itself makes citizenship a qualification for elected office and voting in federal elections.⁵³ The federal government can—and routinely does—make distinctions based on citizenship.⁵⁴ In addition to the obvious case of federal immigration law determining admissibility and removability,⁵⁵ federal welfare law distinguishes on the basis of alienage.⁵⁶ Regarding the Bill of Rights, noncitizens suffer consequences for expressive activity that citizens are free to engage in,⁵⁷ and not all noncitizens can invoke the Fourth Amendment’s protection against unreasonable search and seizure.⁵⁸ Further, although sub-federal governments are sometimes limited in their capacity to discriminate on the basis of alienage,⁵⁹ states and localities are permitted to also employ alienage distinctions when it comes to aspects of self-definition, self-government, and political participation like voting, jury service, and state employment that has discretionary authority over citizens.⁶⁰

Put simply, courts have ruled that in many situations, our national, state, and local governments may rationally exclude noncitizens from certain rights, benefits,

individual right has almost no significant effect on gun control; *Heller*’s bark is much worse than its right.”).

⁵² Gulasekaram, *supra* note 21, at 896–97.

⁵³ U.S. CONST. art. I, § 2, cl. 2; U.S. CONST. art. II, § 1, cl. 5; U.S. CONST. amend. XV; U.S. CONST. amend. XIX; U.S. CONST. amend. XXIV; 18 U.S.C. § 611 (2006).

⁵⁴ *See, e.g.*, *Graham v. Richardson*, 403 U.S. 365, 377–78 (1971) (holding that certain state statutes violated the Equal Protection Clause and encroached on federal power to regulate entrance and residence).

⁵⁵ 8 U.S.C. §§ 1182, 1227 (2006).

⁵⁶ 8 U.S.C. § 1624 (2006) (devolving power to the states to make alienage distinctions in welfare provision); *Mathews v. Diaz*, 426 U.S. 67 (1976) (upholding federal alienage distinctions in public benefits).

⁵⁷ 8 U.S.C. § 1182(a)(3)(D) (2006) (stating members of a totalitarian party are inadmissible); 8 U.S.C. § 1424 (2006) (barring naturalization for applicants who have engaged in certain advocacy); *Kleindienst v. Mandel*, 408 U.S. 753 (1972) (upholding the inadmissibility determination of an applicant with communist associations).

⁵⁸ *See, e.g.*, *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990).

⁵⁹ *See, e.g.*, *Richardson*, 403 U.S. 365.

⁶⁰ *See Ambach v. Norwick*, 441 U.S. 68 (1979) (upholding state alienage distinctions for hiring public school teachers); *Foley v. Connelie*, 435 U.S. 291 (1978) (upholding state alienage distinctions for hiring state troopers).

jobs, and programs.⁶¹ Generally the types of exclusions that have passed constitutional muster could be defended on a theory of participation in self-government,⁶² with discrimination condoned when noncitizens present some plausible threat to the well-being of republican political institutions. As I have argued elsewhere,⁶³ citizenship distinctions in gun laws could fit this framework—and therefore be understood like prohibitions in holding elected office, serving on juries, and certain types of political associations—when the Second Amendment is understood as a right related to protection of or from the sovereign. They make less sense when the Second Amendment is interpreted, as it was in *Heller*, as a right of personal self-defense.⁶⁴

Heller, however, does not entirely disregard the romantic mythology of armed citizen vigilance when tyranny is nigh (indeed, it celebrates it).⁶⁵ As such, a citizen-only reading of the Second Amendment maintains a small, but theoretically plausible constitutional basis—at least during times of existential threat to the Republic. The most obvious existential threats to the Nation have come during times of war, terrorism, and conflict, when foreign governments and foreigners endanger American lives, institutions, and social well-being.

This equivocation over potential uses for firearms and the rationale behind the Second Amendment is apparent in a case like *United States v. Portillo-Munoz*, where the Fifth Circuit upheld a conviction against an undocumented immigrant under federal firearms law.⁶⁶ In doing so, that court rejected the defendant-immigrant's contention that *Heller*'s vision of the right to bear arms undermined the constitutionality of the federal alien-in-possession law.⁶⁷ The Fifth Circuit's opinion, which the Supreme Court declined to review,⁶⁸ opined that noncitizens were excluded from "the people" protected by the Second Amendment.⁶⁹ Curiously, the court seemed to indicate that the right to bear arms was different from other Bill of Rights guarantees, suggesting that whatever "the people" meant in the Fourth Amendment, such an interpretation need not apply to the Second Amendment.⁷⁰ The ruling is an example of how the complicated relationship between gun rights and citizenship rights, and concomitant definitions of "the people" in the Constitution, resists simple explanation.

⁶¹ See, e.g., *id.*

⁶² See Gulasekaram, *supra* note 26, at 1570–77.

⁶³ *Id.*

⁶⁴ *Id.* at 1575.

⁶⁵ Darrell A.H. Miller, *Retail Rebellion and the Second Amendment*, 86 IND. L.J. 939, 940 (2011) ("Portions of *Heller* seem giddy with revolutionary fervor: '[W]hen the able-bodied men of a nation are trained in arms and organized, they are better able to resist tyranny. . . .'" (quoting *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008))).

⁶⁶ *United States v. Portillo-Munoz*, 643 F.3d 437, 442 (5th Cir. 2011), *cert. denied*, 132 S. Ct. 1969 (2012).

⁶⁷ *Id.* at 439–40.

⁶⁸ *Portillo-Munoz v. United States*, 132 S. Ct. 1969 (2012) (denying certiorari to petitioner).

⁶⁹ *Portillo-Munoz*, 643 F.3d at 440.

⁷⁰ *Id.* at 440–41.

Portillo-Munoz makes explicit what many may find implicitly or silently disquieting about guns and noncitizens in our constitutional order—that there is just something unsettling about extending gun rights to those who are not full members of the American polity. The Bill of Rights and the personal liberties enshrined by the Constitution are hallowed protections that citizens rightfully may lay claim to.⁷¹ Even in its most restrictive reading, “the people” of the Second, Fourth, Ninth, and Tenth Amendments, the “persons” of the Fourteenth Amendment’s Due Process and Equal Protection provisions, and the “citizens” of the Fourteenth Amendment’s Privileges or Immunities Clause, include at least those who are, by constitutional or statutory mandate, citizens of the United States.⁷²

For noncitizens, however, the extent of constitutional protections is unsettled and much-debated territory,⁷³ especially when those noncitizens are temporary visitors or unlawfully present persons.⁷⁴ Protecting all persons, regardless of citizenship status, clearly increases the cost of governmental action (e.g., by requiring greater process in removal hearings or applying the exclusionary rule for evidence obtained for prosecutions)⁷⁵ or prohibits the government from treating noncitizens in a particular way (e.g., by disallowing the government from forcing hard labor as punishment on those whom it has decided to deport).⁷⁶

But increasing the time, expense, and hassle of government action is different, both in kind and gravity than prohibiting noncitizens from possessing a particular instrument—guns. Guns are a unique tool of both defense and offense, with a singular ability to allow an individual to coerce another.⁷⁷ Perhaps more importantly, they facilitate the ability of an organized few to impose their will on a larger populace.⁷⁸ While any person may want and require a powerful tool of self-defense, perhaps only those we consider true members of the polity—Americans—should be able to possess firearms because of the potential to use them to protect against foreign invasions and tyrannical uses of government. *Portillo-Munoz*, and a line of prior cases, raises the concerns implicit in reading “the people” broader than “citizens” at least

⁷¹ *District of Columbia v. Heller*, 128 S. Ct. 2783, 2790–91 (2008).

⁷² *See* U.S. CONST. amend. XIV, § 1; *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265, 269 (1990).

⁷³ Gulasekaram, *supra* note 21, at 896.

⁷⁴ *See, e.g., Portillo-Munoz*, 643 F.3d at 440–41.

⁷⁵ *Cf. Verdugo-Urquidez*, 494 U.S. 259 (rejecting a noncitizen’s claim that a search of his property located in a foreign country was unconstitutional); *Mezei v. Shaughnessy*, 345 U.S. 206, 212 (1953) (declining to apply constitutional due process in an inadmissibility decision, stating that “[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned” (quoting *Knauff v. Shaughnessy*, 338 U.S. 537, 544 (1950))).

⁷⁶ *Wong Wing v. United States*, 163 U.S. 228 (1896) (holding that forcing deportable noncitizens into hard labor prior to deportation violated the Fifth and Sixth Amendments).

⁷⁷ *See McDonald v. City of Chicago*, 130 S. Ct. 3020, 3108 (2010) (Stevens, J., dissenting).

⁷⁸ *See id.* at 3039 (majority opinion).

with regards to this singular, exceptional feature of American society—private gun possession.⁷⁹

Heller, *McDonald*, and *Portillo-Munoz* explicitly tie gun rights to citizenship through their interpretation of “the people,” thus potentially excluding noncitizens from at least one part of the Constitution’s largesse. The idea that the Constitution only protects citizens’ gun rights speaks to the uniqueness of firearms in the American historical and cultural narrative. All Americans and immigrants within America, whether they own a gun or do not (or want to or do not want to), likely view the gun as a symbol of American identity. Whether it should be, however, is a matter of entrenched and divisive debate.⁸⁰

II. A PARADOX OF INCLUSION AND EXCLUSION

The relationship between firearms and American identity is complex because access to, and use of, guns has functioned as both a liberating and democratizing force, on the one hand, and as a tool of coercion and oppression, on the other. Even though other nations boast private ownership percentages higher than the United States,⁸¹ there is still something distinct about the ethic and uses of private gun ownership here.⁸² First, our Constitution expressly addresses arms-bearing, and protects some form of it alongside our other Bill of Rights freedoms.⁸³ Second, the amount of privately held guns in America dwarfs other countries.⁸⁴ Finally, and perhaps most importantly, the gun has become a part of our national mythology, weaving its way into creation stories and the conquests that defined and continue to define America.⁸⁵

The inclusionary story starts with Madison’s assertion that guns were the “advantage” that distinguished Americans.⁸⁶ And, as Professor Angela Riley insightfully suggests, one conception of the relationship between Indians and guns is progressive integration into the American polity, with Indians strengthening their claims to gun rights concomitantly with their claims of citizenship.⁸⁷ During the Reconstruction period, it was the freedmen’s claim to equal recognition that laid the foundation for an individualized, self-defense reading of the Second Amendment.⁸⁸

⁷⁹ *Portillo-Munoz*, 643 F.3d at 440–41.

⁸⁰ See, e.g., Hofstadter, *supra* note 7, at 4.

⁸¹ See *Small Arms Survey 2007: Guns and the City*, SMALL ARMS SURVEY (2007), available at <http://www.smallarmssurvey.org/publications/by-type/yearbook.html>.

⁸² Slotkin, *supra* note 5, at 55–56.

⁸³ U.S. CONST. amend. II.

⁸⁴ See Bauer et al., *supra* note 47.

⁸⁵ David C. Williams, *The Militia Movement and Second Amendment Revolution: Con-juring with the People*, 81 CORNELL L. REV. 879, 886–90 (1996).

⁸⁶ Gulasekaram, *supra* note 26, at 1547–48 (citing THE FEDERALIST NO. 46, at 238 (James Madison) (Lawrence Goldman ed., 2008)).

⁸⁷ Riley, *supra* note 11, at 1682.

⁸⁸ Miller, *supra* note 65, at 965.

During the civil rights movement of the 1960s, the Black Panther Party used ostentatious displays of their firepower to demand inclusion and equality.⁸⁹

But this same instrument that signified inclusion, also operated as a dividing line, excluding other groups who were not considered full members of the American polity. During the revolutionary and founding period, in some states, those who would not swear loyalty oaths to the newly emerging nation were not permitted to possess guns.⁹⁰ In addition, gun laws were used to help maintain the political and social hierarchy that kept outgroups from accessing the rights and processes afforded to white male citizens. The coercive power of the gun and its ability to facilitate rule over many by a few, allowed slave-owners to maintain control over slave populations.⁹¹ During the Reconstruction, organized groups of former confederates, pro-slavery advocates, and racists used firearms to enforce Black Codes and reinstate the antebellum racial hierarchy.⁹² As immigrants began entering the United States in large waves, states enacted explicit and implicit regulations on alien possession and the types of arms that were easily found in immigrant-heavy urban centers.⁹³ And, some critics have complained that federal gun control laws are disproportionately aimed at minority populations.⁹⁴

These themes of inclusion and exclusion are poignantly manifest in Malcolm X's famous "The Ballot or the Bullet" speech in 1964 at a gathering of mostly African Americans in Cleveland, Ohio.⁹⁵ In his remarks he first identified himself as an outsider to the American polity, proffering that, despite being a citizen, he did not

⁸⁹ Adam Winkler, *The Secret History of Guns*, THE ATLANTIC, Sept. 2011, <http://www.theatlantic.com/magazine/print/2011/09/the-secret-history-of-guns/308608/> ("Guns became central to the Panthers' identity, as they taught their early recruits that 'the gun is the only thing that will free us—gain us our liberation.'").

⁹⁰ Cornell & DeDino, *supra* note 2, at 506–07; Saul Cornell, *Commonplace or Anachronism: The Standard Model, the Second Amendment, and the Problem of History in Contemporary Constitutional Theory*, 16 CONST. COMMENT. 221, 228–29 (1999).

⁹¹ Carl T. Bogus, *Race, Riots, and Guns*, 66 S. CAL. L. REV. 1365, 1374 (1993); Robert H. Churchill, *Gun Regulation, the Police Power, and the Right to Keep Arms in Early America: The Legal Context of the Second Amendment*, 25 L. & HIST. REV. 139, 148 (2007).

⁹² Cottrol & Diamond, *supra* note 19, at 1324–27; Winkler, *supra* note 89 ("After losing the Civil War, Southern states quickly adopted the Black Codes . . . One common provision barred blacks from possessing firearms. To enforce the gun ban, white men riding in posses began terrorizing black communities.").

⁹³ KENNETT & ANDERSON, *supra* note 8, at 167 ("Added to this rising concern was a disturbing and alien element. The public had always been sensitive to the dangers of armed minorities such as blacks and Indians, but this concern took on new dimensions as cities filled with unassimilated masses of immigrants . . ."); Gulasekaram, *supra* note 26, at 1547–48; *Concealed Pistols*, *supra* note 20, at 6.

⁹⁴ Winkler, *supra* note 89 ("Because these inexpensive pistols were popular in minority communities, one critic said the new federal gun legislation 'was passed not to control guns but to control blacks.'"); *see also* Bogus, *supra* note 91, at 1366.

⁹⁵ MALCOLM X SPEAKS 23 (George Breitman ed., 1965).

consider himself an American.⁹⁶ Purportedly speaking as an outsider, his speech urged his listeners to force political elites and government authorities to recognize their rights by either voting en masse as a block or taking up arms—in his words, Blacks would either have to cast “a ballot or a bullet.”⁹⁷ And, if governmental authorities did not protect their lives and property, Malcolm X exhorted his listeners to use their Second Amendment rights to secure those protections for themselves.⁹⁸ If the government wants to avoid twenty-two million black people with guns, it should “do its job,” he warned.⁹⁹

His speech exemplifies the paradoxes and aspirations represented by the gun in America through present day. Without a real voice in the political process, those who are traditionally excluded from power structures and wealth distributions are not truly American, sometimes even when they are citizens. Governmental and private forces have at times used force to intimidate outgroups and maintain their exclusion from the political process. But, arms-bearing—a right preserved in the Constitution and arguably only available to those included in “the people”—can also be used by outsiders to seek recognition of civil and political rights. The equating of voting with gun rights highlights the democratizing potential of both, and the ability of either to force inclusion and recognition in the American political and cultural consciousness.¹⁰⁰

Malcolm X’s resort, despite his claim to not feel American, to a distinctly American right, as a method of forcing recognition and inclusion comports with the mythical uses of the gun in American history. But, his outsiders’ invocation of this well-worn trope features a twist on the classic American tale: generally those who are presumed to possess the right to check tyrannous governmental authority are limited to the true heirs of the founding generation, inheriting their mantle as the collective “the people” authorized to maintain sovereignty in the polity,¹⁰¹ Malcolm X’s speech, however, calls upon those originally excluded from the Constitution to use firearms to vindicate their membership status against majoritarian preferences.

⁹⁶ *Id.* at 25.

⁹⁷ *Id.* at 30.

⁹⁸ *See id.* (although not explicitly referencing the Second Amendment).

⁹⁹ *Id.* at 36, 43.

¹⁰⁰ Notably, even voting—perhaps the right most tightly associated with citizenship—was not limited to citizens in several states until the early to mid-twentieth century (with the caveat that noncitizens who were allowed to vote were typically white/European noncitizens). *See* Leon E. Aylsworth, *The Passing of Alien Suffrage*, 25 AM. POL. SCI. REV. 114, 114 (1931); Jamin B. Raskin, *Legal Aliens, Local Citizens: The Historical, Constitutional, and Theoretical Meanings of Alien Suffrage*, 141 U. PA. L. REV. 1391, 1416–17 (1993).

¹⁰¹ *See* Williams, *supra* note 85, at 908 (“Thus, when the Framers discussed revolution, they imagined the People acting as a body, an organic entity with a single will.”). Williams argues “it is time to accept [that armed resistance in present-day America would be a civil war]; it is time to stop conjuring with the idea of an organic American people, because that idea leads us in the direction of the militia’s thinking—to the creation of an alien Other against whom we could all be united.” *Id.* at 885.

Finally, the speech suggests the possibility that participation in deliberative self-government may obviate the need for private firearm possession. The condition he imposes on his call to armament—the government’s failure to do its job¹⁰²—highlights a fundamental divide in attitudes towards gun control. While some believe that the existence of governmental authority, like police forces, the National Guard, the U.S. Military, and an independent judiciary obviate the need for personal armament,¹⁰³ others are both fearful of the governmental monopoly on deadly force and the inability of those armed authorities to eliminate the need for all personal defense.¹⁰⁴

Ultimately, his thoughts represent the difficulties inherent at the nexus of guns and membership in the national community. Malcolm X positions himself as an outsider to the polity (i.e., not one of “the people”), but an outsider whose call to armed resistance is, at its core, a product of the Constitution and our national ethos. He never resolves this apparent contradiction, but perhaps that is not surprising. Fifty years later, firearms remain at the center of American mythology and constitutional contestation, helping to keep noncitizens at the literal and metaphorical borders of membership and participation in the American polity.

III. CITIZENSHIP AND THE GUN CONTROL DEBATE

In addition to constitutional conflicts highlighted in Part I and the paradox of inclusion and exclusion discussed in Part II, questions of membership and identity tie into the broader public debates over gun control as well. Part III will connect concerns over noncitizen possession to the larger firearms debate over regulation versus deregulation.¹⁰⁵ This section proffers that the central debate over gun control, grounded in crime data, forensic evidence, and policy prescriptions, is intimately connected to a more cosmic one about the essential aspects of American identity, and worldviews regarding coexistence in our pluralistic republican society.

A. Cultural Theory of Risk & Alien Gun Laws

The two polestars of general gun debate are, crudely labeled, a gun advocates view and a gun control view. Each perspective lays claim to the rich mixture of folklore and fact that undergird the constitutional right to bear arms. These perspectives roughly correspond to political party affiliation, with conservatives and libertarians (and hence, Republicans) generally favoring deregulation, and liberals and

¹⁰² MALCOLM X SPEAKS, *supra* note 95, at 43.

¹⁰³ See Miller, *supra* note 65, at 941–42 (discussing when the need for personal armament arises as it pertains to governmental authority).

¹⁰⁴ *Id.* at 942.

¹⁰⁵ See, e.g., JOHN R. LOTT, JR., MORE GUNS, LESS CRIME 24 (2000); Mark Duggan, *More Guns, More Crime*, 109 J. POL. ECON. 1086 (2001). With regards to Lott’s study, see also Ian Ayres & John J. Donohue III, *Shooting Down the “More Guns Less Crime” Hypothesis*, 55 STAN. L. REV. 1193 (2003).

progressives (and hence, Democrats) generally favoring regulation.¹⁰⁶ Both sides of the debate have attempted to win the policy battle by offering mountains of data on either the evils or the benefits of gun ownership.¹⁰⁷ But, as Professors Kahan and Braman prove, views on gun regulation are rarely changed by econometric data.¹⁰⁸ Instead, they show that attitudes towards gun possession and regulation are not about imperfect information, or even merely based on party affiliation,¹⁰⁹ but rather a disagreement over the social meaning of firearms.¹¹⁰ Those social meanings, in turn, are influenced by individuals' default cultural perspective on what constitutes a good society; differently oriented individuals have differing assessments of what risks are morally and socially acceptable. The intractability of these positions is why, after several decades, the polity has not achieved, and likely may never achieve, agreement on gun control.¹¹¹

In their taxonomy towards a theory of cultural attitudes towards firearms, Kahan and Braman posit that individuals' attitudes towards guns are most heavily influenced by whether their ingrained cultural orientations are (a) hierarchical, (b) egalitarian, or (c) individualistic.¹¹² Those who hold hierarchical views (and privilege traditional forms of social and political authority) are significantly more likely to oppose gun control than those who hold egalitarian views (and abhor stratification and prefer collective action).¹¹³ Similarly, those who hold individualistic views (and favor autonomy and private ordering) are significantly more likely to oppose gun control than those who believe in solving societal problems as a collective whole.¹¹⁴

Kahan and Braman argue that attitudes towards gun regulation solidify and become deeply held because policy preferences are tied to these cultural orientations, each of which is attuned to value risks in different ways. To accept the other's position on gun regulation would be to accept a morally and socially inferior worldview. Whereas an individualistic person might believe it a cowardly concession to disarm in the face of a violent society, those who hold a more egalitarian view might believe that private armament sends unacceptable messages about our "collective indifference" to each other and the mistrust we have of our compatriots.¹¹⁵

¹⁰⁶ See Zimring, *supra* note 50, at 31.

¹⁰⁷ Kahan & Braman, *supra* note 39, at 1292.

¹⁰⁸ *Id.* at 1324.

¹⁰⁹ *Id.* at 1307 (arguing that cultural orientation matters have more explanatory weight than partisan affiliation with respect to gun control preferences).

¹¹⁰ *Id.* at 1297 ("Thus, even when framed in narrowly factual terms, public disagreements over risks are, in truth, disputes among citizens who subscribe to competing norms and to the conflicting cultural visions that those norms construct.").

¹¹¹ *Id.* at 1292 ("Yet we are no closer to achieving consensus on the major issues today than we were ten, thirty, or even eighty years ago.").

¹¹² *Id.* at 1297.

¹¹³ *Id.* at 1297–98, 1306–07.

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 1317–18.

Parts III.B and C that follow attempt to map some of these empirical observations onto the terrain of immigrants and gun rights. On the specific question of alienage restrictions, those with hierarchical and individualistic cultural perspectives likely base their desire for personal armament on the belief that American society is constantly under threat of conflict.¹¹⁶ One of the specific manifestations of that conflict is persistent antagonism between races and between current members of the political community and foreigners.¹¹⁷ In addition, the individualistic gun control opponent might also believe in the perpetual danger of government tyranny against the sovereign peoples. As Kahan and Braman note, those who hold hierarchical and individualist cultural orientations—i.e., those most highly associated with opposing gun control—fear social deviance and the *risk of foreign invasion*.¹¹⁸ On this view, members of the polity should recognize that the threat of violent struggle is inherent in the American Republic. Therefore, everyone should remain armed to ensure the survival of both themselves and the Republic.

In contrast, the egalitarian-solidaristic gun control proponent might see the proliferation of governmental institutions and the gradual inclusion of outgroups as evidence of an evolving society that need not fear tyranny or uncontrolled interpersonal violence. For these individuals, the real or theoretical costs associated with deregulation are either trivial or acceptable in relation to the value of putative benefits. Even assuming, for argument's sake, that certain crime might persist or rise without private gun ownership, it would be an acceptable cost for a gun-free society.¹¹⁹

B. Gun Deregulation and Noncitizens in the American Polity

Based on the research that hierarchically and individualistically oriented individuals favor deregulation of firearms, this section offers some potential links between these groups' views towards gun regulation and citizenship prohibitions. Fundamentally, what might motivate those who believe in general deregulation is a nascent concern for the intractability of intergroup and interpersonal violent conflict, and the necessity of private armament to guard against those risks. This concern inherently implicates citizenship and ideas of membership because violence and threat of violence in America have often been influenced and galvanized by racial tension and fear of foreign elements.

¹¹⁶ *Id.* at 1298 (“Hierarchists and individualists have their own distinctive anxieties—of the dangers of social deviance, the risks of foreign invasion, or the fragility of economic institutions—which egalitarians predictably dismiss.”).

¹¹⁷ *Id.* at 1292.

¹¹⁸ *Id.* at 1298.

¹¹⁹ *Id.* at 1315–16 (“Control supporters, for example, argue that arming private citizens to deter crime would endorse a vision of ‘society based on an internal . . . balance of terror’—‘a jungle where each relies on himself for survival.’ ‘[A] world with slightly higher crime levels,’ they assert, is a price worth paying to avoid a world ‘in which we routinely wave guns at each other.’” (footnotes omitted)).

The anti-control view—pithily captured in the NRA bumper sticker slogans “Guns don’t kill people, people kill people” and “If you outlaw guns, only outlaws will have them”¹²⁰—focuses on the nature of people, not the instrumentality. On this view, no one should be disarmed because violent tendencies and entropy towards societal breakdown are inherent in people, not in the tools they might use. If anyone at all is to be disarmed, however, it would be identifiable groups and persons more prone to pose a danger and threat to the greater majority of persons and who can be reasonably excluded from “the people” protected by the Constitution. Indeed, *Heller*, while recognizing an individual’s right to bear arms as a mode of self-defense, does exactly that, excluding felons, the mentally ill, and noncitizens from the Second Amendment.¹²¹

More importantly, in this view, disarmament is a moral problem: it is cowardly to disarm private citizens and rely on public authority to maintain public safety.¹²² People with violent and dangerous proclivities—either towards good order or towards fellow people—are a fixed part of a pluralist society, and private individuals are appropriately armed to provide self-help to counter those threats when needed. This trope of mistrust underlying the anti-control perspective—mistrust of authority, mistrust of certain individuals—connects with the proclivities of both hierarchists and individualists.¹²³ Those with hierarchical views may worry about threats to traditional power structures and instability in political and cultural institutions created by emerging or nontraditionally powerful groups. Individualists may worry about the threats to personal well-being that cannot be addressed by public ordering alone. Those threats would presumably increase as immigrants—people with whom the citizens have not had a long history of contact and trust—enter the polity.

The beauty of the American Republican scheme, from the hierarchical and individualist deregulation perspective, is that it allows rivalrous groups and persons to coexist, albeit uneasily, as everyone stands on armed guard against potential threats from without as well as from within. This view also allows for, although does not require, defining “the people” of the Second Amendment so as to identify true Americans, i.e., those eligible to engage in the potential right of rebellion against tyranny or existential threat,¹²⁴ and armed self-defense.¹²⁵ The doomsday scenarios justifying widespread personal armament would seem to stem from a belief that human frailty—and not the instrumentalities of violence—are the cause of tragedy. The vicious cycle inherent in this outlook, however, is that the frailty of some persons requires others to remain on constant armed vigil.

Perhaps, part of the fear motivating the gun control opponents is the idea that interpersonal crime and intergroup hostility are stepping stones towards the Hobbesian

¹²⁰ See DENNIS A. HENIGAN, *LETHAL LOGIC* 13, 37 (2009).

¹²¹ *District of Columbia v. Heller*, 128 S. Ct. 2783, 2816–17 (2008).

¹²² Kahan & Braman, *supra* note 39, at 1318.

¹²³ *Id.* at 1297–98.

¹²⁴ See generally Williams, *supra* note 85.

¹²⁵ See *Heller*, 128 S. Ct. at 2783, 2822.

nightmare of an anarchical or disordered society.¹²⁶ In his defining work, *Leviathan*, Thomas Hobbes argued that in the absence of a strong central government mankind was destined for *bellum omnium contra omnes*—the “war of all against all.”¹²⁷ Further, he described man in his state of nature as brutish, willing to kill for material and reputational gain.¹²⁸ Hobbes’s solution to these shortcomings was a public authority that would control for human deficiencies.¹²⁹

The U. S. Constitution creates a central authority, but one whose strength and capabilities are even now the subject of normative and legal contestation.¹³⁰ The inclusion of the Second Amendment, at the time of ratification, reflects unease with this centralized structure.¹³¹ The Second Amendment allows gun owners to conceptualize themselves as meta-enforcers of constitutional norms, by disciplining those who discipline the polity;¹³² meanwhile it provides a mode of self-defense and self-help should the governmental structure collapse and Americans return to a state of nature. Thus, an underlying strand of republican society, in this view, has always been a readiness to confront a Hobbesian armed free-for-all.¹³³

The possibility of mutual distrust and violence predicted by Hobbes, finds a doppelganger in Madison’s theories of the republican political process itself. In his oft-quoted Federalist No. 10, Madison posits that factions—groups with allied interests against other groups—will emerge with potentially violent disagreements between each other.¹³⁴ Their existence is an unalterable truth underlying his theory of the American constitutional order:

The latent causes of faction are thus sown in the nature of man
A zeal for different opinions concerning religion, concerning Government and many other points . . . have in turn divided mankind into parties, inflamed them with mutual animosity, and rendered them much more disposed to vex and oppress each other, than to

¹²⁶ THOMAS HOBBS, *LEVIATHAN* 103 (E.P. Dutton & Co. 1950) (1651).

¹²⁷ *Id.* at 103; THOMAS HOBBS, *DE CIVE* 13 (Sterling P. Lamprecht ed., Apple-Century-Crofts, Inc. 1949) (1642).

¹²⁸ HOBBS, *supra* note 126, at 104.

¹²⁹ *Id.* at 3.

¹³⁰ *See, e.g.*, *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012) (where the Court’s majority and dissents disputed the recent Health Care Act regarding the extent of federal power and its proper scope).

¹³¹ Williams, *supra* note 85, at 888 (“Indeed, modern theorists of the Second Amendment would probably agree on only one point: fear of the central government largely inspired the Amendment.”).

¹³² *See* Williams, *supra* note 85, at 892; Bob Herbert, *A Threat We Can’t Ignore*, N.Y. TIMES, June 20, 2009, at A19 (quoting Wayne LaPierre, Executive Vice President of the NRA, as stating “Our founding fathers understood that the guys with the guns make the rules”).

¹³³ Weisberg, *supra* note 6, at 15.

¹³⁴ THE FEDERALIST NO. 10, at 40 (James Madison) (Clinton Rossiter ed., 2003).

cooperate for their common good. *So strong is this propensity of mankind to fall into mutual animosities, that where no substantial occasion presents itself, the most frivolous and fanciful distinctions have been sufficient to kindle their unfriendly passions, and excite their most violent conflicts.*¹³⁵

Madison's description correlates perfectly with the persistence of actual or imagined intergroup hostility that has fueled firearms regulation from the founding through the present. As Kahan and Braman note, "Pitting women against men, blacks against whites, suburban against rural, Northeast against South and West, Protestants against Catholics and Jews, the gun question reinforces the most volatile sources of factionalization in our political life."¹³⁶

Implicitly, this stance belies a particular view of violence in the American state—a violence that is interwoven into the fabric of the nation.¹³⁷ American violence has many causes, but possibly stems in part from the violent birth of the nation in war, and its violent rebirth in the Civil War and its aftermath.¹³⁸ In these instances, the groups of greatest concern to political majorities have been racial minorities and noncitizen foreigners (who, in many instances, are racially distinct from the majority of the American polity).¹³⁹

Indeed, the creation mythology of the republic centers around the image of a gun-toting militia man, fulfilling his civic obligation to his nation by bearing arms against English loyalists and the English army.¹⁴⁰

The British, however, were amongst the first group of noncitizens against whom the firearm was used or necessary. Since that time, American history is replete with examples of intergroup hostility as the basis for arms-bearing.¹⁴¹ In between and after those examples of nation-birthing conflict, guns were used to help expand and win the

¹³⁵ *Id.* at 41–42 (emphasis added).

¹³⁶ Kahan & Braman, *supra* note 39, at 1292.

¹³⁷ *Cf.* JACOBS, *supra* note 6, at 214 ("Violence is a multifaceted and deeply entrenched phenomenon in American society. Violence implicates our history, including slavery and the near genocide of Native Americans, our economic system, including the widening gap between the wealthy and the poor; our social organization, including a multiplicity of ethnic, racial, and religious groups; our culture, including extreme emphasis on individual achievement and material success; our family values, including extremely high rates of teenage pregnancy and families without fathers; our patterns of drug use, including a tremendous amount of alcohol and drug abuse and a close relationship between alcohol, drugs, and violence; our mental health, including high levels of anxiety, stress, depression, and serious pathology; and our criminal justice system, especially penal institutions that breed and amplify violence.")

¹³⁸ Miller, *supra* note 65, at 968.

¹³⁹ Gulasekaram, *supra* note 26, at 1543; Riley, *supra* note 11, at 1650.

¹⁴⁰ Williams, *supra* note 85, at 886–89.

¹⁴¹ Gulasekaram, *supra* note 26, at 1543.

frontier from Indians,¹⁴² maintain a strict racial hierarchy despite the end of slavery,¹⁴³ promote and stabilize a rapidly industrializing nation with changing urban demographics,¹⁴⁴ and, in present day, guard the border of the country.¹⁴⁵ Indeed, the first mass-produced and widely popular handgun, the Samuel Colt pistol, was advertised by playing upon themes of interethnic aggression.¹⁴⁶ Although strong evidence indicates that Colt invented his pistol on a merchant ship on a voyage to Asia,¹⁴⁷ his advertising gambit stated that the idea was born of a slave insurrection, and the white planters' need to be armed with multiple shots against non-white rebels.¹⁴⁸ And, as Adam Winkler recently elaborated, the Black Panthers' ostentatious display of firearms at the California state capital prompted significant regulatory backlash.¹⁴⁹

So too, fears of immigrant violence are not surprising either.¹⁵⁰ Several state alien gun laws at the turn of the twentieth century were directed specifically at the danger of violence to persons and the sovereign created by the increased numbers of immigrants in urban centers.¹⁵¹ The mid-twentieth century disputes over the contents of the Hawaii Constitution specifically concerned fears of intergroup violence, as delegates argued over the danger to the citizen population created by allowing noncitizens to possess firearms.¹⁵² Even in our current era, many states and localities

¹⁴² Riley, *supra* note 11, at 1681–82.

¹⁴³ Gulasekaram, *supra* note 26, at 1548.

¹⁴⁴ *Id.* at 1557–60.

¹⁴⁵ *Id.* at 1525 & n.24.

¹⁴⁶ Slotkin, *supra* note 5, at 59–60.

¹⁴⁷ *Id.* at 59.

¹⁴⁸ *See id.* at 59–60.

¹⁴⁹ Winkler, *supra* note 89.

¹⁵⁰ Weisberg, *supra* note 6, at 18; *see also* Rubén G. Rumbaut & Walter A. Ewing, *The Myth of Immigrant Criminality*, Immigration Policy Center, AM. IMMIGR. L. FOUND., May 23, 2007, available at http://borderbattles.ssrc.org/Rumbault_Ewing.

¹⁵¹ KENNETT & ANDERSON, *supra* note 8, at 167–78; Gulasekaram, *supra* note 26, at 1557–60; Leti Volpp, *Obnoxious to Their Very Nature: Asian Americans and Constitutional Citizenship*, in 5 CITIZENSHIP STUD. 57, 63–66 (2001) (discussing the political effects of increased immigration).

¹⁵² *See* State v. Mendoza, 920 P.2d 357, 366–67 (Haw. 1996) (quoting Committee of the Whole Rep. No. 5, in II PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF HAWAII OF 1950, at 10–15 (1961)). The Convention produced the following colloquy:

BRYAN: . . . I think the reason that this [protection of citizen gun possession] is in here is because we don't want to see the legislature pass a law absolutely prohibiting the use or the ownership of firearms by the citizens. You'll find in history that it is the illegally armed minority that actually we're faced with as far as the trouble is concerned. The legally armed majority are the ones that should have the right to protect themselves and I believe that this provision gives it to them.

. . . .
FUKUSHIMA: If we did not have such a section in, the legislature can very well go ahead and discriminate non-citizens from citizens. This

have reacted with legislation intended to preserve the culture of their current demographic majorities against perceived threats by the newcomers.¹⁵³ Since 2001, violent hate crimes against immigrants of South Asian and Middle Eastern descent have steadily increased.¹⁵⁴ As Professor Muneer Ahmad notes, courts have at times treated such crimes committed by white American citizens as “crime[s] of passion,” excusing the conduct of those citizens.¹⁵⁵ A spike in gun sales followed both 9/11¹⁵⁶ and President Obama’s assumption of front-runner status in the 2008 election;¹⁵⁷ and, in both instances, coincided with the rise in hate groups and crimes.¹⁵⁸ Since it was unlikely that those firearms would be used in a foreign theater of battle, it appears that the guns were purchased for protection from domestic threats from noncitizens and others perceived as threats to the American citizenry.

Such incidences illustrate the persistence of the fear of both racialized and foreign threats that have plagued the Republic from its inception to present day. The notion that citizens may be under attack by noncitizens, especially when those noncitizens are racially distinct from the majority of American citizenry, is so insinuated into popular discourse that it finds voice in legal doctrine, political debate, and legislation.

In the Federalist Papers, Madison’s response to the inevitability of potentially dangerous factions was to “extend the sphere” of participation so that the deleterious

has been attempted many and many a time. In fact, in the last session of the legislature such a bill was introduced and after it was called to their attention that perhaps it may be unconstitutional, by the attorney general’s office, then the bill was amended to include all persons. I feel that all aliens, all persons, regardless of whether they’re citizens or aliens, should be entitled to bear arms if it is under a reasonable restriction and [if] it’s used for sportsmanship.

Id.

¹⁵³ *Id.*; Pratheepan Gulasekaram, *Sub-National Immigration Regulation and the Pursuit of Cultural Cohesion*, 77 U. CIN. L. REV. 1441, 1444 (2009).

¹⁵⁴ Susan M. Akram & Kevin R. Johnson, *Race, Civil Rights, and Immigration Law After September 11, 2001: The Targeting of Arabs and Muslims*, 58 N.Y.U. ANN. SURV. AM. L. 295, 340 (2002); Leti Volpp, *The Citizen and the Terrorist*, 49 UCLA L. REV. 1575, 1580–82 (2002).

¹⁵⁵ Muneer I. Ahmad, *A Rage Shared by Law: Post–September 11 Racial Violence as Crimes of Passion*, 92 CALIF. L. REV. 1259, 1265–67 (2004). Similarly, in 1992, a Japanese foreign exchange student was shot and killed by a white citizen in Louisiana. Although the student was unarmed and searching for a Halloween party, the jury acquitted the citizen of murder upon testimony that he felt endangered by the Japanese student. See Susan Michelle Gerling, *Louisiana’s New “Kill the Carjacker” Statute: Self-Defense or Instant Injustice?*, 55 WASH. U. J. URBAN & CONTEMP. L. 109, 110 & n.8 (1999) (discussing Louisiana’s self-defense statute).

¹⁵⁶ *Gun Sales Jump After September 11*, CATO INST. (Nov. 6, 2001), <http://www.cato.org/dispatch/11-06-01d.html>.

¹⁵⁷ HENIGAN, *supra* note 120, at 3.

¹⁵⁸ Ahmad, *supra* note 155, at 1261–62 (discussing post–9/11 increase in crime).

effects of factions would be minimized.¹⁵⁹ The hierarchical and individualist perspective (that calls for deregulation of firearms to counteract inherent human frailty) understands firearms as Madison understood the political sphere. Just as “[a]mbition must be made to counteract ambition,”¹⁶⁰ greater disbursement of firearms is important for citizen vigilance against violent factionalization.

Adopting this philosophy, at times even traditionally disfavored or disenfranchised groups clamor for greater firearm ownership to counteract the potential for oppression from majority groups.¹⁶¹ Here again, the claims of groups such as religious and racial minorities, as well as women and gay persons,¹⁶² are based in an understanding of group qua group antipathy that can most effectively be contained by an arms race designed to deter through mutually destructive firepower.¹⁶³ While progressive in their call for democratized gun rights, these outgroup claims adopt the hierarchical and individualistic perspective on the significance and utility of personal armament as a solution to factionalization and interactions in a pluralist society.¹⁶⁴

C. Gun Regulation and Noncitizens in the American Polity

Returning to Kahan and Braman’s typology, those with an egalitarian and solidaristic orientation prefer gun control.¹⁶⁵ This policy preference stems from a cultural orientation grounded in a belief that nonviolent collective action can and should equalize differences in power, wealth, and status. But it is a worldview that also requires significant trust in compatriots to participate in the project of collective solutions to problems like public safety.¹⁶⁶ As such, the prevalence of privately owned firearms signals an unacceptable level of mistrust between persons who are bound together in self-governance.¹⁶⁷ For egalitarian gun control proponents, policies should

¹⁵⁹ THE FEDERALIST NO. 10, at 78 (James Madison) (Clinton Rossiter ed., 2003).

¹⁶⁰ See THE FEDERALIST NO. 51, at 251–52 (James Madison) (Clinton Rossiter ed., 2003) (discussing separation of powers and how the different branches will check each other’s drive for power).

¹⁶¹ DAVID C. WILLIAMS, MYTHIC MEANINGS OF THE SECOND AMENDMENT 220–57 (2003) (discussing “Outgroups and the Second Amendment”); Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Towards an Afro-Americanist Reconstruction*, 80 GEO. L.J. 309, 359–61 (1991); Winkler, *supra* note 89; see also *infra* Part II.

¹⁶² WILLIAMS, *supra* note 161, at 220–57; Cottrol & Diamond, *supra* note 161, at 359–61; Alisa Solomon, *Fired Up: Should Gays Carry Guns?*, VILLAGE VOICE, Nov. 27, 1990, at 43; Winkler, *supra* note 89; see also Note, *Why Annie Can’t Get Her Gun: A Feminist Perspective on the Second Amendment*, 1996 U. ILL. L. REV. 467 (arguing that firearms regulations have a disparate impact on women, given threats to their safety posed by gendered violence).

¹⁶³ WILLIAMS, *supra* note 161, at 221.

¹⁶⁴ See *id.* (“[Outgroups] argue that the Second Amendment projects a social world fragmented into hostile identity groups; hence outgroup members need a personal right to arms.”).

¹⁶⁵ Kahan & Braman, *supra* note 39, at 1297–98.

¹⁶⁶ WILLIAMS, *supra* note 161, at 220.

¹⁶⁷ Kahan & Braman, *supra* note 39, at 1317–18.

signal trust in people, and because firearms are inherently dangerous, the overall limitation in quantity of possessors and firearms is an appropriate policy goal.¹⁶⁸ On this view, gun restrictions should equitably affect all groups, whether citizen or noncitizen, racially marginalized or mainstream—as all persons from all groups must co-exist and find public safety solutions in a pluralist society.¹⁶⁹

Further, for egalitarians, shared institutions of collective action and self-government are sufficient to mediate between factions. Then California Governor Ronald Reagan—prior to the NRA endorsing his candidacy for president (and also prior to the assassination attempt on him, which led to his endorsement of the federal Brady Bill¹⁷⁰)—captured this view when he signed a gun control bill into law, stating that guns were a “ridiculous way to solve problems that have to be solved among people of good will.”¹⁷¹ Based on this belief in the evolution of intergroup and interpersonal interactions, egalitarians would maintain that removing a dangerous instrument from private hands aids in the pursuit of a “more perfect union.”¹⁷² In contrast to the hierarchical and individualistic outlooks, which worry about intergroup hostility with the potential for armed violence, egalitarians might accept current or slightly elevated violence and crime rates as the price of a civilized society.¹⁷³

This perspective eschews the apocalyptic vision of the intergroup antipathist in favor of one of a morally evolving conglomeration of persons who, in time, find alternatives to armed intergroup violence. Just as the deregulation movement can draw from a rich historical and cultural library of movements, so does the call for increased prohibitions on firearms. For example, after white posses used violence to suppress new Black voters during the Reconstruction,¹⁷⁴ the political process produced the Fifteenth Amendment,¹⁷⁵ Civil Rights Act,¹⁷⁶ and Voting Rights Act.¹⁷⁷ These enactments arguably eliminate, or at least lessen, the need for armed minority group resistance to secure political and civil liberties.¹⁷⁸ In addition, egalitarians may argue

¹⁶⁸ See *id.* at 1315–16.

¹⁶⁹ *Id.* at 1318.

¹⁷⁰ 18 U.S.C. § 922 (2006); see Ronald Reagan, *Why I'm for the Brady Bill*, N.Y. TIMES, Mar. 29, 1991, at A23.

¹⁷¹ Winkler, *supra* note 89 (quoting Ronald Reagan). Of course, because Reagan's statement was made in the aftermath of the Black Panthers' armed march on the state capitol, he may have also been mixing his faith in solidaristic, non-violent solutions to collective problems, with a hierarchical view that disapproved of racial minority arms-bearing as a way of securing greater civil and political rights.

¹⁷² See Kahan & Braman, *supra* note 39, at 1315–16.

¹⁷³ *Id.*

¹⁷⁴ See Cottrol & Diamond, *supra* note 161, at 348.

¹⁷⁵ U.S. CONST. amend. XV.

¹⁷⁶ Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241.

¹⁷⁷ Voting Rights Act of 1965, 42 U.S.C. § 1971 (2006).

¹⁷⁸ See *id.*; *The Effect of the Voting Rights Act*, CIVIL RIGHTS DIV., U.S. DEP'T OF JUSTICE (2005), http://epic.org/privacy/voting/register/intro_c.html (noting exponential increase in

that organized police forces only merged in the latter part of the nineteenth century. On this view, local government authority intended to supplant private peacekeeping obviates the need for armed self-defense.

Indeed, the Federalist Papers, while discussing the uniquely American “advantage” of firearms, simultaneously appear to provide an implicit limitation on the need for an armed American citizenry.¹⁷⁹ Madison viewed noncitizens as potentially threatening to republican institutions of the newly formed country because of their inability to understand and value freedom and self-government.¹⁸⁰ Complete gun bans were the marks of oppressed foreign persons, or the symbol of domestic enslavement—both noncitizens from places without self-government who were not capable of understanding the American ethos of freedom and self-government.

Madison’s time, however, was bound by a world order in which monarchies dominated the founders’ imagination.¹⁸¹ Since then, however, the European nations of which Madison spoke have democratized,¹⁸² and the Civil Rights Amendments ended chattel slavery in the United States.¹⁸³ Because the American Republic is no longer unique in its governance structure or its reliance on slavery, private individuals need not use firearms either to preserve the idea of self-governance or to maintain coercive control over an enslaved population. Thus, it is conceivable that the convergence of international governments to democratic and republican forms of leadership temporally limits the reach of the Second Amendment generally, or the exclusion of outgroups from its largesse.¹⁸⁴

The evolution in the international order mirrors growth within certain American institutions as well. This change is typified by the California Supreme Court’s

voter registration among African Americans from 1965 to 1988). This does not mean that racial minorities are adequately protected in the political process, but only that such legislation showcases how non-violent means are available for redress. *See, e.g.*, Nat’l Comm’n on the Voting Rights Act, *Protecting Minority Voters*, LAWYERS’ COMM. CIV. RTS. (2006), http://www.lawyerscommittee.org/admin/voting_rights/documents/files/0023.pdf.

¹⁷⁹ THE FEDERALIST NO. 46, at 295–96 (James Madison) (Clinton Rossiter ed., 2003).

¹⁸⁰ *Id.* at 296 (criticizing the monarchical and tyrannical governments of Europe for disarming their citizens, and stating “it is not certain that with [firearms] alone they would not be able to shake off their yokes”).

¹⁸¹ *See, e.g., id.*

¹⁸² Daniel Griswold, *Globalization, Human Rights, and Democracy*, EJOURNAL USA, Feb. 1, 2006, at 40 (“[T]he percentage of the world’s governments that are democracies has reached 64 percent, the highest in the 33 years of Freedom House surveys.”).

¹⁸³ *See* U.S. CONST. amend. XIII; U.S. CONST. amend. XIV.

¹⁸⁴ Bogus, *supra* note 91, at 1374 (“[S]trong evidence suggests that the Southern states’ concerns about maintaining the militia for slave control, and the Northern states’ desires to relieve the Southern states’ anxiety on the matter, were significant forces behind the Second Amendment. From this perspective, the Second Amendment appears to be a remnant from an era that ended in 1865 when the Thirteenth Amendment was enacted and slavery was abolished.”).

evolution from *Ex Parte Rameriz*¹⁸⁵ in 1924 to *People v. Rappard*¹⁸⁶ in 1972. Although neither was a Second Amendment case, both opined on the constitutionality of non-citizen gun possession and California's alien-in-possession law.¹⁸⁷ *Rameriz* upheld the state's ban on immigrant gun possession, expressly basing its conclusion on the intrinsic dangerousness of immigrants.¹⁸⁸ Yet, within a century, *Rappard* abandoned judicial reliance on pernicious group stereotypes regarding violence.¹⁸⁹ Under *Rappard*'s methodology, noncitizens were not reflexively treated as a dangerous group requiring differential treatment from the citizen rather; the state could not discriminate against immigrant gun rights without first articulating convincing reasons for banning such possession.¹⁹⁰ Because the state could not meet its burden, the court struck down California's alien-in-possession law. In doing so, *Rappard* accounts for the significant changes in American population dynamics during the twentieth century, caused by the repeal of racial and national origin prohibitions on immigration and naturalization, and the increased inflows caused by World War II and the 1965 Immigration Act.¹⁹¹ At base, the opinion reflects the result of extended experience living with and among racially distinct noncitizens. Accordingly, the *Rappard* court based its ruling on the Equal Protection Clause, rather than the Second Amendment.¹⁹²

One of the lessons of *Rappard* is about the nature of persons and the ability of a republican society to adapt over time to demographic shifts. The gun itself, as an instrumentality, is the source of danger, not the characteristics of the group who might possess it. Thus, the egalitarian view highlights very different symbols represented by firearms than hierarchists or individualists. To egalitarians, the gun signifies a regressive type of masculinity and cowboyism, ignorant of the ways in which a culture of firearms undermines progress towards a more cohesive and peaceful populace.¹⁹³

The ultimate goal for those who are attracted to collective solutions and reject the permanency of intergroup warfare is gun control regardless of citizenship status.¹⁹⁴

¹⁸⁵ 226 P. 914, 921–22 (Cal. 1924) (upholding constitutionality of a California law barring “unnaturalized foreign-born persons” from possessing concealed weapons).

¹⁸⁶ 104 Cal. Rptr. 535 (Cal. Ct. App. 1972) (abrogating *Rameriz* and striking down the State alien-in-possession law).

¹⁸⁷ *Rameriz*, 226 P. at 917; *Rappard*, 104 Cal. Rptr. at 535.

¹⁸⁸ *Rameriz*, 226 P. at 917 (“While such a danger [of armed noncitizens attacking the government] may seem improbable at the present time, yet, in time of war, it becomes a very real danger indeed, particularly as a few thousand organized aliens . . . could so cripple our basic industries and our transportation facilities as to make us practically powerless in conducting war.”).

¹⁸⁹ See *Rappard*, 104 Cal. Rptr. at 536–37 (rejecting the State's insistence that *Rameriz* should control).

¹⁹⁰ *Id.* at 536–37.

¹⁹¹ See THOMAS ALEXANDER ALEINIKOFF ET AL., IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 1–36 (7th ed. 2011) (providing a brief history of twentieth century immigration law in the United States).

¹⁹² *Rappard*, 104 Cal. Rptr. at 536.

¹⁹³ Kahan & Braman, *supra* note 39, at 1300–02.

¹⁹⁴ Gulasekaram, *supra* note 26, at 1568.

The irony of the judicial transformation towards equality rationales from *Rameriz* to *Rappard* is that it resulted in democratized gun possession by a larger pool of persons;¹⁹⁵ because noncitizens may not be more dangerous than the citizenry, no compelling reason remains to limit noncitizen possession separate from citizen possession. It is an equitable result, but not one that reduced the potential for personal gun possession.

IV. CURRENT REGULATION OF NONCITIZENS AND FIREARMS

The intertwinement between cultural orientations towards firearm regulation and citizenship, helps explain the current variations in alien gun laws in several states and in federal firearms law.¹⁹⁶ These laws would seem to survive constitutional muster despite a Second Amendment recently reinvigorated by *Heller* and *McDonald*. In those cases, the Court described the right to bear arms as one inuring to the benefit of “citizens” and the “members of the political community,”¹⁹⁷ thus preserving the ability of governments to distinguish between citizens and noncitizens. Here, this Article elucidates how various policy positions vis-à-vis citizenship and gun regulation might arise in various states given the cultural orientations of constituencies described in Part III. These policy positions in turn reflect compromises between competing values and priorities within our constitutional order.

Both pro- and anti-control forces, when confronted with questions of citizenship, equivocate between recognizing equality as operating regardless of citizenship status, or equality as operating only within the confines of citizenship.¹⁹⁸ Because group claims to Second Amendment protection originate from factions other than majority groups, the call for expanded gun rights can be democratizing. Accordingly, racial minorities, religious minorities, women, and gays all have subfactions that have advocated firearm possession as a method for equal dignity and rights.¹⁹⁹ These out-group arguments posit a threat of armed retaliation as the solution to persecution, and in that way, tap into themes of equality and justice fundamental to the post-Civil War, American legal and political identity.

Yet, even as gun ownership has been expanded, citizenship has, in many instances, demarcated the limits of that expansion.²⁰⁰ The notion of noncitizens, including

¹⁹⁵ *Id.* at 1565–66.

¹⁹⁶ See Gulasekaram, *supra* note 21, at 895 nn.11–14 (categorizing States’ varying statutory restrictions on gun ownership).

¹⁹⁷ See Portillo-Munoz v. United States, 643 F.3d 437, 440 (5th Cir. 2011), *cert. denied*, 132 S. Ct. 1969 (2012) (citing “citizen” and “political community” language from *Heller*).

¹⁹⁸ See, e.g., Weisberg, *supra* note 6, at 38–50 (discussing “consistency” in pro-gun and anti-gun political positions).

¹⁹⁹ See *supra* notes 161–62 and accompanying text.

²⁰⁰ Cf. Kenneth A. Klukowski, *Citizen Gun Rights: Incorporating the Second Amendment Through the Privileges or Immunities Clause*, 39 N.M. L. REV. 195, 247 (2009) (“Now in

undocumented immigrants, utilizing firearms in a manner similar to other disfavored groups is uncomfortable philosophical territory, causing one commentator to label the idea “bizarre” and “extraordinarily troubling.”²⁰¹ Even though intergroup violence might be endemic, foreigners generally, and racially distinct noncitizens specifically, are special outgroups that have occupied a unique position at the heart of American paranoia.²⁰²

This final observation, then, brings to a head the dilemma of the gun advocate at the nexus of citizenship and the right to bear arms. If the gun is a democratizing and equalizing force, made necessary in a society with intergroup tension, it theoretically should be available to all groups and persons. Yet, the discomfort with non-citizen possession manifest in Supreme Court opinions and state and federal statutes suggests that universality and equality have its limits.²⁰³ And so, gun rights remain a hallmark of membership in the American polity because of their ability to demarcate and advantage citizens over noncitizens.²⁰⁴

The current variation in alien gun laws across the several states—with some states with relatively stringent regulation regardless of citizenship status,²⁰⁵ others with relatively lenient regulation regardless of citizenship status,²⁰⁶ and others with relative regulation or prohibition of noncitizen possession compared to citizens’ gun privileges²⁰⁷—is indicative of these conflicting perspectives on both immigrants and guns.

Some states that have enacted noncitizen firearm prohibitions are also states with high noncitizen populations.²⁰⁸ For example, some heavily Democratic states

the Supreme Court’s sole examination of the Second Amendment, the Court speaks of it as a right of citizens.”).

²⁰¹ *Id.* at 238–39.

²⁰² *See, e.g., State v. Mendoza*, 920 P.2d 357, 366–67 (Haw. 1996) (quoting Committee of the Whole Rep. No. 5, in II PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF HAWAII OF 1950, at 14 (1961)); *see supra* Parts II.B–C.

²⁰³ *See Gulasekaram, supra* note 21, at 897.

²⁰⁴ It is worth noting that hierarchical and individualistic persons might part ways when it comes to alien gun laws specifically; while individualistic perspectives would support general deregulation, hierarchical ones might support alienage distinctions in gun laws, as such classifications maintain traditional social priority ordering of citizens over noncitizens.

²⁰⁵ *See, e.g., Brady Issues 2011 State Scorecard: California Rises Again*, BRADY CAMPAIGN TO PREVENT GUN VIOLENCE, <http://www.bradycampaign.org/media/press/view/1468/> (last visited Dec. 6, 2012) [hereinafter *State Scorecard*] (ranking California as having the most stringent gun laws in the United States).

²⁰⁶ *See, e.g., id.*

²⁰⁷ *See Gulasekaram, supra* note 21, at 895 nn.11–13 (listing Hawaii, Indiana, New York, Arkansas, Missouri, Montana, New Mexico, North Carolina, Oregon, South Dakota, Massachusetts, and Washington as states maintaining significant alienage distinctions in their gun laws).

²⁰⁸ *See, e.g., id.* (ranking the gun laws of Massachusetts and New York); *see also Gulasekaram, supra* note 21, at 895; Cristina Rodriguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567, 577 (2008).

such as New York, are generally disposed towards ameliorative treatment of immigrants²⁰⁹ but also enact strict gun laws in an attempt to regulate firearms to the extent permissible under federal and state constitutional guarantees.²¹⁰ Meanwhile, other states with alienage prohibitions in gun laws, such as Republican-heavy states like Montana and South Dakota, have low immigrant populations²¹¹ and relative deregulation of firearms for citizens.²¹² The fact that these demographically and politically disparate states arrive at the same conclusion regarding alien gun possession suggests the possibility of alternative rationales animating similar results.

To decipher these rationales, this section considers three general legislative outcomes: (1) restrictive, even-handed gun regulation regardless of citizenship status; (2) non-restrictive, even-handed non-regulation of guns regardless of citizenship status; and (3) restrictive gun regulation for noncitizens, but relatively non-restrictive gun regulation for citizens.²¹³

A. Restrictive Regulation Regardless of Citizenship Status

Even-handed gun regulation irrespective of citizenship status is the most favored policy goal of gun control proponents—egalitarians, who believe that private armament is both unnecessary and regressive.²¹⁴ Taking a virtuous view of humans interacting in a republican society, control proponents correlate the total quantity of available firearms with the prevalence of violent and deadly incidents.²¹⁵ The egalitarians' dual commitments to collective action and equality lead them to prefer blanket regulation to universal deregulation.

Axiomatically, this is the position most feared and ridiculed by gun control opponents, who are most likely to be hierarchically and individualistically oriented.²¹⁶

Broadly applicable firearms regulation clearly blunts the “advantage” extolled by Madison in the Federalist Papers. To some gun advocates, the uniqueness of American violence, both lawful and unlawful, and the role of guns in that violence, is itself a virtue because these dynamics function to exceptionalize the United States.²¹⁷ The concern is not whether the gun-related violence is, on its own merits, a good or bad policy outcome; rather, this critique of regulation posits that the ability to inflict

²⁰⁹ Rodriguez, *supra* note 208, at 577.

²¹⁰ See *State Scorecard*, *supra* note 205.

²¹¹ See Gulasekaram, *supra* note 21, at 895 & n.11; Rodriguez, *supra* note 208, at 574–75.

²¹² See *State Scorecard*, *supra* note 205.

²¹³ Obviously, this matrix could be completed with a fourth category for restrictive gun regulation for citizens with relatively non-restrictive gun regulation for noncitizens. This possibility is so far beyond constitutional, judicial, and public policy possibility that it does not warrant further discussion.

²¹⁴ See Kahan & Braman, *supra* note 39, at 1297–98.

²¹⁵ See Weisberg, *supra* note 6, at 44–47.

²¹⁶ See Kahan & Braman, *supra* note 39, at 1297–98; Weisberg, *supra* note 6, at 7.

²¹⁷ See Weisberg, *supra* note 6, at 10–11.

deadly violence and the corollary ability to endure deadly violence, are distinguishing American traits.²¹⁸ The ability to distinguish functions as its own virtue. Prohibiting citizens from owning firearms, then, chips away at the nation's uniqueness and consequently, the content of citizenship, making it a less substantively important legal status.²¹⁹

In addition, gun advocates vilify blanket firearms restrictions as reflecting frailty.²²⁰ The idea that restriction is cowardly and weak—and thus un-American—taps into deep-seeded folklore about the armed machismo that pervades the American ethos. As scholars like Robert Weisberg and James Jacobs have noted, various theories regarding the culture of violence, the nature of the frontier, and the chivalry of the South, have been proffered as justifications for the prevalence of guns and gun violence in the United States.²²¹ Until the Civil War, dueling with pistols was officially sanctioned in a number of states.²²² Limited to the white citizenry, and complete with its own set of rules adopted from Europe and modified by the governor of South Carolina, dueling acted as a form of alternative dispute resolution for a certain class of citizens.²²³ These uses of firearms were not only legal, but were celebrated as well.

B. Permissive Deregulation Regardless of Citizenship Status

The opposite end of the legislative spectrum—deregulation regardless of citizenship status (the result most favored by individualistic or libertarian viewpoints)²²⁴—bolsters American firearm exceptionalism, while concurrently effecting the same “devaluation” of citizenship status as blanket restrictions.²²⁵ As with complete regulation, citizens cannot distinguish themselves from noncitizens based on arms rights in a fully deregulated scheme. While eschewing membership differentiations, deregulation retains the benefit of preserving a distinctly American advantage.²²⁶ It

²¹⁸ See *id.* at 21–35 (discussing “cultural explanations” for American violence); see also Hofstadter, *supra* note 7 (discussing modern and historical attitudes toward gun control in the United States).

²¹⁹ Charles E. Roh, Jr. & Frank K. Upham, *The Status of Aliens Under United States Draft Laws*, 13 HARV. INT'L L.J. 501, 501–02 (1972).

²²⁰ Kahan & Braman, *supra* note 39, at 1317–18; Slotkin, *supra* note 5, at 56–57.

²²¹ Weisberg, *supra* note 6, at 12–17; JACOBS, *supra* note 6, at 17.

²²² Dueling was known as “judicial combat” and the outcome of a duel could settle disputes, including affronts to reputation and dignity. See *The History of Dueling in America*, PBS AMERICAN EXPERIENCE, <http://www.pbs.org/wgbh/amex/duel/sfeature/dueling.html> (last visited Dec. 6, 2012).

²²³ *Id.*; Ross Drake, *Duel!*, SMITHSONIAN MAG., Mar. 2004, <http://www.smithsonianmag.com/history-archaeology/duel.html>.

²²⁴ See Kahan & Braman, *supra* note 39, at 1307.

²²⁵ See Klukowski, *supra* note 200, at 219–20.

²²⁶ See Weisberg, *supra* note 6, at 10–11.

neatly divides the American nation-state from other liberal democracies, providing armed self-defense rights to all within the territorial jurisdiction.

Moreover, it allows the Hobbesian alarmist to tie gun rights to equity commitments. Arming all against all is one way to redress the historical legacy immigrant, Indian, and black disarmament, in efforts to render them second-class citizens. In addition, equal armament comports with military service rules, which have long allowed noncitizens to bear arms in prosecuting wars and have drafted noncitizens during conscription.²²⁷ In this understanding, equal armament of noncitizens is the cost gun advocates endure for their commitment to armed vigilance in a factionalized society.

Conversely, equitable non-regulation is the worst legislative outcome for gun control proponents. On this view, the national distinctiveness achieved by deregulation is a backwards-looking exceptionalism tied to a brutish past of constant intergroup tension and a future of intractable interpersonal violence.²²⁸ While egalitarians would support the recognition that violence is not endemic to certain peoples or groups, they would bemoan the evolutionary stasis that the commitment that universal firearm availability symbolizes.²²⁹

C. Restrictive Regulation for Noncitizens, Deregulation for Citizens

The final legislative outcome vis-à-vis immigrants and guns—relatively free gun rights for citizens with restrictions for noncitizens—ends up as the political compromise in several states perhaps because it draws support from both gun rights advocates and gun control proponents for widely disparate reasons. Unequal regulation resulting in the disarming of noncitizens has considerable historical appeal, conjuring a past of citizen vigilance against existential threats to person and nation posed by outsiders to the revolutionary community,²³⁰ or by Indian savages on the frontier.²³¹ It echoes the founding generation's distrust and disarmament of British loyalists, and the use of citizen militias to augment George Washington's Continental Army.²³²

²²⁷ *State v. Mendoza*, 920 P.2d 357, 366–67 (Haw. 1996) (quoting Committee of the Whole Rep. No. 5, in II PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF HAWAII OF 1950, at 10–15 (1961)); see Roh & Upham, *supra* note 219 (discussing the military's willingness to draft and employ noncitizens).

²²⁸ See Weisberg, *supra* note 6, at 14.

²²⁹ See *id.* at 21–35 (discussing the evolving cultural ethos in the United States).

²³⁰ See THE FEDERALIST No. 46 at 295–96 (James Madison) (Clinton Rossiter ed., 2003).

²³¹ Riley, *supra* note 11, at 1681–83.

²³² See Cornell & DeDino, *supra* note 2, at 506–07 (recounting eighteenth-century laws conditioning firearms on loyalty oaths); Williams, *supra* note 85, at 885 (“In my view, it is time to accept [that armed resistance in present-day America would be a civil war]; it is time to stop conjuring with the idea of an organic American people, because that idea leads us in the direction of the militias’ thinking—to the creation of an alien Other against whom we could all be united.”).

During the founding era, some states stripped gun rights from those who refused to swear loyalty oaths to the emerging republic.²³³ And, during that same era, the militia could be comprised of only citizens.²³⁴

Such heightened vigilance against outside or foreign threats appears heightened again in our current historical moment. Post-9/11 terrorist threats to security have been distinctly coded as foreign (and not domestic, like Timothy McVeigh),²³⁵ and even threats to economic security during current recessionary times have elicited anti-immigrant responses, like a rise in state and local immigration laws and restrictions on student and worker visas. Recently, in a perverse facsimile of the Revolutionary militia, the self-proclaimed Minutemen Civil Defense Corps attempted to rekindle that same fervor, having tasked itself with aiding U.S. Customs and Immigration Enforcement patrol of the Mexican border.²³⁶ Stationed in remote outposts in Arizona, many of the Minutemen were former military or law enforcement personnel who carried firearms during their border vigils.²³⁷ They literally perceived themselves as protecting America from an existential threat posed by foreigners.²³⁸

But, this historical legacy is both a blessing and curse. While alienage distinctions in gun laws may rekindle the revolutionary and founding ethic, the more extensive legacy of citizenship and gun laws is far less noble.²³⁹ Linking guns to citizenship status also strengthens the historic tie between firearms rights and violent oppression on the basis of alienage, racial background, and national origin that has been a recurring theme in American history. Citizenship may be imbued with more exclusive content when arms rights are limited to status citizens, but only when policy regresses into less attractive parts of American history.²⁴⁰ The ugly linkage was most explicit in *Dred Scott*, which understood “the people” of the Constitution to mean only citizens, and “citizens” to include only white individuals.²⁴¹ In the same vein, early nineteenth-century alien-in-possession laws were based on the presumed savagery and violent nature of immigrants.²⁴²

In addition to the historical problem, alien gun laws pose another, more practical conundrum for gun advocates. Any type of regulation—even of noncitizens—is a

²³³ See, e.g., Cornell & DeDino, *supra* note 2, at 506.

²³⁴ An Act to Establish an Uniform Rule of Naturalization, ch.3, §1, 1 Stat. 103 (1790), repealed by Nationality Act of 1940, ch. 876, title I, subch. V, § 504, 54 Stat. 1172.

²³⁵ Williams, *supra* note 85, at 879–80.

²³⁶ David Holthouse, *Minutemen, Other Anti-Immigrant Militia Groups Stake Out Arizona Border*, S. POVERTY L. CENTER (2005), <http://www.splcenter.org/get-informed/intelligence-report/browse-all-issues/2005/summer/arizona-showdown> (last visited Dec. 6, 2012).

²³⁷ *Id.*

²³⁸ *Id.*

²³⁹ See generally Gulasekaram, *supra* note 26, at 1542–61 (discussing “Race, Citizenship, Xenophobia, and the Right to Bear Arms in the American Legal Narrative”).

²⁴⁰ *Id.*

²⁴¹ *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 407 (1857), superseded by constitutional amendment, U.S. CONST. amend. XIV.

²⁴² *Id.*; KENNETT & ANDERSON, *supra* note 8, at 50.

step towards greater firearm regulation. It is for this reason that those with individualistic worldviews may part company with those gun advocates who hold hierarchical worldviews. For advocacy organizations like the NRA, an important argument against virtually every type of regulation—even “cop-killer” bullets and assault rifle regulations—has been to characterize each as a slippery slope towards more complete governmental control.²⁴³ Likewise, any jurisdiction that requires proof of citizenship status multiplies the transaction costs of procuring a firearm, and imposes the obstacle of proving such status on citizens as well. In so doing, alien gun laws contribute to a culture of augmented firearm regulation, including the normalization of excluding entire groups from possession.²⁴⁴ The costs of alien gun laws might worry some gun control opponents (especially individualistic/libertarian ones), even when they concurrently believe in enhancing the substantive value of citizenship and/or decreasing incentives for immigration.

Despite these difficulties, the discussion above explains why those who believe in traditional power and social structures would support alienage restrictions in gun laws, despite generally favoring firearm deregulation. But, even those who hold an egalitarian outlook, and believe in the ability of a pluralist, republican society to solve protection and anti-tyranny goals without private armament, may also accept citizenship-dependent gun laws, but for different reasons than the gun control opponent. For egalitarian gun control proponents, the inequity of restricting noncitizen ownership is tolerated in service of a deeper societal, and constitutional, commitment to collective, deliberative responses to both private and public threats.²⁴⁵ Disarmament of noncitizens qua noncitizens is regrettable, but acceptable; the restriction is important because it reduces the eligible pool of gun owners and total firearms possessed. Although not as attractive as comprehensive prohibitions, citizenship distinctions are the next best, politically feasible alternative.

Heller leaves open the possibility that entire groups can be excluded from Second Amendment protection, and specifically mentions two such groups—felons and those with mental illness—in addition to its *sub silentio* protection of only citizens’ right to bear arms.²⁴⁶

²⁴³ JACOBS, *supra* note 6, at 48–52. Counterintuitively, *Heller* actually appears to dampen this well-worn NRA mantra by creating a firm stopping point for governmental regulation. In essence, the polity can no longer slip down the slope to total disarmament. Accordingly, in light of *Heller*, it might be possible to unequally regulate noncitizens without fearing ultimate regulation of citizen possession.

²⁴⁴ See Gulasekaram, *supra* note 21, at 917–18.

²⁴⁵ See Kahan & Braman, *supra* note 39, at 1302.

²⁴⁶ See *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008). Indeed, post-*Heller* laws challenging the constitutionality of regulations on such groups have been upheld. See, e.g., *Wilson v. State*, 207 P.3d 565 (Alaska Ct. App. 2009) (citing *Heller*’s language in discussing whether the Alaska Constitution’s right to bear arms provision prohibited statutes criminalizing felon firearm possession).

A CONCLUSION: GUNS AND MEMBERSHIP IN THE AMERICAN POLITY

In researching the relationship between gun rights and questions of membership, I feel much like Professor Sanford Levinson must have felt when he wrestled with his own discomfort regarding judicial interpretations of the Second Amendment.²⁴⁷ In his law review article, he wrote about his attempts to square his views on firearms regulation with his more expansive, individualistic understanding of other Bill of Rights guarantees.²⁴⁸ He concluded that the Second Amendment was embarrassing to liberals who maintained that it protected a collective right while relying on robust individual interpretations of rights in other Amendments.²⁴⁹

Without endorsing his specific dilemma or conclusion, my foray into guns and citizenship leads me to a similar quandary. I find my steadfast support of extensive governmental regulation of firearms stymied by my correspondingly faithful dedication to expansive readings of “the people,” and equal protection guarantees for all persons. I cannot claim to have peacefully reconciled these competing concerns. Equality is a bivariate factor: both non-discriminatory prohibition and non-discriminatory access are theoretically coherent from the perspective of equal treatment.²⁵⁰ And, extensive deregulation of firearms across citizenship status may actually symbolize greater inclusion of noncitizens in the American polity and lead to more robust constitutional protection of noncitizens. Further, *Heller*’s fundamental premise regarding armed self-defense might be understood to require choosing equal deregulation across citizenship status.²⁵¹

In the end, however, my belief that equality transcends citizenship status, combined with my belief that the strength of our political institutions allows for deliberative, collective responses to both foreign and domestic threats, leads me to the conclusion that most firearms laws—when regulating evenhandedly for all persons—are reasonable, and consequently, constitutional.²⁵²

I detail my own struggle with competing commitments vis-à-vis gun control and citizenship because I suspect that it is emblematic of a larger and deeper—and perhaps

²⁴⁷ Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637, 642 (1989).

²⁴⁸ *Id.* at 645.

²⁴⁹ *Id.* at 658. I note that hand-wringing and theoretical consistency issues are not uncommon in Second Amendment scholarship. *See also, e.g.*, Weisberg, *supra* note 6, at 38–50 (discussing “consistency” in pro-gun and anti-gun political positions).

²⁵⁰ *Cf.* Randall L. Kennedy, *McCleskey v. Kemp: Race, Capital Punishment, and the Supreme Court*, 101 HARV. L. REV. 1388, 1394–95 (1988) (arguing that equality and remedying racial bias could be understood in capital punishment cases like *McCleskey* to require more executions of black criminals, rather than the abolition of the death penalty altogether).

²⁵¹ Gulasekaram, *supra* note 26, at 1524.

²⁵² I note here that *Heller*’s lack of an articulated standard for assessing Second Amendment claims leaves this as a possible mode of judicial evaluation. *See* District of Columbia v. *Heller*, 128 S. Ct. 2783, 2851 (2008) (Breyer, J., dissenting) (noting a lack of a judicial standard for evaluating Second Amendment claims).

latent and mostly unvoiced—societal struggle with these same issues. If Professor Levinson is correct in his assessment of liberal philosophies and the Second Amendment, then those who hail *Heller*'s vision of the purpose of firearms *and* its exegesis of “the people” should also be embarrassed.²⁵³ They support an expansive distribution of a powerful instrumentality based on the importance of self-defense, yet limit access to that tool to those who are formal members of the American polity. Even more problematic, *Heller* and its progeny accomplish this exclusion with little or no explanation.²⁵⁴ Accordingly, both this judicial *ipse dixit* and state statutory frameworks that employ alienage distinctions in gun laws appear to represent a troubling and undertheorized trend towards leaving immigrants outside the protection of our Constitution's liberties and increasing the chasm between citizens and noncitizens without justification.²⁵⁵

Here, I have argued that gun rights and citizenship distinctions raise profound questions about American identity and membership in the polity. These questions are unlikely to be resolved by historical exegesis or constitutional interpretation. To paraphrase the subtitle of Professor Tushnet's book, *Out of Range*, the Constitution alone can't end the battle over guns or the meaning of “the people.”²⁵⁶ Indeed, this Article began its inquiry with Tushnet's critical observation that battles over gun rights are battles over “who we are” as Americans. It concludes by proffering that judicial limitations on “the people,” and the continued existence of immigrant gun restrictions suggest that “we” still resist noncitizen inclusion and participation in the polity. Moreover, “we” remain only partially committed to the constitutional goal of equality, retreating from that vision when citizenship status becomes the dividing line and when distribution of our uniquely American “advantage” is in question. Finally, judicial interpretations of the Second Amendment and alienage distinctions in gun laws show that, while sometimes extolling the virtues of firearm possession, “we” still understand why it's a distinctly dangerous instrumentality in private hands.²⁵⁷ The gun in America is unique because it has defined, and will continue to define, membership and belonging in the polity.

²⁵³ *Id.* at 2790–91 (majority opinion); Levinson, *supra* note 247, at 638–44.

²⁵⁴ *Heller*, 128 S. Ct. 2783; *McDonald v. Chicago*, 130 S. Ct. 3020 (2010) (holding that the Second Amendment right to keep and bear arms is applicable against states and localities by virtue of the Fourteenth Amendment).

²⁵⁵ See generally Gulasekaram, *supra* note 26.

²⁵⁶ TUSHNET, *supra* note 37.

²⁵⁷ See, e.g., *Heller*, 128 S. Ct. 2783; *State v. Mendoza*, 920 P.2d 357, 366–67 (Haw. 1996) (quoting Committee of the Whole Rep. No. 5, in II PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF HAWAII OF 1950, at 10–15 (1961)).